IN THE CIRCUIT COURT OF CRAIGHEAD COUNTY, ARKANSAS
WESTERN DISTRICT

ARKANSAS STATE UNIVERSITY PLAINTIFF

CASE NO.: 16JCV-18-199

v.

UNIVERSITY OF MIAMI DEFENDANT

MOTION TO DISMISS FOR *FORUM NON CONVENIENS* IN FAVOR OF FIRST-FILED ACTION IN FLORIDA AND, ALTERATIVELY, TO DISMISS FOR STATING A CLAIM THAT IS BARRED ON ITS FACE

Defendant, University of Miami ("UM"), by and through its undersigned counsel and pursuant to Section 16-4-101, Arkansas Code, and Rule 12(b)(6), Arkansas Rules of Civil Procedure, hereby moves the Court for entry of an Order dismissing this action in favor of a first-filed action pending in a more convenient forum between the same parties concerning the same subject matter as this action or, alternatively, dismissing the complaint for stating a claim that is barred on its face.

I. MOTION TO DISMISS FOR *FORUM NON CONVENIENS*

A. Parallel actions concerning the same matter.

On February 13, 2018, UM filed an action against Arkansas State University ("ASU") alleging in a single count that UM is entitled to a declaration of its rights under a game contract between UM and ASU (the "UM-ASU Action") concerning a football game that originally was scheduled to occur on September 9, 2017 (the "Game"). A copy of the UM-ASU Action is attached hereto as Exhibit "1." As alleged in the UM-ASU Action, the contract for the Game provides for liquidated damages in the event of a cancellation of the Game unless the cancellation is due to a force majeure event in which case the contract is void with respect to the

cancellation is due to a force majeure event in which case the contract is void with respect to the Game and the parties are to attempt to reschedule the Game "as such exigencies may permit or dictate." Ex. 1, ¶ 21.

The UM-ASU Action alleges that the Game was cancelled due to Hurricane Irma and that it "was unable to be rescheduled to occur in the days and weeks following the originally scheduled date or during the remainder of the 2017 football season." Ex. 1, ¶ 38. The UM-ASU Action alleges that ASU became disappointed with UM's available dates following the 2017 football season, demanded an earlier date and, when UM did not accede to ASU's demand, threatened UM with liquidated damages. Ex. 1, ¶¶ 41 - 50. The UM-ASU Action asks the court to determine whether (i) the Game properly was cancelled due to a force majeure event; (ii) whether ASU acted unreasonably in refusing to reschedule the Game to one of several dates available to UM; and (iii) whether ASU's conduct is a breach that relieves UM of further rescheduling obligations. Ex. 1, ¶ 58.

On February 13, 2018, counsel for UM sent a courtesy copy of the UM-ASU Action to general counsel for ASU and inquired whether formal service of process would be necessary. Instead of responding to the letter, on February 16, 2018, ASU filed this action ("this action" or the "ASU-UM Action"). In this action, ASU seeks to recover liquidated damages from UM for the cancellation of the Game. ASU also alleges that ASU "has made repeated good faith efforts . . . to reschedule the game" and that UM "has made no good faith attempts to work with ASU, and has merely repeatedly stated that it cannot schedule a game until 2024 or later." Compl., ¶ 56. UM now seeks entry of an order staying or dismissing this case in favor of the first-filed UM-ASU Action.

B. The Court should dismiss this action under the doctrine of *forum non conveniens*.

Section 16-4-101, Arkansas Code, provides that a court may dismiss an action where it finds that the matter should be heard in another forum in the interests of substantial justice. Ark. Code § 16-4-101 ("D. Inconvenient Forum. When the court finds that in the interest of substantial justice the action should be heard in another forum, the court may stay or dismiss the action in whole or in part on any conditions that may be just"). This law is based on the common law doctrine of *forum non conveniens*. There are four factors a court should consider in making a *forum non conveniens* determination. *Farm Bureau Mut. Ins. Co. of Arkansas, Inc. v. Gadbury-Swift*, 2010 Ark. 6, 5–6, 362 S.W.3d 291, 295 (2010). Those factors are "(1) the convenience to each party in obtaining documents or witnesses; (2) the expense involved to each party; (3) the condition of the trial court's docket, and (4) any other facts or circumstances affecting a just determination." *Id.* "Application of the doctrine lies within the sound discretion of the circuit judge." *Id.*

(1) The convenience to each party in obtaining documents or witnesses.

The first factor weighs heavily in favor of dismissal of this case and in favor of the UM-ASU case in Florida. At its base, this case concerns whether cancellation of the Game was appropriate based on the anticipated landfall of Hurricane Irma in South Florida and the impact of that landfall on the ability of UM players and coaching staff to travel away from South Florida, leaving their homes unprepared for and their families without their assistance during and immediately after the storm. The witnesses to these events are the airport authorities, local governmental authorities in South Florida, weathercasters in South Florida and the players and coaches (and their families) whose homes were in the storm's projected path. All of those witnesses and any documents they might possess are located in South Florida.

This factor is one of the most important factors and militates strongly in favor of dismissal. *See Wal-Mart Stores, Inc. v. U.S. Fid. & Guar. Co.*, 76 S.W.3d 895, 896–901 (Ark. Ct. App. 2002). In *Wal-Mart Stores*, a rockslide damaged a store in Pennsylvania. After investigating the matter and its options, Wal-Mart evacuated and relocated the store to another location incurring a loss. A dispute arose between Wal-Mart and its insurers over coverage for this loss and Wal-Mart brought suit in Benton County, Arkansas where its offices are located. The insurers moved to dismiss on the ground of *forum non conveniens* because the majority of witnesses were located in Pennsylvania and there already was litigation in Pennsylvania that could address all issues. The trial court granted the motion and, on appeal, that decision was affirmed. The *Wal-Mart* court held that "the location of witnesses is a significant factor viewed by the courts in making a *forum non conveniens* determination" and concluded that this factor outweighed the Wal-Mart's interest in its choice of forum:

> we find no fault with the trial court's ruling that the location of the Pennsylvania witnesses and the relative inconvenience that would ensue from attempting to compel their attendance in Benton County weigh in favor of having the trial in Pennsylvania. The court made a determination, which we think is supportable based on experience and logic, that the issues in Wal–Mart's lawsuit would involve not just legal questions, but factual questions as well. While the testimony of those corporate personnel who executed the insurance contracts and managed the claims process could be of some relevance, the testimony of those persons in Pennsylvania who were employed by the store and who inspected the hillside and rendered opinions on its condition appear highly relevant to the question of whether coverage was owed in this case and, if so, to what extent. Several cases have recognized that the location of witnesses is a significant factor viewed by the courts in making a *forum non conveniens* determination.

Id. at 223-224.

(2) The expense involved to each party.

There would undoubtedly be greater expenses in litigating this matter here versus in Florida because of the number of witnesses that would be required to travel to this Court from Florida. Also, considering that this case concerns a public university/plaintiff, this factor militates in favor of dismissal. *See Wal-Mart Stores, Inc. v. U.S. Fid. & Guar. Co.*, 76 S.W.3d 895, 896–901 (Ark. Ct. App. 2002) ("We note that a plaintiff such as Wal–Mart, who has chosen to acquire property and engage in extensive business dealings in numerous locations throughout the country, might be expected, more than the average plaintiff, to find that its resident forum is not convenient for all purposes").

(3) The condition of the trial court's docket.

UM respectfully submits that it is unaware of any reason that this Court's docket would be any more accommodating to this dispute than the docket of the court in the UM-ASU Action.

(4) Other facts or circumstances affecting a just determination.

This final factor militates strongly in favor of dismissal because of the important issues of state comity involved in two separate state courts adjudicating the same action. Arkansas law recognizes that when two different Arkansas courts both have jurisdiction over the same matter there is an inherent danger of confusion, conflict and collision *See Askew v. Murdock Acceptance Corp.*, 225 Ark. 68, 73–74, 279 S.W.2d 557, 561 (1955):

> The principle is essential to the proper and orderly administration of the laws; and while its observance might be required on the grounds of judicial comity and courtesy, it does not rest upon such considerations exclusively, but is enforced to prevent unseemly, expensive, and dangerous conflicts of jurisdiction and of process. If interference may come from one side, it may from the other also, and what is begun may be reciprocated indefinitely.'

Id., 72, 560. *See also Edwards v. Nelson*, 372 Ark. 300, 303–04, 275 S.W.3d 158, 161–62 (2008) ("Without [a first-filed priority] principle, courts with concurrent jurisdiction could bog in the mire of endlessly overruling each other"). While those cases involve intrastate conflicts, the issues that arise from two courts in different states having concurrent jurisdiction over the same matter are not less troublesome but are, in fact, exacerbated. *See Bank of Augusta v. Earle*, 38 U.S. 519, 525 (1839) ("Between the states comity is doubly due; and is an obligation of the highest influence"). The same analysis holds true for cases in two different state courts.

While this Court is not obligated to dismiss this case to permit the UM-ASU Action to proceed, this Court also is without power to stop the UM-ASU Action from proceeding. Concomitantly, the court in the UM-ASU Action finds itself in the same position. Under these circumstances, unless one of these courts prudently declines to exercise its jurisdiction, the parties will be stuck in parallel cases where conflicting rulings could be issued leading to one state court's ruling being pitted against the other. *Harvey v. Eastman Kodak Co.*, 271 Ark. 783, 787, 610 S.W.2d 582, 585 (1981) (under doctrine of *forum non conveniens* "trial court could properly refuse to entertain the complaint though it had jurisdiction to do so"). There is no reason for such a result where the majority of witnesses are located in Florida and Florida is the location where suit was first filed. *See Silkman v. Evangelical Lutheran Good Samaritan Soc'y*, 2015 Ark. 422, 5, 474 S.W.3d 74, 76–77 (2015) (affirming dismissal of complaint "under the doctrine *of forum non conveniens*" in favor of "the first validly filed action in this case."); *Life of Am. Ins. Co. v. Baker-Lowe-Fox Ins. Mktg., Inc.*, 316 Ark. 630, 635–36, 873 S.W.2d 537, 540 (1994) (affirming dismissal of Arkansas state court action in favor of action pending in Texas). This factor, thus, weighs heavily in favor of dismissal of this action and in favor of the matter being resolved in the UM-ASU Action.

The fact that UM asserted its rights in a declaratory judgment action also is not a basis to deny dismissal of this case on the grounds of *forum non conveniens*. In *U.S. Fire Ins. Co. v. Goodyear Tire & Rubber Co.*, 920 F.2d 487 (8th Cir. 1990), Goodyear was insured by a group of insurers for products liability claims. *Id.* at 488. A Minnesota resident was injured in an accident involving a tire rim manufactured by Goodyear. *Id.* At trial in the injury action, a Minnesota jury awarded the injured Minnesotan $3.3 million in compensatory damages and $12.5 million in punitive damages. *Id.* The punitive damages award was reduced to $4 million by the Minnesota Supreme Court. *Id.* During the appeals process, the insurers notified Goodyear that punitive damages were not insurable in Minnesota. *Id.* After the injury case was final, Goodyear requested coverage for the punitive damages award. *Id.* Negotiations between Goodyear and the insurers continued on this and other issues until the insurers filed a declaratory judgment action in Minnesota state court. *Id.* Goodyear removed the case to federal court and also filed a separate lawsuit in federal court in Georgia. *Id.* Goodyear then moved the Minnesota federal court to dismiss or stay the Minnesota case in favor of the Georgia case, and the Minnesota federal court denied the motion. *Id.*

On appeal, the Eighth Circuit affirmed finding that proceeding with the first-filed Minnesota action was not an abuse of discretion. The court expressly rejected Goodyear's argument that "Goodyear could be considered the 'true plaintiff' in th[e] dispute, and that the insurers' motive in filing th[e] action in Minnesota was to avoid the application of Georgia law." *Id.* at 489. In doing so, the court pointed out that Goodyear had plenty of time to file suit and that Goodyear's claim of having been misled by the insurers' continued negotiations about other issues was "less than 'compelling.'" *Id.*

The same analysis holds true here. ASU has known for months that UM claims that Hurricane Irma was a force majeure event. *See* Compl. ¶ 42 ("UM has claimed and continues to claim, that . . . Hurricane Irma was a force majeure event"). If ASU really believed that Hurricane Irma was not a force majeure event and that ASU was entitled to liquidated damages, then ASU had no right to seek to reschedule the Game. If ASU wanted to take that position, it should have done so and sought legal redress for what it now claims was an unjustified cancellation. ASU has had months and months to file an action seeking the liquidated damages it now claims to be due. But ASU chose not to do so. Instead, ASU took the position that it was entitled to reschedule the Game and only recently has threatened damages in a bid to coerce UM to play on dates that are not available. Now, ASU finds itself on both sides of the issue. Just like the insurers in *Goodyear* that filed suit after Goodyear demanded reimbursement of punitive damages following months of negotiations in which the insurers had always made clear that they did not believe punitive damages were covered, UM should not be faulted for promptly filing suit after ASU changed its position by demanding "better" game dates and threatened liquidated damages if its demands were not met. Because the court in the UM-ASU Action first acquired jurisdiction over the dispute, this Court properly should dismiss this action under the doctrine of *forum non conveniens* and under the general principles of comity and conservation of resources.

II. MOTION TO DISMISS CLAIM THAT IS BARRED ON ITS FACE

The complaint in this action suffers from an incurable facial defect: it alleges both that (i) ASU is entitled to liquidated damages because the cancellation of the Game was not properly due to a force majuere event and (ii) that ASU has made repeated good faith efforts to reschedule the Game where a right to reschedule only existed if the cancellation was due to a force majeure

event. Because these mutually exclusive allegations appear on the face of the complaint, the complaint properly should be dismissed.

The contract attached to the complaint in this action contains a force majeure provision as follows:

> 14. FORCE MAJEURE: This contract shall be void with respect to any of the games in the event that it becomes impossible to play such game(s) by reason of an unforeseen catastrophe or disaster such as fire, flood, earthquake, war, epidemic, confiscation, by order of government, military or public authority or prohibitory or injunctive orders of any competent judicial or other government authority. . . . Any games not played as scheduled shall be rescheduled as such exigencies may permit or dictate.

Ex. 2 (Ex. A). Under the plain language of this provision, no obligation to reschedule the Game could have arisen unless it was cancelled due to a force majeure event. The complaint alleges that "UM has claimed and continues to claim, that they [sic] do not have to fulfill their [sic] obligations under the contract because Hurricane Irma was a force majeure event." Ex. 2., ¶ 42. The complaint also alleges that "[a]fter UM failed to play the September 9, 2017 game at ASU, Mr. Mohajir . . . contacted Mr. James to reschedule the game" and that "Mr. Mohajir agreed to wait until the end of the season to contact Mr. James again." Ex. 2, ¶ 42. The complaint further alleges "ASU has made repeated good faith efforts . . . to reschedule the game." Ex. 2, ¶ 55. The complaint does not state that these efforts were part of an effort to settle any claim made by ASU for liquidated damages. In fact, the complaint does not even allege that ASU ever made a demand on UM for liquidated damages. Instead, the plain allegations of the complaint are that all parties agreed to reschedule the Game - - an understanding that flows directly from the express terms of the contract requiring the Game to be rescheduled only where it was cancelled due to a force majeure event.

ASU now seeks to backtrack from its efforts to reschedule the Game (because it is dissatisfied with the dates UM has available) and adopts the position that Hurricane Irma was not a force majeure event and that UM is liable for liquidated damages. However, the contract attached to the complaint expressly provides that "No liquidated damages shall be paid if it becomes impossible to play the game by reason of force majeure (see provision 14)." Having alleged that all parties agreed to reschedule the game due to the cancellation and that ASU attempted on multiple occasions to reschedule the Game, ASU cannot at the same time plead that it also is entitled to liquidated damages. Such inconsistent and mutually exclusive allegations make the complaint subject to dismissal on its face. *See Hutcherson v. Rutledge*, 2017 Ark. 359, 1–2, 533 S.W.3d 77, 78–79 (2017) (affirming dismissal of complaint barred on its face); *Martin v. Equitable Life Assur. Soc. of the U.S.*, 344 Ark. 177, 183–84, 40 S.W.3d 733, 738 (2001) (reviewing insurance policy attached to complaint and dismissing claim as being barred on its face).

Apparently, based on its complaint, ASU wishes to graft onto the force majeure clause in the contract an additional obligation to pay liquidated damages where efforts to reschedule the game are unsuccessful, but that is not what the contract provides. This Court cannot rewrite the contract for ASU. *See Rector-Phillips-Morse, Inc. v. Vroman*, 253 Ark. 750, 756, 489 S.W.2d 1, 5 (1973) ("We must therefore decline the appellant's invitation to rewrite this contract, either directly, by giving effect to the parties' agreement to accept whatever modification the court may find to be reasonable, or indirectly, by approving a limited injunction that would in effect enforce a contract that the parties might have made but did not make"); *Crittenden County v. Davis*, 430 S.W.3d 172, 178 (Ark. Ct. App. 2013) ("we will not read into the contract words that are not there."). Accordingly, the complaint should be dismissed.

CONCLUSION

The doctrine of *forum non conveniens* serves the important purposes of conserving judicial resources and avoiding conflicting rulings while at the same time having the matter resolved in the most efficient location for all parties and witnesses. The UM-ASU Action is the more convenient forum and was first filed action. There exist no circumstances that compel this Court to allow this action to continue where all issues can and will be resolved in the UM-ASU Action. Accordingly, this action should be dismissed. Alternatively, this action should be dismissed for the failure to state a claim because ASU cannot allege that there was a mutual obligation to reschedule the Game and, at the same time, that there was no force majeure event and liquidated damages are due. These allegations are mutually exclusive. This action should be dismissed for that reason as well.

WHEREFORE, Defendant, University of Miami, respectfully requests entry of an order dismissing this action on the ground of *forum non conveniens* in favor of the first-filed UM-ASU Action as more fully described above and, alternatively, dismissing this action for failure to state a claim, along with all other and such further relief as this Court deems appropriate under the circumstances.

Respectfully submitted,

ISICOFF RAGATZ
601 Brickell Key Drive
Suite 750
Miami, Florida 33131
Tel: (305) 373-3232
Fax: (305) 373-3233
Eric D. Isicoff
Florida Bar No. 372201
e-mail: isicoff@irlaw.com
Matthew L. Lines
Florida Bar No. 0243980
e-mail: lines@irlaw.com

Counsel for Defendant University of Miami

(*pro hac vice* pending)

ROSE LAW FIRM
120 East Fourth Street
Little Rock, Arkansas 72201
Tel: 501-377-0325
Fax: 501-375-1309

/s/ Rick Donovan
Rick Donovan, Esq.
Arkansas Bar No.
e-mail: rdonovan@roselawfirm.com

Counsel for Defendant University of Miami

CERTIFICATE OF SERVICE

I hereby certify that on this _____ day of _____, 2018, the foregoing was delivered via First Class Mail, to the following attorney of record:

Brad Phelps
Delena C. Hurst
Arkansas State University System
501 Woodlane Drive #600
Little Rock, AR 72201

/s/ Rick Donovan
Rick Donovan, Esq.

Filing # 67927944 E-Filed 02/13/2018 07:00:46 PM

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT
IN AND FOR MIAMI-DADE COUNTY, FLORIDA

UNIVERSITY OF MIAMI,

Plaintiff,

Case No.: 2018-004609-CA-01

vs.

ARKANSAS STATE UNIVERSITY,

Defendant.
_____/

COMPLAINT FOR DECLARATORY RELIEF

Plaintiff, University of Miami ("UM"), hereby sues Defendant, Arkansas State University ("ASU"), and alleges as follows:

GENERAL ALLEGATIONS

Nature of this Action

1. This is an action by a university for a declaration of its rights and obligations under a written football competition agreement with another university concerning a football game that had to be cancelled due to Hurricane Irma.

Jurisdiction and Venue

2. UM is a not-for-profit corporation organized and existing under the laws of the State of Florida with its principal place of business in Miami-Dade County, Florida.

3. ASU is public university with its principal place of business in Arkansas.

4. This Court has subject matter jurisdiction over this matter because the amount in controversy exceeds $15,000.00, exclusive of interests, costs and attorneys' fees.

5. This Court also has subject matter jurisdiction over this matter because UM seeks a declaration of its rights, pursuant to Chapter 86, Florida Statutes.

EXHIBIT 1

6. ASU is subject to this Court's jurisdiction pursuant to Florida Statutes § 48.193(1)(a) and (g) because ASU operated, conducted, engaged in, or carried on a business or business venture in Florida, and ASU breached a contract in Florida by failing to perform required acts in Florida.

7. Venue is proper in this judicial circuit pursuant to Florida Statutes §§ 47.011 and 47.051 because the causes of action set forth in this Complaint accrued in this judicial circuit.

8. All conditions precedent to the maintenance of this action have been met, performed, waived or otherwise satisfied.

The Game Contract

9. In 2013, UM and ASU engaged in discussions concerning conducting a two-game football series between them - - one home and one away.

10. Those discussions resulted in UM and ASU entering into that certain Atlantic Coast Conference Football Competition Agreement (the "Game Contract").

11. The Game Contract was formed in Miami-Dade County, Florida.

12. The Game Contract became binding on June 25, 2013 when it was last executed by Blake James for UM in Miami, Dade County, Florida.

13. A true and correct copy of the Game Contract is attached hereto and incorporated as though fully set forth herein as Exhibit "A."

14. The Game Contract scheduled two games.

15. Game 1 was scheduled to occur on "8/28 or 8/30/14 or 9/13/14" and was to be a home game for UM.

16. The Game Contract referred to Game 1 as "HOME."

17. Game 2 was scheduled to occur on "9/9/17" - - four years after the date of the Game

Contract - - and was to be a home game for ASU.

18. The Game Contract referred to Game 2 as "AWAY."

19. As to the dates for Games 1 and 2, the Game Contract provided "Both schools acknowledge that the date(s) and game time(s) listed above are tentative and subject to change pending the mutual written agreement of the participating institutions."

20. The Game Contract contains a liquidated damages provision as follows:

> 6. LIQUIDATED DAMAGES: The failure of a party to participate in the Game will constitute a material breach of the Agreement that will cause the other party significant disruption and damages. The parties recognize that the damages incurred as a result of the breach increase significantly as the date of the Game approaches, and they further recognize and agree that these damages cannot be fully mitigated. Therefore, the breaching party shall pay to the non-breaching party as liquidated damages:
>
> > A. The sum of $650,000 if notice of cancellation is received by the non-breaching party 24 months or more before the scheduled date of the Game;
> >
> > B. The sum of $650,000 if notice of cancellation is received by the non-breaching party more than 12 months but less than 24 months before the scheduled date of the Game; or
> >
> > C. The sum of $650,000 if notice of cancellation is received by the non-breaching party 12 months or less before the scheduled date of the Game.
>
> Payment for liquidated damages as set forth above will be the sole remedy for damages incurred because of cancellation of the Game due to breach. No liquidated damages shall be paid if it becomes impossible to play the game by reason of force majeure (see provision 14). The sum shall be payable on or before February 15 of the year following the Game for which the breach occurred. The parties acknowledge that the breach of cancellation of one game in a series shall not be considered a breach of or cancellation of all games.

See Ex. A. (emphasis added).

21. The Game Contract also contained a force majeure provision as follows:

> 14. FORCE MAJEURE: This contract shall be void with respect to any of the games in the event that it becomes impossible to play such game(s) by reason of an unforeseen catastrophe or disaster such as fire, flood, earthquake, war, epidemic, confiscation, by order of government, military or public authority or prohibitory or injunctive orders of any competent judicial or other government authority. Notice of such catastrophe or disaster shall be given as soon as possible. No such cancellation shall affect the parties' obligations as to subsequent games covered by this contract. Any games not played as scheduled shall be rescheduled as such exigencies may permit or dictate.

22. On September 13, 2014, UM defeated ASU by a score of 41 to 20 in Game 1.

Hurricane Irma

23. With Game 2 scheduled to take place in Jonesboro, Arkansas on September 9, 2017, Hurricane Irma was approaching the State of Florida.

24. Just days before the Football Game, meteorologists and hurricane experts forecasted a path that had Hurricane Irma, a category 5 storm measuring over 350 miles wide with sustained winds as high as 185-miles-per-hour, headed directly toward Miami.

25. South Florida residents began bracing for the impacts of the storm and the administration at UM's Athletics Department began considering options as UM's football, women's soccer, women's volleyball, and men's and women's cross country teams were set to compete.

26. The best information available at that time indicated that UM's flight for the Football Game might not make it out of Miami and a return flight would not be available in a timely fashion after the game.

27. President Trump declared a pre-landfall emergency.

28. Governor Rick Scott and UM's President both declared a State of Emergency.

29. Miami-Dade County ordered unprecedented evacuations of coastal and inland areas and, for the first time in school history, UM's campus was closed and evacuated, resulting in the evacuation of approximately 4,300 residential students.

30. Based on these unprecedented circumstances and, in furtherance of protecting the health, safety and welfare of UM's student-athletes and staff, UM's Athletics administration canceled Game 2 and released student-athletes and staff to prepare for the storm and make decisions with their families.

31. In the aftermath of the storm, over 50% of UM's main campus was impassable and 75% of its roadways and pathways were obstructed by numerous toppled trees, downed power lines and huge amounts of other accumulated debris.

32. More than 2,000 tons of landscape debris covered the campus, requiring more than 300 personnel, vendors and contractors to remove the debris, clear roadways and pathways, and restore power and damaged infrastructure.

33. Due to the massive damage and destruction, it took 19 days for the campus to become fully operational again.

34. As emergency crews worked to return the campus to normal operations, UM canceled or postponed athletic events for a second consecutive week, including postponing the September 16 football game at Florida State, canceling the volleyball team's home invitational against Florida International University, postponing the women's soccer match against Syracuse and canceling the women's tennis team's trip to North Carolina for the Duke Bond Invitational.

35. ASU was given timely notice of the cancellation due to this force majeure event.

36. Because of the force majeure event, by the express terms of the Game Contract, the liquidated damages provision is not applicable to the cancellation of Game 2.

37. Specifically, the Game Contract provides that "[n]o liquidated damages shall be paid if it becomes impossible to play the game by reason of force majeure" (Ex. A, ¶ 6) and "[t]his contract shall be void with respect to any of the games in the event that it becomes impossible to play such game(s) by reason of [force majeure]." (Ex. A, ¶ 14)

38. While the Game Contract contemplates that Game 2 would be rescheduled "as such exigencies may permit or dictate," due to the impact of Hurricane Irma and the schedules of UM and ASU, Game 2 was unable to be rescheduled to occur in the days and weeks following the originally scheduled date or during the remainder of the 2017 football season.

39. Following the 2017 football season, UM reviewed its football schedule and determined that Game 2 could be rescheduled to any of the following dates: September 3 or 14, 2024 or September 13 or 20, 2025 (the "Available Game 2 Dates").

40. UM offered the Available Game 2 Dates to ASU.

41. ASU has refused to accept the Available Game 2 Dates and, instead, has demanded that Game 2 be rescheduled to earlier dates in 2020 and 2021 that are not available for UM.

42. The Game Contract does not require that Game 2 be rescheduled within any set time frame and does not state that time is "of the essence."

43. While ASU may be disappointed that Game 2 could not be rescheduled to an earlier date, planning games such as these usually is done years in advance, particularly for a football program like UM's.

44. For example, the Game Contract itself indicates that Game 2 originally was scheduled more than 4 years in advance.

45. ASU's demands are unjustified and unlawful.

46. ASU has not indicated that it is unavailable or unable to play Game 2 on the Available Game 2 Dates.

47. Instead, ASU merely wishes to force UM to play Game 2 on a date earlier than the Available Game 2 Dates even though UM does not have any available away game slots prior to the Available Game 2 Dates.

48. Accordingly, the Available Game 2 Dates are dates that would be acceptable to ASU except that it is demanding an earlier date for Game 2.

49. ASU has no contractual basis to refuse to reschedule Game to 2 to a mutually acceptable date such as the Available Game 2 Dates in favor of earlier dates unilaterally selected by ASU.

50. With Game 2 having not been rescheduled due to ASU's unreasonable demands, ASU now threatens to sue UM for liquidated damages for the cancellation of Game 2 under the Game Contract even though Game 2 properly was cancelled due to Hurricane Irma and the liquidated damages provision is inapplicable.

51. UM has retained undersigned counsel to represent it in this action and is obligated to pay reasonable attorneys' fees therefor and the costs associated therewith.

COUNT I
(Declaratory Relief)

52. UM realleges and incorporates by reference the allegations in paragraphs 1 through 51 above.

53. UM is uncertain of its rights under the Game Contract.

54. Although UM believes that Game 2 was properly cancelled due to a force majeure event and that no liquidated damages are due with respect to this cancellation, ASU has

demanded liquidated damages and threatened to sue UM therefor.

55. Although UM believes it has acted reasonably and in good faith in offering to ASU the Available Game 2 Dates, ASU has unreasonably refused to accept the Available Game 2 Dates and demanded earlier dates that are not available.

56. There is uncertainty as to the rights afforded the parties under the Game Contract and the parties require the Court to declare their rights under the Game Contract.

57. Given the dispute among the parties, there is a bona fide, actual, and present need for a declaration of the parties' rights under the Game Contract.

58. UM seeks declaratory relief to determine whether (i) Game 2 properly was cancelled due to a force majeure event; (ii) whether ASU has acted unreasonably in refusing to agree to the Available Game 2 Dates; (iii) whether UM is relieved of any further rescheduling obligation with respect to Game 2 because of ASU's unreasonable conduct in breach of the Game Contract.

WHEREFORE, Plaintiff, University of Miami, requests that this Court declare the following:

(i) Game 2 properly was cancelled due to a force majeure event;

(ii) ASU has acted unreasonably in refusing to agree to the Available Game 2 Dates; and

(iii) UM is relieved of any further rescheduling obligation with respect to Game 2 because of ASU's unreasonable conduct in breach of the Game Contract.

and all other and such further relief as this Court deems appropriate under the circumstances.

Respectfully submitted and dated this 13th day of February, 2018,

ISICOFF RAGATZ
601 Brickell Key Drive
Suite 750
Miami, Florida 33131
Tel. (305) 373-3232
Fax (305) 373-3233

By: /s/Matthew L. Lines
Eric D. Isicoff
Florida Bar No. 372201
isicoff@irlaw.com
Matthew L. Lines
Florida Bar No. 0243980
lines@irlaw.com

Attorneys for University of Miami

EXHIBIT "A"

Atlantic Coast Conference
FOOTBALL COMPETITION AGREEMENT

This Agreement is entered into this 9th day of May, 2013, by and between the University of Miami (hereinafter HOME) and Arkansas State University (hereinafter AWAY).

1. PURPOSE/COMMITTED GAMES: The purpose of this Agreement is to confirm the arrangements and conditions under which HOME and AWAY will compete in a game of intercollegiate football ("Game") to be played on the following date(s) and at the following location(s):

GAME #	DATE	HOST INSTITUTION	LOCATION (City)	GAME TIME
1	8/28 or 8/30/14 or 9/13/14	HOME	Miami Gardens, FL	TBD
2	9/9/17	AWAY	Jonesboro, AR	TBD

Both schools acknowledge that the date(s) and game time(s) listed above are tentative and subject to change pending the mutual written agreement of the participating institutions. If a game time is not specified, the game time will be decided by the Host Institution, but shall be no earlier than 12:00 p.m. and no later than 8:15 p.m. local time unless mutually agreed.

2. GAME RULES / STUDENT-ATHLETE ELIGIBILITY: The Games shall be governed by the rules and regulations of the National Collegiate Athletic Association ("NCAA"), and the rules of the applicable host conference (if any) in effect on the date of the Game. The eligibility of student-athletes and coaches to participate in the Game(s) shall be determined by the rules of the NCAA, applicable conference(s) (if any) and the respective institutions in effect on the date of each Game.

3. FINANCIAL AID EQUIVALENCIES- FCS OPPONENT: To confirm compliance with the provisions of NCAA Bylaws 18.7.2.2.1 & 20.9.7.2.1 the Visiting Institution shall certify in writing and provide the Host Institution with verification prior to signing the contract that it averaged 90% of the permissible maximum number of grants-in-aid per year in the sport of football during the two academic years immediately preceding the date of the agreement. Further, the Visiting Institution shall certify in writing ten months prior to the game that it intends to maintain compliance with the applicable NCAA Bylaw effective during the academic year in which the game is scheduled to be played. If the Visiting Institution is not in compliance with the above bylaws at any time following the execution of the contract, then Host Institution has the option to cancel the affected game without being subject to the liquidated damages provision contained within this agreement.

4. GAME OFFICIALS: A crew of qualified on-field officials shall be selected and compensated by the assigning agency of the HOME Institution for the Game. The replay officiating crew, operating in accordance with NCAA and College Football Officiating (CFO) standards, shall be selected and compensated by the assigning agency of the HOME Institution for the Game.

5. GUARANTEE PAYMENT: In consideration for its participation in the above described football Game(s), the Host Institution shall pay the Visiting Institution as follows:

GAME #	DATE	HOST INSTITUTION	GUARANTEE AMOUNT
1	8/28/14 or 8/30/14 or 9/13/14	HOME	$300,000
2	9/9/17	AWAY	$300,000

The Host Institution shall pay to the Visiting Institution the full amount of the guarantee which is due no later than February 15 of the year following the Game for which the guarantee was provided. Except for this fee, the Visiting Institution shall be entitled to no other additional payments from the Host Institution in connection with the Game(s) played. Any amount not paid by the due date shall ~~immediately~~ bear interest at the maximum amount as permitted by state law of the governing jurisdiction.

6. LIQUIDATED DAMAGES: The failure of a party to participate in the Game will constitute a material breach of the Agreement that will cause the other party significant disruption and damages. The parties recognize that the damages incurred as a result of the breach increase significantly as the date of the Game approaches, and they further recognize and agree that these damages cannot be fully mitigated. Therefore, the breaching party shall pay to the non-breaching party as liquidated damages:
   A. The sum of $650,000 if notice of cancellation is received by the non-breaching party 24 months or more before the scheduled date of the Game;
   B. The sum of $650,000 if notice of cancellation is received by the non-breaching party more than 12 months but less than 24 months before the scheduled date of the Game; or
   C. The sum of $650,000 if notice of cancellation is received by the non-breaching party 12 months or less before the scheduled date of the Game.

   Payment of liquidated damages as set forth above will be the sole remedy for damages incurred because of cancellation of the Game due to breach. No liquidated damages shall be paid if it becomes impossible to play the game by reason of force majeure (see provision 14). The sum shall be payable on or before February 15 of the year following the Game for which the breach occurred. The parties acknowledge that the breach or cancellation of one game in a series shall not be considered a breach or cancellation of all games.

   Notwithstanding any other provisions of this Agreement, if either party is prohibited from appearing on television by the NCAA or the governing conference of either team (if applicable), and such prohibition applies to a Game, then the liquidated damages provision of this paragraph shall not apply, and either party shall have the right to cancel that affected Game and the non-sanctioned party shall have the right to file a claim, if necessary, to recover its ~~actual (but not consequential)~~ damages arising out of the failure or inability of the sanctioned party to fulfill its contractual obligations hereunder.

7. TICKETING:
   A. The Host Institution will establish all ticket prices.
   B. The Visiting Institution shall be allotted 300 complimentary tickets.
   C. The Visiting Institution shall be allocated up to 3,200 tickets for sale to its fans if requested by June 1 for the year in which each game is scheduled. Unsold tickets may be returned to the Host Institution 30 days prior to the Game date. The Visiting Institution is responsible for paying the printed face value to the Host Institution for any tickets not returned to Host Institution by the agreed upon date as set forth above. Said location of tickets shall be identified on the attached diagram (attach copy of diagram to contract).
   D. The Visiting Institution's Band, Cheerleaders and Mascot(s) shall be admitted to the Game only with a valid game ticket from B or C above.

8. GAME MANAGEMENT:
   A. The Host Institution shall be responsible for managing the Game at its own cost. This shall include but not be limited to the procurement of the facility, arranging for and conducting ticket sales, advertising, security, and all of the other details customarily associated with hosting a intercollegiate football game, along with paying all expenses associated therewith, except for the expenses of the Visiting Institution. The Host Institution agrees to have a medical doctor and ambulance with emergency personnel at the game site throughout the duration of the football game.
   B. The Host Institution shall retain all revenue associated with each Game unless otherwise set forth in this Agreement.
   C. The Visiting Institution shall be furnished 60 free game programs, to be delivered to its dressing room at least one (1) hour before game time.

9. WALK-THROUGH: If requested by the Visiting Institution, not later than 14 days prior to the game, the Home Institution will make its best efforts to accommodate the Visiting Institution's request to conduct a walk-through at the game facility on the day prior to the game. It is understood that such an opportunity is contingent upon weather and field conditions. Non-cleated shoes shall be worn.

10. SIDELINE LIMITATIONS: The Visiting Institution may use any and all product and equipment on the sidelines of the football field that are normally used on their home field sidelines, and in conjunction with such use, may display the

product or equipment name, logo, image, slogan or identifying marks ~~in a safe and responsible manner~~ on the products and equipment. In addition, Game personnel (coaches, players, trainers, equipment managers, etc.) who must be on the field or sidelines will be permitted to wear any brand name clothing or equipment to display any product or equipment name, logo, image, slogan or identifying marks as ~~are customary on their home field sidelines~~. on the clothing or equipment.

11. CREDENTIALS: The Visiting Institution shall be provided a minimum of 60 team bench area passes, 8 all-access passes, 8 coaches' booth passes, 4 team/coaches video passes and 0 field passes. Bench passes must be worn at all times by those holding such passes and shall be restricted to the team bench area (between the 25-yard lines). Additional credential requests shall be subject to mutual agreement, availability and facility constraints. The Visiting Institution shall use its best efforts to provide a list of all credentialed workers and personnel to the Home Institution at least 5 days prior to the Game

12. PARKING: The Visiting Team shall be allowed parking passes for 1 equipment truck(s), 4 buses, and 1 automobiles for use by the football program and administration.

13. MEDIA RIGHTS- TELECAST, RADIO, INTERNET:

A. Telecast: Each of the undersigned parties understand and hereby acknowledges that the Host Institution has entered into, or may enter into, contractual arrangements with a broadcast partner(s) for the sale of telecast rights or for a syndicated series of games for national or regional telecast. The Host Institution shall have the exclusive right to contract for the live broadcast of the Game played pursuant to this Agreement. "Telecast" is defined as any distribution, transmission, display, exhibition, projection, duplication, performing of licensing of audiovisual works by which audio and visual material are combined in any media or technology now known or hereafter created (whether analog, digital or other means) capable of simultaneous receipt by consumers, including, without limitation, over-the-air terrestrial broadcast, cable, MMDS, satellite, high-definition, subscription broadcast (STV), pay-per-view, video-on-demand, enhanced or interactive television, whether on a free subscription or pay basis, including the re-transmission of any such works. "Telecast Rights" are defined as all rights to distribute, transmit, display, project, duplicate, perform, create derivative works of, or license visual or audiovisual material in any and all media and means of distribution whatsoever, whether now existing or developed in the future, including all Telecast media whatsoever (including, for the sake of clarity and not limitation, terrestrial broadcast, cable, satellite, high-definition, pay-per-view and video-on-demand), the Internet and any other form of computer distribution, all forms of enhanced television or interactive media, home video, DCD, distribution to mobile platforms (including, without limitation, PDAs and mobile telephones) and all other forms of new media. The Visiting Institution is responsible for ensuring that their affiliated conference and/or network partner (or other applicable governing entity) understands and agrees to the media terms and conditions set forth in this Agreement. The Host Institution shall retain all telecast rights fees for the game.

B. Video: Each party shall have the right to produce films and/or video of the Game played pursuant to this Agreement for coaching purposes and for use in a weekly coaches' show only and for no other purpose. Such films and/or video may not be replayed, used or otherwise distributed by the Visiting Institution to any person other than the incorporation of up to eight (8) minutes of highlights of the game as part of a weekly coaches' show and to its coaches and players.

C. Radio: The Host Institution shall retain full control of radio rights, except that the Visiting Institution shall be permitted to provide or sell a radio broadcast or broadcast rights of the Game to its own flagship station and/or normal recurring radio network. There shall be no sharing of radio revenue between schools.

D. Internet: The Host Institution has the exclusive right to distribute an audio and/or video internet broadcast of the Game. Accordingly, the Visiting Institution may not distribute an audio and/or video internet broadcast of the Game without the express written permission of the Host Institution.

E. Facility Access: The Host Institution agrees to provide reasonable facilities for the origination of any of the programs described herein.

F. Additional Use: Any other usage by the Visiting Institution of footage of games played pursuant to this Agreement shall be governed by a separate agreement between the Visiting Institution and the applicable affiliated conference (or governing entity) and/or broadcast partners.

14. FORCE MAJEURE: This contract shall be void with respect to any of the games in the event that it becomes impossible to play such game(s) by reason of an unforeseen catastrophe or disaster such as fire, flood, earthquake, war, confiscation, by order of government, military or public authority or prohibitory or injunctive orders of any competent judicial or other government authority. Notice of such catastrophe or disaster shall be given as soon as possible. No such cancellation shall affect the parties' obligations as to subsequent games covered by this contract. Any games not played as scheduled shall be rescheduled as such exigencies may dictate or permit.

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15. SEVERANCE: If any portion of this Agreement is declared null, void, invalid, or unenforceable, such provisions shall be stricken from the Agreement. All of the provisions of this Agreement not stricken shall remain in full force and effect and shall be binding upon the parties.

16. INTEGRATION: This contract constitutes the entire agreement between the parties. There are no understandings, agreements, or representations, oral or written, not specified herein regarding this contract. No amendment, consent, or waiver of terms of this contract shall bind either party unless in writing and signed by both parties.

17. ASSIGNMENT: This Agreement may not be assigned by either party without the written consent of the non-assigning party.

18. TERMINATION: This contract may be terminated without penalty by mutual written consent of both parties.

~~19. INDEMNIFICATION: Each party agrees to indemnify, defend and hold harmless the other, from and against all claims, demands, costs (including attorney fees), actions or damages brought by third parties, arising out of the negligent acts or omissions of the that party, or its employees, agents and assigns.~~

20. AUTHORITY TO SIGN: By executing this Agreement, the undersigned parties represent and warrant that they are each authorized to act on behalf of the educational institution they represent and the terms of this Agreement shall bind each institution and their respective officers, trustees, employees, agents, servants, affiliates and successors.

~~21. GOVERNING LAW: This Contract shall be governed, construed and enforced in accordance with the laws of the State of Florida, regardless of its place of execution.~~

IN WITNESS WHEREOF, the undersigned parties have executed this Agreement on the respective dates set forth.

INSTITUTION:

By: Blake James

Name: Blake James

Title:

Date: 6/25/13

6.26.13

INSTITUTION:

By:

Name: Terry Mohajir

Title: Director of Athletics

Date: 5/15/13

Len Frey 5/17/13

Vice Chancellor Finance & Administration