STATE OF NORTH CAROLINA MECKLENBURG COUNTY ATLANTIC COAST CONFERENCE, Plaintiff, v. CLEMSON UNIVERSITY, Defendant.	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION 24CV013688-590 **ORDER AND OPINION ON DEFENDANT CLEMSON UNIVERSITY'S MOTION TO DISMISS AND MOTION TO STAY UNDER N.C.G.S. § 1-75.12**

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

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

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

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

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

Womble Bond Dickinson (US) LLP, by James P. Cooney, III, Sarah Motley Stone, and Patrick Grayson Spaugh, for Plaintiff Atlantic Coast Conference.

Parry Law, PLLC, by K. Alan Parry and Neil A. Reimann, Ropes & Gray LLP, by John Paul Bueker, and Nelson Mullins Riley & Scarborough LLP, by Axton Crolley, David Dukes, and B. Rush Smith III, for Defendant Clemson University.

Bledsoe, Chief Judge.

I.

FACTUAL AND PROCEDURAL BACKGROUND

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

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

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

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

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

---

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

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

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

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

[9] (*See* Compl. ¶¶ 10, 29.)

[10] (*See* Compl. ¶¶ 15 n.4, 39–40.)

[11] (*See* Compl. ¶ 39.)

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

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

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

[12] (Compl. ¶ 53.)

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

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

[15] (*See* Compl. ¶¶ 41, 52.)

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

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

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

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

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

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

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

---

[19] (Compl. ¶ 74.)

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

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

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

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

[24] (Compl. ¶ 89.)

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

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

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

---

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

[26] (Compl. ¶ 108.)

[27] (*See* Compl. ¶¶ 110–12.)

[28] (Compl. ¶ 113.)

[29] (*See* Compl. ¶ 115.)

[30] (Compl. ¶ 116.)

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

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

[31] (Compl. ¶ 117.)

[32] (Compl. ¶ 118.)

[33] (Compl. ¶ 118.)

[34] (Compl. ¶ 119.)

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

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

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

---

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

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

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

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

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

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

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

II.

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

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

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

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

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

A. Legal Standard

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

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

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

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

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

B. Analysis

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[48] (*See* Compl. ¶¶ 1–2, 19.)

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

---

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

[50] (*See* Compl. ¶¶ 1–2.)

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

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

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

---

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

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

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

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

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

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

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

---

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

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

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

[60] (Compl. ¶ 18.)

[61] (*See* Compl. ¶ 18.)

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

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

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

---

[62] (*See* Compl. ¶ 18.)

[63] (*See* Hostetter Aff. ¶ 4.)

[64] (Compl. ¶ 25.)

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

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

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

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

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

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

---

[68] (Compl. ¶ 58.)

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

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

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

---

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

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

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

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

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

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

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

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

---

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

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

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

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

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

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

---

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

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

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

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

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

III.

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

---

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

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

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

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

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

A. Legal Standard

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

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

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

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

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

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

Id. at 446–47 (cleaned up).

B. Analysis

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

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

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

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

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

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

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

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

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

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

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

[88] (Compl. ¶ 134.)

[89] (Compl. ¶ 153.)

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

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

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

---

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

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

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

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

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

[92] (Compl. ¶ 134.)

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

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

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

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

---

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

[96] (Compl. ¶ 131.)

[97] (Compl. ¶ 134.)

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

IV.

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

A. Legal Standard

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

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

---

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

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

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

B. Analysis

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

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

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

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

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

[101] (*See* Compl. ¶¶ 189–96.)

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

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

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

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

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

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

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

---

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

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

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

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

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

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

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

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

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

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

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

---

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

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

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

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

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

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

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

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

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

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

[112] (Compl. ¶ 169.)

[113] (Compl. ¶ 170.)

[114] (Compl. ¶ 171.)

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

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

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

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

---

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

[117] (Compl. ¶ 171.)

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

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

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

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

[119] (*See* Compl. ¶¶ 118–20.)

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

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

[120] (*See* Compl. ¶¶ 189–96.)

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

[122] (Compl. ¶ 194.)

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

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

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

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

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

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

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

V.

MOTION TO STAY

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

---

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

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

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

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

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

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

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

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

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

> (1) the nature of the case, (2) the convenience of the witnesses, (3) the availability of compulsory process to produce witnesses, (4) the relative ease of access to sources of proof, (5) the applicable law, (6) the burden of litigating matters not of local concern, (7) the desirability of litigating

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

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

> matters of local concern in local courts, (8) convenience and access to another forum, (9) choice of forum by plaintiff, and (10) all other practical considerations.

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

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

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

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

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

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

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

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

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

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

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

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

[133] (*See* Compl. ¶¶ 1, 6, 13, 29.)

[134] (*See* Compl. ¶¶ 1, 18.)

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

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

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

---

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

[137] The Court finds that the remaining *Lawyers Mutual* factors—(2) the convenience of the witnesses, (3) the availability of compulsory process to produce witnesses, (4) the relative ease of access to sources of proof, and (8) convenience and access to another forum—do not strongly favor either Clemson or the ACC on the evidence of record presented by the parties here. In this regard, the Court notes that Clemson, unlike FSU, offered evidence and argument in connection with factors (2) and (4), leading the Court to a different conclusion than it did in the FSU Action. *See FSU Order*, 2024 NCBC LEXIS 53, at *78 (finding that "the convenience of witnesses and the ease of access to proof favor[ed] proceeding in North Carolina[ ]" when the ACC presented evidence and argument on these factors and "the FSU Board did not specifically address these factors in its briefing or at the Hearing[ ]").

86. Considering the *Lawyers Mutual* factors as discussed above, both independently and in combination, and balancing the equities present in these circumstances, the Court concludes, in the exercise of its discretion, that the stay that Clemson requests is not warranted under *Lawyers Mutual* and that proceeding with this action in North Carolina would not work a "substantial injustice" on Clemson. The Court concludes, as discussed above, that (1) the nature of the case, (5) the applicable law, (6) the burden of litigating matters not of local concern, (7) the desirability of litigating matters of local concern in local courts, and (10) the practical considerations presented by the issues raised in the Pending Actions, when considered in combination, decisively outweigh Clemson's choice of the South Carolina forum for the determination of the scope of the rights Clemson granted the ACC in the Grant of Rights Agreements, Clemson's related, and later-added, claim for slander of title, and Clemson's challenge to the enforceability of the withdrawal payment in the ACC's Constitution. Accordingly, the Court, in the exercise of its discretion, will deny Clemson's Motion to Stay under N.C.G.S. § 1-75.12(a).

VI.

CONCLUSION

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

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

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

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

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

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

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

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