

IN THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY, MARYLAND

BOARD OF REGENTS OF THE UNIVERSITY \*  
SYSTEM OF MARYLAND, et al., \*  
*Plaintiffs,* \*

v. \*

Case No. CAL13-02189

ATLANTIC COAST CONFERENCE, \*  
*Defendant.* \*

OPINION

On January 18, 2013, the Board of Regents of the University System of Maryland and the University of Maryland, College Park (together, "Maryland"), filed this action in the Circuit Court for Prince George's County, Maryland. Maryland's Complaint requests that the Court "declare that the Withdrawal Penalty<sup>1</sup> set forth in Section IV-5 of the Atlantic Coast Conference's ("ACC") Constitution is invalid and unenforceable" and that "Maryland is entitled to and should receive its share of all distributions of Conference revenue." See Complaint at Count I. Maryland's Complaint also alleges breach of contract (Count II), violation of Maryland's Antitrust Act, Md. Code Ann., Commercial Law, § 11-204 (Count III), and tortious interference with prospective advantage (Count IV).

The ACC moved to dismiss Maryland's Complaint, or, in the alternative, to stay the proceedings, alleging,

- 1) that application of Maryland's Antitrust Act to the actions of the Atlantic Coast Conference is a violation of the Commerce Clause of the United States Constitution;
- 2) that Maryland's antitrust claim is deficient in that it fails to allege a relevant market and antitrust injury;

<sup>1</sup> The ACC refers to this as a "withdrawal payment" while Maryland refers to it as a "withdrawal penalty." Throughout this Opinion and at this stage of the proceedings, the Court has used the "withdrawal payment" found in the ACC's Constitution without any opinion as to whether it is a "payment" or a "penalty."

- 4) that the matter should be stayed or dismissed in favor of the already pending North Carolina action under the doctrines of forum *non-conveniens* and comity.

See ACC's Reply at p. 1-2. The Court held a hearing on this matter on May 23, 2013.

## **I. Introduction.**

On or about November 19, 2012, University President Dr. Wallace Loh held a press conference at which he announced that, effective July 2014, Maryland would withdraw from the ACC and join the Big Ten Conference. See Complaint at ¶ 1. Despite the very public announcement, Maryland contends that it has not given "official" notice of withdrawal as required by Section IV-5 of the ACC Constitution. Complaint at ¶ 71. On November 25, 2012, immediately following Maryland's announcement, the ACC filed a single count declaratory judgment action in the Superior Court for Guilford County, North Carolina against the University of Maryland, College Park, and the Board of Regents, University System of Maryland, requesting that the Court:

clarify and settle the validity and enforceability of the withdrawal payment at issue and will afford relief from the controversy and dispute created by defendant Maryland's assertion that the withdrawal payment is invalid and unenforceable.

See Exhibit A to Plaintiff's Opposition to Motion to Dismiss, North Carolina Complaint at ¶ 40.

Maryland moved to dismiss the North Carolina Superior Court matter alleging, *inter alia*, sovereign immunity. The Superior Court for Guilford County denied Maryland's motion and Maryland took an interlocutory appeal. See Exhibit B to Opposition. The North Carolina matter has been stayed pending resolution of the appeal in the North Carolina Court of Appeals. See Exhibit C to Opp.

## **II. Standard of Review**

"A motion to dismiss for failure to state a claim tests the sufficiency of the pleadings."

*Afamefune v. Suburban Hosp., Inc.*, 385 Md. 677, 681-82 n. 4, 870 A.2d 592 (2005). In

reviewing a Motion to Dismiss, the trial court must “assume the truth of all well-pled facts in the complaint as well as the reasonable inferences that may be drawn from those relevant and material facts.” (*Porterfield v. Mascari II, Inc.*, 374 Md. 402, 414, 823 A.2d 590 (2003)) and “determine whether the complaint, on its face, discloses a legally sufficient cause of action.” *Fioretti v. Maryland State Bd. of Dental Exam'rs*, 351 Md. 66, 71–72, 716 A.2d 258 (1998). The pleading must

provide notice to the parties of the nature of the claims, state the facts upon which the claims exist, establish the boundaries of the litigation, and afford the speedy resolution of the frivolous claims.

*Heritage Harbor, LLC, v. John J. Reynolds, Inc.*, 143 Md. App. 698, 710, 795 A.2d 806 (2002). “Dismissal is proper only if the alleged facts and permissible inferences, so viewed, would, if proven, nonetheless fail to afford relief to the plaintiff.” *Ricketts v. Ricketts*, 393 Md. 479, 492, 903 A.2d 857, 864 (2006). *See also Pace v. State*, 425 Md. 145, 155, 38 A.3d 418, 423 (2012).

### **III. Is the ACC's enforcement of the Withdrawal Payment subject to the Maryland Antitrust Act?**

The ACC contends that application of Maryland's Antitrust Act, Md. Code, Ann., Commercial Law § 11-200 *et seq.*, to Section IV-5 of the ACC Constitution, the “Withdrawal Provision,” is a violation of the Commerce Clause of the United States Constitution. Relying primarily on *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Oklahoma*, 468 U.S. 85, 101-02, 104 S. Ct. 2948, 2960-61 (1984), *Nat'l Collegiate Athletic Ass'n v. Miller*, 795 F. Supp. 1476, 1480 (D. Nev. 1992) *aff'd*, 10 F.3d 633 (9th Cir. 1993), and *Partee v. San Diego Chargers Football Co.*, 34 Cal. 3d 378, 668 P.2d 674 (1983), the ACC argues that it is a sports league and, therefore, is exempt from regulation under state antitrust statutes:

[a]pplication of the Maryland Antitrust Act...would unduly burden interstate commerce because the ACC is a unique commercial actor whose need for uniformity across state

lines means that its own internal governance of the teams in the conference be subject only to federal law.

Mot. at p. 11. The ACC argues that the Withdrawal Payment is necessary to preserve both the integrity of the league and the quality and nature of the product. Specifically, the ACC alleges that “the withdrawal payment *is* essential to the effective running of the ACC’s business because it minimizes the potential disruption and damages that conference realignment could cause to the conference by establishing the compensation that must be paid to the other members when an ACC school departs.” Reply at p. 6. (emphasis in original). At the hearing on this matter, the ACC argued that the Council of Presidents voted to increase the Withdrawal Payment in September 2012 to ensure the ACC’s continued success as a college athletic league.

Consequently, the ACC contends that application of Maryland’s Antitrust Act to the withdrawal provision is dispositive of the national uniformity required for the product to exist at all.<sup>2</sup>

Maryland responds that, “[t]he ACC is wrong at every turn” because the ACC is “no different than any other commercial actor that must conform its conduct to varying laws and regulations of multiple states.” Opp. at p. 13. Maryland argues that the “sports exception” is to be narrowly construed and that the ACC does not fall within the narrow confines of the exception. Factually distinguishing *Miller*, Maryland argues that the sports league exception only applies to *nationwide* regulations promulgated by national professional sports leagues or the NCAA, and not to those regulations governing regional and/or amateur sports leagues. Opp. at p. 21-23. Maryland further contends that the Withdrawal Payment is not “a fundamental rule requiring national uniformity in order to create the athletic product” and, therefore, the sports league exception is inapplicable. Opp. at p. 24. Instead, Maryland advocates for application of the *Pike* test, which requires the Court to consider whether the statute has a legitimate local

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<sup>2</sup> As explained herein, the “product” at issue has not been sufficiently defined in the Complaint.

purpose and, if it does, whether the activity has a “clearly excessive” burden on interstate commerce in relation to the local benefit. Opp. at p. 15; *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142, 90 S. Ct. 844, 847, 25 L. Ed. 2d 174 (1970).

Courts have long recognized that national uniformity in the form of horizontal restraints is essential to sports leagues “if the product is to be available at all.” *Bd. of Regents of Univ. of Oklahoma*, 468 U.S. at 101-02. The Supreme Court elaborated:

What the NCAA and its member institutions market in this case is competition itself—contests between competing institutions. Of course, this would be completely ineffective if there were no rules on which the competitors agreed to create and define the competition to be marketed. A myriad of rules affecting such matters as the size of the field, the number of players on a team, and the extent to which physical violence is to be encouraged or proscribed, all must be agreed upon, and all restrain the manner in which institutions compete. Moreover, the NCAA seeks to market a particular brand of football—college football. The identification of this “product” with an academic tradition differentiates college football from and makes it more popular than professional sports to which it might otherwise be comparable, such as, for example, minor league baseball. **In order to preserve the character and quality of the “product,” athletes must not be paid, must be required to attend class, and the like. And the integrity of the “product” cannot be preserved except by mutual agreement; if an institution adopted such restrictions unilaterally, its effectiveness as a competitor on the playing field might soon be destroyed.** Thus, the NCAA plays a vital role in enabling college football to preserve its character, and as a result enables a product to be marketed which might otherwise be unavailable.

*Id.* (emphasis supplied). Evaluating whether restraints on television contracts were permissible horizontal restraints, the Supreme Court recognized that “the NCAA plays a critical role in the maintenance of a revered tradition in amateurism in qualified sports” and that “[t]here can be no question but that it needs ample latitude to play that role.” However, the Court qualified its holding, recognizing that not all league activity was directed at this objective:

The NCAA does not claim that its television plan has equalized or is intended to equalize competition within any one league....[t]here is no evidence that this restriction produces any greater measure of equality throughout the NCAA than would a restriction on alumni donations, tuition rates, or any other revenue-producing activity.

*Id.* at 2969. In doing so, the Supreme Court found that restricting the quantity and nature of television broadcasts was not directed at preserving the quality and nature of the product and, thus, applied the Sherman Antitrust Act to the actions of the NCAA.

Applying the Supreme Court's teachings in *Board of Regents*, the United States Court of Appeals for the Sixth Circuit found that "by its plain language, [§1 of the Sherman Antitrust Act] applies [to a league regulation] *only if the rule is commercial in nature.*" *Worldwide Basketball and Sports Tours, Inc. v. National Collegiate Athletic Association*, 388 F.3d 955, 958 (6<sup>th</sup> Cir., 2004)(emphasis in original). The Sixth Circuit Court found that the test for "commercial activity" was "whether the rule itself is commercial, not whether the entity promulgating the rule is commercial," finding that "some commercial impact insofar as [the rule regulating the number of games which a team may play] regulates games that constitute sources of revenue for both the member schools and the Promoters." *Id.* at 959-60.

More recently, the United States Court of Appeals for the Seventh Circuit employed a similar analysis in *Agnew v. National Collegiate Athletic Ass'n.* when it considered NCAA rules purported to limit the number and term of athletic scholarships. The *Agnew* Court's analysis began with the presumption that, "the Sherman Act applies to the NCAA bylaws generally" because "the Sherman Act applies to commercial transactions, and the modern definition of commerce includes almost every activity from which [an] actor anticipates economic gain." *Agnew v. National Collegiate Athletic Ass'n.*, 683 F.3d 328, 340 (7<sup>th</sup> Cir., 2012) (internal citations omitted). The *Agnew* Court interpreted the Supreme Court's ruling in *Board of Regents* Court's that, "[i]t is reasonable to assume that most of the regulatory controls of the NCAA...are procompetitive" as "a license to find certain NCAA bylaws that 'fit into the same mold' as those

discussed in *Board of Regents* to be procompetitive 'in the twinkling of an eye,' —that is, at the motion-to-dismiss stage." *Id* at 341. (internal citations omitted). The *Agnew* Court discussed,

Herein lies the scope of the procompetitive presumption for certain NCAA regulations. A certain amount of collusion in college football is permitted because it is necessary for the product to exist. Accordingly, when an NCAA bylaw is clearly meant to help maintain the 'revered tradition of amateurism in college sports' or the 'preservation of the student-athlete in higher education,' the bylaw will be presumed procompetitive, since we must give the NCAA 'ample latitude to play that role.' *Id.* at 120, 104 S.Ct. 2948. But if a regulation is not, on its face, helping to 'preserve a tradition that might otherwise die,' either a more searching Rule of Reason analysis will be necessary to convince us of its procompetitive or anticompetitive nature, or a quick look at the rule will obviously illustrate its anticompetitiveness.

*Id* at 342-43, citing to *Board of Regents, supra*. See also, i.e. *Smith v. NCAA*, 139 F.3d 180 (3d Cir.1998) (holding that that the NCAA's eligibility rules are not related to the NCAA's commercial interests and, therefore, the Sherman Act does not apply.); *Gaines v. NCAA*, 746 F.Supp. 738, 743-44 (M.D.Tenn.1990) (distinguishing between the NCAA's commercial rules and noncommercial rules, and finding that eligibility rules are of the latter type, and thus not subject to the Sherman Act). The *Agnew* Court concluded that, "Most—if not all—eligibility rules...fall comfortably within the presumption of procompetitiveness afforded to certain NCAA regulations;" however, "[t]he Bylaws at issue in this case... are not eligibility rules, nor do we conclude that they 'fit into the same mold' as eligibility rules." The Court determined that Bylaws regulating scholarships "are not inherently or obviously necessary for the preservation of amateurism, the student-athlete, or the general product of college football," but rather "seem to be aimed at containing university costs, not preserving the product of college football" and were commercial in nature. *Id* at 343-44. The *Agnew* Court declined to dismiss the claims under the sports league exception.

This Court must use the standards annunciated in *Board of Regents* and its progeny to determine whether the Withdrawal Payment is directed toward preserving the character and

quality of the “product” and, therefore, is presumptively procompetitive, or if the payment is “commercial” in nature and subject to Maryland’s Antitrust Act.<sup>3</sup> As in *Worldwide Basketball*, it is the act, not the organization, toward which the Court must direct its attention. *Worldwide Basketball and Sports Tours, Inc.*, 388 F.3d at 959.

Upon consideration of the factors articulated in *Board of Regents, Agnew, Smith, Gaines*, and *Worldwide Basketball*, this Court finds that the Withdrawal Payment at issue here is inherently commercial and not presumptively procompetitive. During the hearing, the ACC conceded that the payment was designed to “compensate for the **economic effect** of a member leaving” and “ensure the conference remains **financially strong**.” (emphasis supplied). Moreover, the ACC argued that the Council of Presidents voted to increase the Withdrawal Payment from 1 ¼ to 3 times the annual budget of the League because a 1 ¼ Withdrawal Payment was deemed insufficient to ensure the continued economic success of the League upon a school’s departure for another association.

The Court acknowledges that league stability may ultimately play a role in preserving the nature and character of a sports league in the wake of a member school’s departure; however, it does not “fit the same mold” as an eligibility rule, as applied in *Agnew*. Unlike regulations governing scholarship availability (*Agnew*), the number of games which may be played (*Worldwide Basketball*), or rules governing play after draft entry (*Partee v. San Diego Charges Football Co.*, 34 Cal.3d 378, 668 P.2d 674(1983)) that aim to preserve the amateur nature of college athletics, the Withdrawal Payment is designed to ensure the financial stability and continued economic success of the ACC. As such, the Withdrawal Payment has an admitted

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<sup>3</sup> Maryland did not cite the Court to, or otherwise advance, a case applying the *Pike* to a matter contemplating the sports league exception. Instead, it is presumed that antitrust laws are applicable to activity not specifically exempt under the sports league exception. The Court agrees with this analysis and will assume antitrust laws apply to activity with a commercial, rather than a procompetitive, purpose.

purpose of economic protectionism. In light of the aforementioned legal analysis and the ACC's acknowledgement that the Withdrawal Payment is intended to protect the economic stability of the League, the Court finds that the provision is not entitled to a procompetitive presumption and, therefore, is subject to Maryland's Antitrust Act.

**IV. Has Maryland adequately alleged the existence of a relevant market and cognizable antitrust injury?**

Claims under Md. Code Ann., Commercial Law § 11-204, Maryland's Antitrust Act, require allegations of:

- 1) a contract, combination, or conspiracy with one or more other persons,
- 2) an unreasonable restraint on trade in a relevant market, and
- 3) market injury.

Md. Code Ann., Commercial Law § 11-204. *See also Agnew*, 683 F.3d at 336;<sup>4</sup> *c.f. Estate Constr. Co. v. Miller & Smith Holding Co., Inc.*, 14 F.3d 213, 220 (4th Cir.1994) (holding that a § 11-204(a) (1) violation consists of two elements: "(1) There must be at least two persons acting in concert, and (2) the restraint complained of must constitute an unreasonable restraint on [ ] trade or commerce."). "Relevant market" has been determined to include the "geographic market" and the "product market." *See i.e. Tanaka v. Univ. of S. Cal.*, 252 F.3d 1059, 1063 (9<sup>th</sup> Cir. 2001). Failure to sufficiently plead each element "is proper grounds for dismissing an [antitrust] claim." *Big Bear Lodging Ass'n. v. Snow Summit, Inc.*, 183 F.3d 1096, 1105 (9<sup>th</sup> Cir. 1999). *See also Adidas America, Inc. v. Nat'l. Collegiate Athletic Ass'n.*, 64 F.Supp.2d 1097,

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<sup>4</sup> Maryland Courts have made it clear that the Maryland Antitrust Act is to be construed, interpreted, and applied in concert with the Sherman Antitrust Act, § 1. "The purpose of the Maryland Antitrust Act is 'to complement the body of the federal law governing restraints of trade.' § 11-202(a). That section goes on to state that, in construing the Act, 'the courts [are to] be guided by the interpretation given by the federal courts to the various federal statutes dealing with the same or similar matters.' Section 11-204(a)(1) of the Maryland Act is essentially the same as § 1 of the Sherman Antitrust Act of July 2, 1890, 26 Stat. 209, as amended, 15 U.S.C. § 1. Thus, decisions of the federal courts interpreting § 1 of the Sherman Act guide us here." *Natural Design, Inc. v. Rouse Co.*, 302 Md. 47, 53, 485 A.2d 663, 666 (1984). This Court is guided by the federal and out-of-state analysis and interpretation of the Sherman Antitrust Act, § 1.

1101 (D. Kan. 1999) (failure to define the relevant geographic or product market is a fatal flaw because “there is no way for a court to determine whether a defendant has restrained trade...or to measure a defendant’s ability to lessen or destroy competition.”).

**a. Has Maryland adequately alleged the existence of a relevant geographic and product market?**

Having determined that the Maryland Antitrust Act may be applied to the enforcement of the ACC’s withdrawal provision, the Court must now determine whether Maryland has sufficiently alleged relevant geographic and product markets, and a cognizable antitrust injury.

**i. Quick Look v. Rule of Reason analysis.**

Courts use three standards to determine whether an antitrust claim has been sufficiently alleged: the *per se* analysis, the Quick Look analysis, and the Rule of Reason analysis.

Restraints are *per se* unlawful when “their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use.”

*Krause Marine Towing Corp. v. Ass’n of Maryland Pilots*, 205 Md. App. 194, 210, 44 A.3d 1043 (2012); *see also Northern Pac. Ry. Co. v. United States*, 356 U.S. 1, 5, 78 S.Ct. 514 (1958); *accord State Oil Co. v. Khan*, 522 U.S. 3, 10, 118 S.Ct. 275 (1997). Because of the blatant anticompetitive nature of the act, *per se* violations do not require any inquiry into the relevant market or its context. *See Board of Regents*, 488 U.S. at 100. While Maryland initially alleges that the conduct is *per se* unlawful, it abandons this argument in favor of a Quick Look analysis in its Opposition. *See Opp.* at p. 28, fn. 2.

In *Board of Regents*, the Court defined an intermediate analysis which would later be deemed the “quick look” analysis. The Quick Look analysis looks to the procompetitive justifications of otherwise *per se* illegal conduct when “a certain degree of cooperation is

necessary if the [product at issue] is to be preserved.” *Board of Regents*, 468 U.S. at 117. The Quick Look analysis is applied “...only to business activities that are so plainly anticompetitive that courts need undertake only a cursory examination before imposing antitrust liability,” *Krause Marine Towing Corp. v. Ass'n of Maryland Pilots*, 205 Md. App. at 210. (internal quotations omitted).

Put another way, the quick-look approach can be used when ‘an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets,’ but there are nonetheless reasons to examine potential procompetitive justifications.

*Agnew*, 683 F.3d at 336, quoting *California Dental Ass'n v. F.T.C.*, 526 U.S. 756, 119 S. Ct. 1604 (1999).

The Quick Look analysis comes with a reduced, but not altogether alleviated, burden on the plaintiff to identify the relevant geographic and product markets. See *i.e. California Dental Ass'n v. F.T.C.*, 526 U.S. at 779. (“a challenge to a ‘naked restraint on price and output’ need not be supported by ‘a detailed market analysis’ in order to ‘requir[e] some competitive justification’). The Court’s elaboration in *Worldwide Basketball* is instructive:

this abbreviated or “quick-look” analysis may only be done where the contours of the market and, where relevant, submarket, are sufficiently well-known or defined to permit the court to ascertain without the aid of extensive market analysis whether the challenged practice impairs competition.

*Worldwide Basketball and Sports Tours, Inc.*, 388 F.3d at 961.

A Rule of Reason analysis is required in all other circumstances. The Maryland Court of Special Appeals said,

[i]f an arrangement might plausibly be thought to have a net procompetitive effect, or possibly no effect at all on competition, more than a ‘quick look’ is required, and the court must conduct a more thorough enquiry into the consequence of those restraints.

*Krause Marine Towing Corp. supra*. In applying a Rule of Reason analysis, this Court must evaluate whether the plaintiff has met its initial burden to demonstrate

that the defendant has market power—that is, the ability to raise prices significantly without going out of business—without which the defendant could not cause anticompetitive effects on market pricing. If the plaintiff meets his burden, the defendant can show that the restraint in question actually has a procompetitive effect on balance, while the plaintiff can dispute this claim or show that the restraint in question is not reasonably necessary to achieve the procompetitive objective.

*Agnew*, 683 F.3d at 335-36 (internal citations omitted). A Rule of Reason analysis requires an intensive analysis of the facts and circumstances surrounding the alleged anticompetitive conduct.

The ACC argues that the Rule of Reason applies to alleged antitrust activities involving sports leagues. Reply at p. 10, citing to *Am. Needle, Inc. v. Nat'l Football League*, 560 U.S. 183, 130 S. Ct. 2201 (2010), *Mid-South Grizzlies v. Nat'l. Football League*, 550 F. Supp. 558 (E.D. Pa. 1982). Specifically, the ACC contends that the withdrawal provision does not present the “naked, effective restraint on market price or volume,” that compels either a *per se* or Quick Look analysis. Reply at p. 11, citing to *Law v. Nat'l Collegiate Athletic Ass'n*, 134 F.3d 1438 (10th Cir. 1998) and *Board of Regents, supra*. Rather, the ACC suggests that the Withdrawal Payment is intended to preserve the financial stability of the league upon the departure of a member school and does not restrict competition on its face. Finally, the ACC argues that the Quick Look analysis does not alleviate Maryland’s pleading burden; instead, “it is only *after* pleading a sufficiently well-defined market that plaintiffs could suggest to this Court that a quick look analysis should apply.” Reply at p. 13.

Here, Maryland contends that the relevant market and type of restraints involved are so obvious that its claims should be subject to the less stringent “quick look” analysis. Citing to *Board of Regents, supra*, *Law, supra*, *Chi. Prof'l Sports Ltd. P'ship. v. NBA*, 961 F.2d 667 (7<sup>th</sup> Cir. 1992), and *F.T.C. v. Indiana Fed'n of Dentists, supra*, Maryland alleges that the Withdrawal Payment “represents a horizontal conspiracy that restrains competition from other conferences

and among the ACC members,” and that the “anticompetitive aspects of the challenged conduct are clear.” Opp. at p. 28. Maryland contends that this payment is not an essential element of a sports league, but is plainly commercial in that it is intended to prevent Maryland and other schools from departing the ACC for another league. Opp at p. 27-28.

This Court concludes that use of a Quick Look analysis is inappropriate here and a full Rule of Reason analysis must be applied. Maryland has failed to meet its initial burden and demonstrate the plain and unequivocal anticompetitive nature of the Withdrawal Payment. Despite labeling the Withdrawal Payment as a horizontal restraint, Maryland’s factual allegations do not constitute the “naked price and output control” required to invoke a Quick Look analysis, like the restraint on output found in *Board of Regents, supra*, or in *California Dental Ass’n, supra*, or a direct restraint on price, such as price-fixing. On its face, the approximately \$30 million increase in the ACC’s Withdrawal Payment is just that, a withdrawal payment, and is not so obviously designed to restrict competition that it may be deemed *per se* anticompetitive. This finding precludes a Quick Look analysis.

Furthermore, a Quick Look analysis is inappropriate when, “‘the contours of the market’...are not ‘sufficiently well-known or defined to permit the court to ascertain without the aid of extensive market analysis whether the challenged practice impairs competition.’”

*Deutscher Tennis Bund v. ATP Tour, Inc.*, 610 F.3d 820 (2010), quoting *Worldwide Basketball and Sports Tours, Inc.*, 388 F.3d 955 at 961. The *Agnew* Court’s opinion is instructive on this issue, holding that,

[i]n an area that is not obviously commercial, and thus where the Sherman Act’s application is not clearly apparent, we believe it is incumbent on the plaintiff to describe the rough contours of the relevant commercial market in which anticompetitive effects may be felt, even when a quick-look approach is all that is called for.

*Agnew*, 683 F.3d at 345. The *Agnew* Court held that plaintiffs' allegation that, "member institutions compete with each other to attract and enroll highly skilled athletes to their institutions for obtaining bachelor's degrees," was an unclear market definition and was definitionally insufficient to trigger a Quick Look analysis. As explained *infra*, this Court finds that Maryland has failed to sufficiently allege the relevant geographic and product markets such to permit a Quick Look analysis. See *Worldwide Basketball & Sport Tours, Inc.*, 388 F.3d at 961. ("[u]nder the 'quick-look' approach, extensive market and cross-elasticity analysis is not necessarily required, but where, as here, the precise product market is neither obvious nor undisputed, the failure to account for market alternatives and to analyze the dynamics of consumer choice simply will not suffice.")

The very nature of Maryland's allegations requires the use of the more detailed Rule of Reason analysis. Maryland contends that the Withdrawal Payment violates Maryland's Antitrust Act because it "bears no justifiable relationship to the amount of damages, if any, the ACC would incur upon Maryland's withdrawal from the Conference and has no economic basis or justification." Compl. at ¶ 61. See also Compl. at ¶ 106 ("The establishment of this exorbitant penalty goes well above and beyond what is necessary to compensate the ACC for the loss of any member or the amount needed to continue the Conference's operations."). Similar to liquidated damages, the question of a "justifiable relationship" is a factual dispute that the trier of fact can only resolve after an examination of the history, basis, and purpose of the provision, as well as the damages or potential damages to the ACC upon the departure of a member school.<sup>5</sup> See *i.e. Barrie Sch. v. Patch*, 401 Md. 497, 510, 933 A.2d 382, 390 (2007) (noting that "We have long recognized that 'one of the most difficult and perplexing inquiries encountered in the

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<sup>5</sup> The Court notes that Maryland was quickly replaced by the University of Louisville in the ACC, resulting in little disturbance to the ACC's structure.

construction of written agreements' is determining whether a contractual clause should be regarded as a valid and enforceable liquidated damages provision or as a penalty." (internal citations omitted)). *Even by Maryland's own allegations*, a detailed analysis is necessary to determine whether the Withdrawal Payment bears a justifiable relationship to actual damages sustained upon departure of a member school or is simply a punitive measure intended to stymie competition.<sup>6</sup> Such a multi-faceted analysis is patently impossible under a Quick Look analysis and necessarily dictates a more in-depth Rule of Reason analysis. Therefore, this Court will apply a Rule of Reason analysis herein.

## ii. Market allegations

A Rule of Reason analysis requires that the plaintiff adequately identify the relevant geographic and product markets.

### 1. Geographic Market

The relevant "geographic market" is "an area of effective competition...where buyers can turn for alternative sources of supply." At no point in its Complaint does Maryland specifically allege the relevant geographic market. However, it does allege that

conferences *typically* draw their members from a geographic area within which each member's teams can travel economically and without undue interruption of the student-athletes' academic responsibilities. In addition to geographical proximity, conferences or divisions within athletic conferences often include universities that offer historic and/or regional rivalries that are of great interest to the alumni and fan base of the respective institutions.

Compl.at ¶ 20. Moreover, Maryland states,

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<sup>6</sup> To be sure, Maryland's Opposition seems to admit that it cannot meet the Rule of Reason test. In a footnote at p. 28, Maryland acknowledges that,

The Complaint also alleges that the horizontal conspiracy among the ACC and certain of its members is *per se* illegal under the Antitrust Act..., but the Court need not consider that issue now, because Maryland has adequately stated a claim under the quick look (or **another less than full rule of reason**) analysis.

Opp. at p. 28, fn 2. Although not an outright admission, Maryland appears to concede that it cannot meet the full rule of reason test. This Court shall not treat this as dispositive.

cost and academic disruption of lengthy travel for student-athletes limits the number of conferences that present a realistic option for Maryland. Schools evaluate the benefits and costs when deciding the conference they wish to join.

Compl. at ¶ 38. The ACC's Motion to Dismiss attacks Maryland's purported geographic market, arguing that Maryland, "cling[s] to the hodgepodge of different markets they say are impacted without ever saying how that is so." ACC's Reply at p. 9. Maryland's Opposition counters the ACC's arguments by generally stating that the markets are "sufficiently well known to the ACC and the Court to permit evaluation of whether the [withdrawal payment] impairs competition." Maryland's Opp. at p. 34-35. Maryland's summary conclusions entirely avoid the ACC's attacks on geographic market definition.

In *Tanaka v. University of Southern California*, the plaintiff alleged that the relevant geographic market was the Los Angeles area because she preferred to remain close to her family. The Court summarily dismissed this summary geographic market definition:

Of course, Tanaka's personal preference to remain in the Los Angeles area is irrelevant to the question of whether Los Angeles is an area of effective competition for the services of women's intercollegiate soccer players...In fact, according to her own allegations, Tanaka herself was 'heavily recruited by universities across the country,' from Connecticut to Washington. Tanaka's own experience strongly suggests that the relevant geographic market is national in scope.

*Tanaka v. Univ. of S. California*, 252 F.3d 1059, 1063 (9th Cir. 2001). Likewise, Maryland claims a preference for a geographic area, but fails to adequately explain or identify an effective area of competition. Incongruously, Maryland has voluntarily decided leave the ACC, where all of the constituent schools are located on the Eastern seaboard, and join the Big Ten Conference, where the schools are primarily located in the Midwest. Maryland does not offer an explanation as to why the Big Ten Conference falls within the relevant geographic market, or why other conferences, such as the Southeastern Conference (SEC), do not. Unlike in *Tanaka*, where the Court found the geographic market allegations too narrow, Maryland's Complaint is entirely

devoid of any allegation of as to the geographic area of effective competition. This Court finds that Maryland's conclusory allegations are insufficient to adequately define the relevant geographic market and fail to provide the ACC the proper notice or state the facts upon which Maryland's antitrust claims are based.

## 2. Product Market

A plaintiff must also allege with specificity the product market where it claims adversely impacted.

Defining a relevant product market is primarily 'a process of describing those groups of producers which, because of the similarity of their products, have the ability—actual or potential—to take significant amounts of business away from each other.' "

*U.S. Anchor Mfg., Inc. v. Rule Indus., Inc.*, 7 F.3d 986, 995 (11th Cir. 1993) *certified question answered*, 264 Ga. 295, 443 S.E.2d 833 (1994) (internal citations omitted). The relevant product market includes "commodities reasonably interchangeable by consumers for the same purposes make up that 'part of the trade or commerce.'" *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 395, 76 S.Ct. 994 (1956) (internal citations omitted). Whether a product is interchangeable is determined by examining:

- (1) the product uses, *i.e.*, whether the substitute products or services can perform the same function, and/or
- (2) consumer response (cross-elasticity); that is, consumer sensitivity to price levels at which they elect substitutes for the defendant's product or service.

*Worldwide Basketball & Sport Tours, Inc.*, 388 F.3d at 961. Products "need not be fungible to be market competitors..." (*id*); however, "the market must encompass the product at issue as well as all economic substitutes for the product." *Newcal Indus., Inc. v. Ikon Office Solution*, 513 F.3d 1038 (9th Cir. 2008).

Maryland's Complaint discusses numerous product markets that could be impacted by the ACC's alleged anticompetitive behavior; however, its discussions fall short of meeting the requisite pleading standard. Attempting to define the relevant product market, Maryland alleges:

[T]he ACC's actions adversely affect competition in the markets in which conferences compete for university members and in which universities compete for membership in conferences. In addition, the ACC's conduct also adversely affects relevant markets for providing educational services and athletic competitions for student-athletes and for providing athletic events for consumers of intercollegiate sporting events. Further, the ACC's conduct reduces competition in the relevant market for coaches of intercollegiate sports.

Compl. at ¶ 104. Elsewhere in the Complaint, Maryland alleges,

- Members of conferences “compete with each other with respect to student-athletes and with respect to students, faculty, academics, and other matters.” Compl. at ¶ 21;
- “Conferences compete for member schools, sales of tickets, sale of broadcasting rights, advertising and sponsorships, and opportunities for their members to compete....” Compl. at ¶ 22;
- Maryland must be able to compete for “name-recognition and reputation.” Compl. at ¶ 37.
- “Membership in the Big Ten Conference, and the enhanced competitive [athletic] opportunities that it will provide to Maryland, will increase Maryland's national visibility and reputation in the field of intercollegiate athletics and beyond.” Compl. at ¶ 43;
- “Upon information and belief, the move [to the Big Ten Conference] will lead to an increase in the number of student-athletes and teams competing for Maryland in intercollegiate athletics...” Compl. at ¶ 45;
- Membership in [Big Ten Conference educational consortium] will significantly enrich academic, research, and collaborative opportunities for Maryland's students and faculty...” Compl. at ¶ 47;
- Membership in the Big Ten Conference will “significantly increase the revenue generated by its athletic department...” Compl. at ¶ 49;
- The Withdrawal Payment will significantly weaken Maryland's athletic program and “undermine Maryland's ability to compete with other ACC members for student athletes, coaches, sponsorship opportunities, and other financial and reputational benefits that Maryland derives from its intercollegiate athletic programs.” Compl. at ¶ 78.
- The Withdrawal Payment will deter other ACC members from moving to another conference which “might... present an even stronger conference offering in comparison to the ACC and that might appeal to more fans, sponsors and broadcasters...” Compl. at ¶ 85.

- The ACC is “adopting a course of action to render Maryland’s athletic teams less competitive within the Conference...” Compl. at ¶ 90.
- “The conduct undertaken by the ACC is consistent with an effort to suppress and limit competition among conferences and teams...” Compl. at ¶ 90.
- The Withdrawal Payment will “result in a chilling effect on the ability of intercollegiate athletic conference to build teams and promote their member institutions.” Compl. at ¶ 107.
- “Consumers are harmed by the deterioration of quality...” Compl. at ¶ 110.

Notably absent from Maryland’s allegation is the very thing courts use to define the product market: reasonably interchangeable product substitutes, or an explanation as to why the product cannot be substituted. This Court is left to ponder which product Maryland alleges is impacted by the alleged restriction.

The Court in *Agnew* clearly held that such a wide variety of allegations fails to meet the pleading standard for an antitrust claim:

Plaintiffs' complaint did state that ‘NCAA member institutions compete with each other to attract and enroll highly skilled athletes to their institution for obtaining bachelor's degrees,’ which at least suggests the existence of *some* market, but the confines of that market are far too unclear. For instance, it is not apparent whether plaintiffs believe that the Bylaws affect an overall market for bachelor's degrees, which would impact scholarship athletes and non-athletes alike, or some subsidiary market that only concerns athletes attempting to obtain educational degrees in exchange for athletic services. This may seem like nitpicking, but if a Sherman Act claim of this nature progresses past the quick-look stage and enters a full-fledged Rule of Reason analysis, the scope of the market becomes of central importance.

*Agnew v. Nat'l Collegiate Athletic Ass'n*, 683 F.3d 328, 346 (7th Cir. 2012). Likewise, in *Ticketmaster v. Prior*, the Court found the plaintiff’s laundry list of purported “product market” contours insufficient as a matter of law.

Certain allegations pertain to ‘ticket distribution services,’ while others pertain to tickets themselves, and both distribution services and tickets are further sometimes divided into sales in the ‘primary’ and ‘secondary’ markets. Thus any number of markets might be intended: the market for ‘primary ticket distribution services,’ the market for ‘secondary ticket distribution services,’ the market for ‘ticket distribution services’ for any and all tickets, the market for tickets that have never been sold before, the market for tickets that

have been sold before, the market for tickets regardless of whether or not they have been sold before ... and so on. Whether any of these product markets might ultimately turn out to be valid or not, it is currently impossible to tell from the FACC which one(s) Prior may be trying to base its case on.

*Ticketmaster LLC v. Prior*, CV 07-2535 ABC JCX, 2008 WL 649792 (C.D. Cal. Mar. 10, 2008).

As in *Ticketmaster*, this Court finds that Maryland's "allegations ... are hopelessly muddled as to what product market (or markets) are at issue here." *Id.* It is unclear whether the competition is between conferences, for conference membership, between schools within conference, for athletes, for other institutional opportunities, or for some other product. The disparate nature of Maryland's charges and its failure to identify reasonable substitutes renders this Court unable to identify the relevant competitors, to decipher the level at which competition is allegedly infringed, or to identify exactly what is being bought, sold or competed for. Simply, this Court is unable to determine which "product" Maryland refers to.

Absent an adequate identification of the relevant product market, a reviewing court cannot identify a "reasonably interchangeable commodity" and, therefore, is unable to perform the requisite balancing tests. *See Adidas Am., Inc. v. Nat'l Collegiate Athletic Ass'n*, 64 F. Supp. 2d at 1101-02 ("Without defined relevant markets, there is no way for a court to determine whether a defendant has restrained trade in violation of § 1 or to measure a defendant's ability to lessen or destroy competition in violation of § 2."); *Queen City Pizza, Inc. v. Domino's Pizza, Inc.*, 124 F.3d 430, 436-37 (3d Cir.1997) ("Where [an antitrust] plaintiff fails to define its proposed relevant market with reference to the rule of reasonable interchangeability and cross-elasticity of demand, or alleges a proposed relevant market that clearly does not encompass all interchangeable substitute products even when all factual inferences are granted in plaintiff's favor, the relevant market is legally insufficient and a motion to dismiss may be granted.")

Allegation of a product market is of central importance to a claim under the Maryland Antitrust Act, and this Court finds that Maryland has failed to meet the pleading standard and adequately identify the market it alleges has been infringed upon.

**b. Market Harm**

Harm to the relevant market must be properly alleged to survive a motion to dismiss. The ACC has challenged the sufficiency of Maryland's "market harm" allegations. The ACC argues that, while Maryland alleges ample *individual* harm, it falls short of alleging harm to the market itself. Specifically, the ACC points out that, "Plaintiffs do not allege...that the withdrawal payment ... has prevented any current or prospective member of the ACC from taking any actions that the school considers to be in its best competitive interests," noting that Maryland has never wavered in its commitment to leave the ACC and join the Big Ten Conference. Mot. at p. 18. The ACC cites to *Mid-South Grizzlies, supra*, *Seattle Totems Hockey Club, Inc. v. Nat'l Hockey League*, 783 F.2d 1350 (9<sup>th</sup> Cir 1986); *Fishman v. Estate of Wirtz*, 807 F.2d 520 (7<sup>th</sup> Cir. 1986), and *Levin v. Nat'l Basketball Ass'n.*, 385 F.Supp. 149 (S.D.N.Y. 1974) in support of its allegation that the particularized and individualized harm allegedly sustained by Maryland is insufficient to constitute harm to *competition* in the relevant market/s.

Maryland contends that it has "alleged injuries and threatened injuries flowing from the ACC's conduct denying Maryland and other ACC member institutions a viable, free choice between market alternatives and from participating in some markets altogether." Opp. at p. 40. Maryland argues that under *FTC v. Indiana Federation of Dentists, supra*, it need not allege a specific restraint to the competition in order to satisfy the pleading test for market restraint. Maryland's opposition points to numerous allegations in the Complaint where it purports to allege harm beyond Maryland and to the market itself. Opp. at p. 39-41.

This Court recognizes that antitrust laws are intended to protect competition within a relevant market, not individual competitors. *Martello v. Blue Cross & Blue Shield of Maryland, Inc.*, 143 Md. App. 462, 483, 795 A.2d 185, 197 (2002). (“That below-cost pricing may impose painful losses on its target is of no moment to the antitrust laws if competition is not injured: It is axiomatic that the *antitrust laws were passed for the protection of competition, not competitors.*”) (emphasis in original, citations omitted). See also *Tanaka*, 252 F.3d at 1064. “It is the impact upon competitive conditions in a definable market which distinguishes the antitrust violation from the ordinary business tort. [The] failure to allege injury to competition is a proper ground for dismissal by judgment on the pleadings.” *McGlinchy v. Shell Chem. Co.*, 845 F.2d 802, 812-13 (9th Cir.1988). The Second Circuit Court of Appeals said,

The antitrust injury requirement obligates a plaintiff to demonstrate, as a threshold matter, “that the challenged action has had an actual adverse effect on competition as a whole in the relevant market; **to prove it has been harmed as an individual competitor will not suffice.**”

*Capital Imaging v. Mohawk Valley Med. Assoc.*, 996 F.2d 537, 543 (2d Cir.1993). Therefore, to state a valid claim, Maryland must allege that competition in the relevant market<sup>7</sup> has been harmed or restricted in some manner.

As to “market harm,” Maryland argues that,

[t]The ACC’s Withdrawal Penalty will have an anticompetitive effect and will unreasonably restrain trade in relevant antitrust markets (including the markets for conferences seeking member universities and universities seeking to affiliate with conferences) and will result in a chilling effect on the ability of intercollegiate athletic conferences to build teams and promote their member institutions...The purpose and intent of the Withdrawal Penalty is to prevent schools from leaving the conference, thereby restricting schools from improving their performance on the field and in all of the relevant markets.

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<sup>7</sup> As noted above, the “relevant market” is not sufficiently defined, rendering it impossible to determine whether competition has been harmed.

Compl. at ¶ 107. Elsewhere, however, Maryland discusses the recent expansion of the ACC, stating that “[r]ecently, the ACC has been extremely active in the market for new conference members,” and notes that the ACC’s recruitment efforts have been very successful:

In 2012, Syracuse University and the University of Pittsburgh announced that they will withdrawal from the Big East Conference and join the ACC in 2013. On September 12, 2012, the ACC announced that the University of Notre Dame will join the conference by 2015 for all conference-sponsored sports except football...Most recently, on November 28, 2012, ACC presidents and chancellors voted to admit the University of Louisville...Louisville is scheduled to leave the Big East and become an ACC member in 2014.

Compl. at ¶ 30. Maryland’s allegation that the Withdrawal Payment has stymied competition is directly contradicted by the expansion of the ACC. Despite the September 2012 vote to increase the payment, Syracuse University, University of Pittsburgh, and Notre Dame have not wavered in their commitment to join the ACC. Similarly, Louisville University chose to join the conference *after* the 2012 Withdrawal Payment amendment was adopted. Maryland’s claims of injury to competition are controverted by the recent expansion of the ACC. Even in light of all reasonable inferences this Court must grant Maryland, Maryland’s allegations of market harm are completely contradicted by its factual allegations that the ACC has expanded. This Court finds, therefore, that Maryland has failed to allege injury to competition.

This Court also finds that the Complaint falls short of alleging even individual harm. To the contrary, throughout its pleadings, Maryland alleges that it is in a *better* competitive position as a member of the Big Ten Conference than as a member of the ACC. *See* Compl. at ¶ 39-49.

Indeed, Maryland alleges that

[it’s] mission would be best served, and the interests of its students, student-athletes, faculty, alumni, and Maryland taxpayers would be best served by joining the Big Ten Conference.

Compl. at ¶ 40. Maryland alleges that the Big Ten Conference will offer it “enhanced competitive opportunities” (Compl. at ¶ 42), “vastly superior research opportunities” (Compl. at ¶ 46), and “superior economic benefits” (Compl. at ¶ 48). Maryland has remained committed to its departure from the ACC and its commitment to join the Big Ten Conference. By Maryland’s own admission, it will be in a *better* economic and competitive posture, both on the field and off, after the transition. This Court recognizes that the Withdrawal Payment may prevent Maryland from realizing the full benefit of the revenue increase when it first joins the Big Ten Conference; however, this is a business decision and does not necessarily constitute injury. To the point, Maryland says,

[b]y moving to the Big Ten, Maryland will significantly increase the revenue generated by its athletic department, enhancing Maryland’s ability to compete on the field and permitting Maryland to sustain and ultimately enhance the athletic opportunities available to its student-athletes. Upon information and belief, the Big Ten pays annual distributions to its member schools well in excess of the revenue distributions made by the ACC to its members. On information and belief, this trend will continue and the gap between revenue distributions to Big Ten members and ACC members will widen in the coming years.

Compl. at ¶ 49. Relying on Maryland’s pleadings, the Court finds that the Withdrawal Payment has not prevented Maryland from improving its economic and competitive postures by leaving the ACC and joining the Big Ten Conference. By Maryland’s own admissions and actions, its freedom to associate with various conferences has not been impeded by the Withdrawal Payment and, in fact, publically declares the financial benefit of joining the Big Ten Conference.

Based upon this Court’s findings that Maryland has failed to adequately allege the relevant geographic and product markets and has failed to allege market harm, this Court shall dismiss Count III without prejudice.

**V. Tortious Interference Claim.**

Maryland alleges in Count IV of its Complaint that the ACC's

attempt to amend the ACC constitution and adopt the Withdrawal Penalty, actions to enforce the Withdrawal Penalty by withholding distributions of Maryland's share of Conference revenues, and denying Maryland equal access and treatment as a member of the ACC constitute intentional, deliberate and willful acts calculated to cause damages to Maryland in the conduct of its lawful affairs and business.

Compl. at ¶ 114. The result, Maryland alleges, is an "inability to conduct its athletic affairs on level financial and competitive playing fields." Compl. at ¶ 115. Finally, "[t]he ACC's conduct was perpetrated with the intentional and improper purpose of causing damage and was without justifiable cause." *Id.*

**a. Choice of Law**

The parties dispute whether Maryland's tortious interference claim is governed by Maryland law or North Carolina law.

Unlike an automobile accident or personal injury litigation where the wrongful act and the injury occur in the same place, the alleged wrongful act here occurred in North Carolina, while the alleged injury arose/ is arising in Maryland. In separate footnotes, each party addressed choice of law.<sup>8</sup> The ACC argues that North Carolina law should govern because the decision to withhold conference distributions, the act giving rise to the alleged injury, occurred in North Carolina. Maryland, however, alleges that the harm accrued/ is accruing in Maryland, and Maryland tort law should govern.

The ACC's constitution does not contain a choice of law provision; therefore, to resolve the issue of which law to apply, this Court looks to the doctrine of *lex loci delicti*. "[L]ex loci delicti ... requires a tort action to be governed by the substantive law of the state where the wrong occurred." *Hauch v. Connor*, 295 Md. 120, 123-25, 453 A.2d 1207 (1983); see also *Philip*

<sup>8</sup> The ACC also addressed choice of law in its Reply at 16 *et seq.*

*Morris Inc. v. Angeletti*, 358 Md. 689, 744, 752 A.2d 200 (2000); *White v. King*, 244 Md. 348, 352, 223 A.2d 763 (1966).

The *Phillip Morris* Court noted that, “[t]he tort is complete only when the harm takes place, for this is the last event necessary to make the actor liable for the tort.” *Phillip Morris*, *supra* citing Herbert F. Goodrich, Handbook of the Conflict of Laws § 93, at 263-64 (3d ed. 1949). See also *Williams v. Gyrus ACMI, Inc.*, 790 F.Supp.2d 410, 414 (D.Md.2011) (“Where the events giving rise to a tort action occur in more than one state, courts must apply the law of the state where the last event required to constitute the tort occurred.”). The Court of Appeals for the Fourth Circuit held that, “The place of injury is the place where the injury was suffered, not where the wrongful act took place.” *Johnson v. Oroweat Foods Co.*, 785 F.2d 503, 511 (4th Cir.1986) (holding that it was “unclear” whether a Connecticut statute could apply when the termination at issue occurred in Maryland).

In accordance with *Phillip Morris* and *Johnson*, this Court shall apply Maryland law since the injury necessary to complete the tort has occurred, and is occurring, in the State of Maryland.

#### **b. Failure to State a Claim**

Even under Maryland law, the ACC argues that Maryland has failed to state a claim. Mot. at p. 20, *et seq.* The ACC alleges that Maryland has failed to identify a relationship or potential relationship with a third party that was damaged; instead, it has only alleged identical harm to that arising from the alleged breach of contract and/ or the antitrust claim. The ACC cites to *Alexander & Alexander Inc. v. B. Dixon Evander & Associates, Inc.*, 336 Md. 635, 654, 650 A.2d 260 (1994) and *K & K Mgmt., Inc. v. Lee*, 316 Md. 137, 557 A.2d 965 (1989) in support of their position that a claim for tortious interference may not sound in breach of

contract. Finally, the ACC argues that the Complaint fails to allege that the ACC's actions were specifically calculated to cause harm to Maryland.

Maryland argues that the Court of Appeals opinion in *Natural Design, Inc. v. Rouse Co.*, 302 Md. 47, 485 A.2d 663 (1984) does not supplant a claim for interference with prospective advantage when the parties are in contractual privity. Maryland contends that the ACC's enforcement of the 2012 amendment to its constitution and withholding of conference distributions were done with the improper purpose of "causing damage" to Maryland. Opp. at 44. These acts, Maryland alleges, interfered with Maryland's future relationship with the Big Ten Conference, student-athletes, athletic teams, and coaches. *Id.* at p. 45.

The Court of Appeals has held that a properly pleaded claim under Maryland's Antitrust Act *can* give rise to a claim for tortious interference with prospective advantage.

We agree that the defendants' acts, if proven to be part of a price-fixing combination in violation of the Maryland Antitrust Act, would also constitute the Maryland common law tort of malicious interference with the plaintiffs' business. Under these circumstances, the acts would be unlawful and thus improper. *Goldman v. Building Assn.*, *supra*, 150 Md. at 682, 133 A. 843. Moreover, even before the enactment of the state antitrust statute, this Court took the position that acts in furtherance of a price-fixing conspiracy or combination were unlawful and that, if damage resulted from such acts, those injured had a cause of action for interference with their business. *Klingel's Pharmacy v. Sharp & Dohme*, *supra*, 104 Md. 218, 64 A. 1029.

*Natural Design, Inc.*, 302 Md. at 71. In *Martello v. Blue Cross & Blue Shield of Maryland, Inc.*, the Court of Special Appeals affirmed the dismissal of plaintiff's claim for tortious interference, explaining

[b]ecause we have already held that the count charging a horizontal allocation of the market was properly dismissed and ... that all other counts charging an unlawful restraint of trade were inadequate to withstand summary judgment against them, it follows that the count charging the common law tort of interference with a business relationship similarly cannot withstand an adverse summary judgment. The viability of that count was dependent on a contingency and the contingency never came to pass. The count, therefore, was in the last analysis supported by nothing.

*Martello v. Blue Cross & Blue Shield of Maryland, Inc.*, 143 Md. App. at 478-79. To the extent that Maryland's tortious interference claim is based on its antitrust claim, however, it cannot stand, because this Court has dismissed Count III.

In Maryland's opposition, it contends that its tortious interference claim is not wholly dependent upon its antitrust claim. Therefore, this Court will continue its analysis of tortious interference as an independent therefrom.

Under Maryland, a law claim for tortious interference with prospective advantage requires four elements:

'(1) intentional and willful acts; (2) calculated to cause damage to the plaintiffs in their lawful business; (3) done with the unlawful purpose to cause such damage and loss, without right or justifiable cause on the part of the defendants (which constitutes malice); and (4) actual damage and loss resulting.' "

*Natural Design, Inc. v. Rouse Co.*, 302 Md. at 71; *see also Martello, supra*.

When the allegations are based up a breach of contract between two parties, an action for tortious interference with prospective advantage cannot stand; however, when the breach is intentional and motivated by a desire to interfere with plaintiff's prospective advantage, the Courts have approved recovery for resulting loss.

When the claim is based upon tortious interference with prospective advantage...the plaintiff may maintain an action against a defendant who was a party to the contract if the plaintiff can demonstrate that the defendant breached the contract in an effort to interfere with the plaintiff's business relationship with other individuals.

Pleading Causes of Action in Maryland, § 3.137 (2013), *citing K & K Mgmt., supra*. *See also Sims v. Ryland Grp., Inc.*, 37 Md. App. 470, 475, 378 A.2d 1, 4 (1977). ("It is well settled in Maryland that punitive damages cannot be awarded in a pure breach of contract case, although they are recoverable in tort actions arising out of contractual relationships where actual malice is present.")

Maryland's complaint successfully alleges that the ACC intentionally and willfully withheld conference revenue *before* Maryland gave official notice of its withdrawal from the league. Maryland further alleges that these withholdings were done to "punish Maryland and deter further withdrawals from the Conference" (Compl. at ¶ 5) and to "to impede and to penalize Maryland for its decision to join the Big Ten Conference ..." (Compl. at ¶ 50) and to otherwise cause damage to Maryland in its lawful business. Compl. at ¶ 115. Maryland also successfully alleges that ACC's withholdings were done with the unlawful purpose of causing harm to Maryland's actual and prospective economic relationships with third parties. Paragraph 78 alleges that

The ACC and each of the other members of the ACC are aware that significant budget cuts in intercollegiate athletic programs can put into jeopardy the competitiveness of the teams. Universities that have experienced elimination of a Division-I sport for even a single season have experienced the difficulty of retaining a highly competitive team. The ACC and each of its members also know that significantly weakening Maryland's athletic programs will undermine Maryland's ability to compete with other ACC members for student-athletes, coaches, sponsorship opportunities and other financial and reputational benefits that Maryland derives from its intercollegiate athletic programs.

Compl. at ¶ 78. Maryland alleges that ACC was cognizant of the immediate and future impact of the lost revenue on Maryland's athletic program and overall institutional health and implemented the withholdings with the specific intent to harm Maryland's athletic and academic programs and reputation. Finally, Maryland alleges that it "has suffered and will continue to suffer damages" as a result of the ACC's conduct. Compl. at ¶ 116.

As Maryland's pleadings assert that the ACC has unjustifiably withheld revenue owed to Maryland with the purpose of unlawfully or maliciously causing harm to Maryland's prospective advantage, Maryland has properly pleaded a claim for tortious interference with prospective advantage. The ACC's Motion to Dismiss as to Count IV is denied.

**VI. Forum Non-Conveniens and Comity.**

In its Motion to Dismiss, the ACC argues that North Carolina is a more convenient forum for adjudication of this matter, and further alleges that this matter should be dismissed as a matter of comity. The ACC points out that “four of the Member schools...are located in North Carolina, while five are closer to Greensboro, NC...than Upper Marlboro, Maryland...the ACC representatives are based at conference headquarters in Greensboro, North Carolina...and North Carolina law will govern almost all of the matters in dispute.” Mot. at p. 26. The ACC argues that the convenience of the witnesses is a paramount consideration in determining whether to dismiss an action based on forum *non-convenience*, and that the proximity of some witnesses to Greensboro dictates dismissal of the instant matter. The ACC alleges that, under *lex loci contractus* and *lex loci delecti*, the laws of North Carolina, not Maryland, will control. Finally, the ACC argues that under the principles of comity, the Maryland Court should dismiss the instant matter and defer to the first-filed matter in the North Carolina Court. Alternatively, the ACC argues that this matter shall be stayed pending a resolution of the North Carolina matter.

Maryland argues that the declaratory judgment action filed by the ACC in North Carolina cannot be used to preempt the robust Complaint filed in the instant matter. It contends that a full litigation of the North Carolina matter may not resolve all relevant controversies between the parties, specifically Maryland’s claims for breach of contract and violation of the Maryland Antitrust Act. Maryland further argues that the public and private interests of the State of Maryland in the claims at issue greatly overshadow the minor inconvenience of requiring witnesses to travel to Maryland to participate in a complex litigation matter. Finally, Maryland disputes the ACC’s assertion that at least some of the claims are governed by North Carolina law.

In reviewing issues of forum *non-conveniens* and comity, this Court is guided by Maryland's Courts and Judicial Proceeding Article, which provides that,

[i] f a court finds that in the interest of substantial justice an action should be heard in another forum, the court may stay or dismiss the action in whole or in part on any conditions it considers just.

Md. Code, Cts. and Jud. Proceedings, § 6-104. The Court of Appeals has instructed that, "[t]he plaintiffs' choice of forum is not to be lightly disturbed. See *Leung v. Nunes*, 354 Md. 217, 224-225, 729 A.2d 956 (1999). The Court of Appeals "must weigh in the balance the convenience of witnesses and those public-interest factors of systemic integrity and fairness that, in addition to private concerns, come under the heading of 'the interest of justice.'" *Jones v. Prince George's Cnty.*, 378 Md. 98, 120-21, 835 A.2d 632 (2003), citing to *Leung, supra*. A motion challenging forum "should be granted only when the balance weighs strongly in favor of the moving party." *Urquhart v. Simmons*, 339 Md. 1, 18 n. 7, 660 A.2d 412 (1995).

This Court is not persuaded that the balance of convenience and interest in resolution of the matter overwhelmingly weights in favor of dismissal of this action and in favor of the North Carolina action. It is true that representatives from the University of North Carolina, Duke University, Wake Forest University, and North Carolina State University are in close proximity to Greensboro; however, representatives from Boston College, Florida State, Clemson, University of Miami, Georgia Institute of Technology, University of Virginia, and Virginia Tech will be required to travel substantial distances regardless of where this matter is litigated. Moreover, modern technology has significantly lessened the expense and inconvenience of litigating in a distant district. *Ivoclar Vivadent AG v. 3M Co.*, CIV.A. 11-1183-GMS, 2012 WL 2374657 (D. Del. June 22, 2012) (finding that two large corporations would not be unduly burdened by litigating in either forum); *Cypress Semiconductor Corp., Int'l Microcircuits, Inc. v.*

*Integrated Circuit Sys., Inc.*, 01-199-SLR, 2001 WL 1617186 (D. Del. Nov. 28, 2001)

(“Convenience of the parties is a somewhat archaic notion in the world today... “advances in technology have significantly lessened the burden of litigating in a distant district”); *Wesley-Jessen Corp. v. Pilkington Visioncare, Inc.*, 157 F.R.D. 215, 218 (D.Del.1993) ( “technologies have shortened the time it takes to transfer information, reduced the bulk or size of documents or things on which information is recorded ... and have lowered the cost of moving that information from one place to another”). Such witness travel is not extraordinary in a complex litigation matter and would not be unduly burdensome here. This factor does not weigh strongly in favor of dismissal in favor of the North Carolina action.

This Court finds that public and private interest in the matter clearly lies in the State of Maryland. The University of Maryland is Maryland’s flagship academic and athletic college and the taxpayers, residents, fans, and students have a keen interest in the outcome of this dispute. Furthermore, Maryland law governs at least some of the claims, including the antitrust claim and the tortious interference claim. The Maryland Courts are best equipped to interpret and apply the laws of Maryland. The minor inconvenience of witness travel does not outweigh Maryland’s choice of forum and the State of Maryland’s substantial interests in the resolution of this matter.

This Court also finds that principles of comity do not require that this Court dismiss the instant matter in deference to the North Carolina Court. A resolution of North Carolina matter may, but will not necessarily, resolve *all* of Maryland’s pending claims. For, the North Carolina court could rule on the enforcement of the Withdrawal Payment; however, the decision may not preclude Maryland’s claims for breach of contract, a sufficiently pled violation of Maryland’s Antitrust Act, or a claim for tortious interference. Alternately, the North Carolina matter may be

disposed of on procedural or jurisdictional grounds, avoiding the substantive claims and potentially denying Maryland the opportunity to litigate its claims anywhere.

Based upon the foregoing considerations, the ACC's Motion to Dismiss on *forum non convenience* and comity grounds is denied.

**V. Who shall defer to whom?**

This Court does find, however, that this matter shall be stayed pending the outcome of the North Carolina proceeding.

Under the doctrine of comity, an action may be stayed until a prior parallel action in the courts of a different sovereignty is determined. Once stayed, the later action remains pending until the judgment in the prior action becomes final.

*Apenyo v. Apenyo*, 202 Md. App. 401, 410-11, 32 A.3d 511 (2011), *citing* 15A C.J.S. Conflict of Laws § 8.

The ACC argued that the answer of "who shall defer to whom" is controlled by *State v. 91<sup>st</sup> St. Venture*, which recognized that, "[i]t has long been the rule in this State that, once a court takes jurisdiction over a particular subject matter, another court of concurrent jurisdiction generally should abstain from interfering with the first proceeding." *State v. 91<sup>st</sup> St. Joint Venture*, 330 Md. 620, 628, 625 A.2d 953, 956 (1992). This case addressed comity between various jurisdictions within the State of Maryland. Here, comity is between two states, and additional inquiry is warranted.

In *Apenyo*, Judge Moylan, writing for the Court of Special Appeals, instructed:

a variety of factors may be considered, including avoiding increased costs; preventing harassment by repeated suits involving the same subject matter; avoiding conflicting or inconsistent judgments; whether the foreign litigation is at an advanced or preliminary stage; the likelihood of obtaining complete relief in the foreign jurisdiction; and the possibility that a judgment entered in the foreign jurisdiction will give rise to collateral estoppel or will render the matter before the court res judicata.

*Apenyo*, 202 Md. App. at 213. These factors are to be balanced, assigning each appropriate weight. *Id* at 214-215. This Court shall apply these factors.

This Court notes that neither the North Carolina matter or this matter have advanced beyond the preliminary motions stage. Were the cases were to proceed simultaneously, however, this Court foresees the potential for significantly increased costs to both parties as they endeavor to conduct discovery and litigate the matters in two jurisdictions.

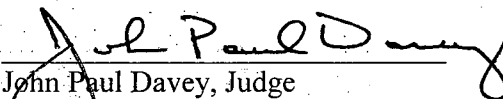
Moreover, this Court recognizes the potential for “competing or inconsistent judgments” resulting from simultaneous litigation. For, the decision of the North Carolina Court and the decision by this Court could be similar to one another, could directly compete with one another, and/or could leave unresolved issues. Permitting both matters to proceed simultaneously plainly risks inconsistent and/or competing determinations of fact and law, an outcome this Court seeks to avoid.

A decision by the North Carolina Court could have a preclusive or *res judicata* effect. As noted above, a resolution of the North Carolina matter *may or may not* dispose of the claims and controversy at issue here; however the specific outcome of the North Carolina matter must be reduced to final judgment before this Court can make such a determination. A stay will avoid potential conflict while preserving the claims of all parties involved.

This Court issues a stay pending a final judgment in *Atlantic Coast Conference v. University of Maryland, et al.*, Civil Action No. 12CVS10736, to avoid unnecessary expenses and the potential for inconsistent determinations of fact and law. Upon resolution of the North Carolina matter, this Court will determine which, if any, of Maryland’s remaining claims may proceed.

**VI. Conclusion.**

Based upon the foregoing findings, this Court shall dismiss Count III WITHOUT PREJUDICE and shall STAY further proceedings on Counts I, II, and IV until a final judgment is entered in *Atlantic Coast Conference v. University of Maryland, et al.*, Civil Action No. 12CVS10736.

  
John Paul Davey, Judge  
June 27, 2013

IN THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY, MARYLAND

BOARD OF REGENTS OF THE UNIVERSITY \*  
SYSTEM OF MARYLAND, et al., \*

*Plaintiffs,* \*

v. \*

Case No. CAL13-02189

ATLANTIC COAST CONFERENCE, \*

*Defendant.* \*

ORDER

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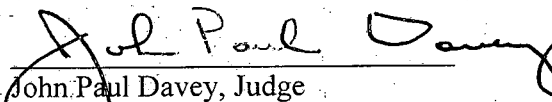
For the reasons set forth in the accompanying Opinion, it is, this 27 day of June 2013,  
by the Circuit Court for Prince George's County, Maryland, hereby

**ORDERED** that Defendant's Motion to Dismiss or, Alternatively, to Stay Plaintiff's  
Complaint is GRANTED in part and DENIED in part; and it is further

**ORDERED** that the ACC's Motion to Dismiss as to Counts I, II and IV is DENIED; and  
it is further

**ORDERED** that Count III is DISMISSED WITHOUT PREJUDICE; and it is further

**ORDERED** that Count I, Count II, and Count IV are STAYED pending a final judgment  
in *Atlantic Coast Conference v. University of Maryland, et al.*, Civil Action No. 12CVS10736 in  
the Superior Court for Guilford County, North Carolina.

  
John Paul Davey, Judge  
Circuit Court for Prince George's County,  
Maryland