IN THE CIRCUIT COURT OF CRAIGHEAD COUNTY, ARKANSAS
WESTERN DISTRICT

ARKANSAS STATE UNIVERSITY PLAINTIFF

vs. Case No. 16JCV-18-199

UNIVERSITY OF MIAMI DEFENDANT

RESPONSE TO MOTION TO DISMISS

Plaintiff, Arkansas State University ("ASU"), filed its Complaint in this action against Defendant, University of Miami ("UM"), after UM breached its contract with ASU. UM then filed a motion to dismiss ASU's complaint. UM's motion is unsupported, and in fact contradicted, by the facts, allegations, and law in this case, and should be denied. UM's motion fails because (1) this Court is the proper jurisdiction and venue for this action since the contract was to be performed in Arkansas and (2) ASU's Complaint is valid on its face. Accordingly, this Court should deny UM's motion to dismiss.

I. Background.

UM's recitation of the events leading up to the lawsuit misstates key facts and conveniently leaves out other pertinent and relevant facts. Contrary to UM's false allegations, ASU has never agreed that Hurricane Irma was a force majeure event that made it impossible for UM to appear in Jonesboro. When Blake James, Director of Intercollegiate Athletics for UM, informed Terry Mohajir, Director of Intercollegiate Athletics at ASU, that UM would not appear for and play the game, Mr. Mohajir offered UM multiple accommodations and options to keep the game as scheduled. *See ASU's Complaint*, ¶¶ 24-30. Both parties knew and acknowledged that because the game was to be played in Jonesboro, Arkansas—not Miami, Florida—Hurricane Irma did not

make the game "impossible" to play, as delineated by the contract. *See Contract*, Exhibit A to ASU's Complaint.

Despite the ability of UM's football team and staff to travel to Jonesboro to play the game, as well as the many proffered accommodations by ASU, UM refused to show up to play the game on September 9, 2017, or the alternative date of September 8, 2017, which was arranged through the efforts of ASU and Sun Belt Conference personnel. While ASU could offer all possible accommodations to assist UM, ASU could not compel UM to actually travel to Jonesboro and play the game. ASU has at all times maintained that Hurricane Irma was not a force majeure event that made it impossible for UM to play the game in Jonesboro.

UM is the only party who has been arguing force majeure since before its refusal to appear for the game. UM's position, however, is even contradicted by its own head football coach, Mark Richt, who admitted that it was possible for UM to travel to Jonesboro and play the football game. Coach Richt told the media, "Could we have snuck out just in time to play that game [against Arkansas State]? We could have, logistically…." Susan Miller Degnan, *UM's Richt in Orlando: 'Dangerous to play football if your mind is somewhere else.'*, http://www.miamiherald.com/sports/college/acc/university-of-miami/article173819991.html (last updated September 18, 2017). Hurricane Irma did not make it "impossible" for UM to appear for and play the September 9, 2017 game in Jonesboro.

Because UM claimed that it could not play the game due to force majeure, however, as a gesture of good will, ASU attempted to work with UM to reschedule the game. But instead of acting in good faith in trying to reschedule the game "as such exigencies may dictate or permit," UM refused to reschedule the football game on multiple available dates during the 2020 and 2021

football seasons, and now argues that ASU should be barred from this lawsuit because of ASU's attempts negotiate a resolution the game issue without litigation.

Because UM refused to cooperate with ASU to timely reschedule the game, even though UM was the party who canceled the game by claiming force majeure, undersigned counsel for ASU sent UM's assistant general counsel a letter on February 12, 2018, detailing the dispute and informing UM that if a mutually-agreeable resolution could not be reached, ASU would be forced to file suit. The letter concluded:

> Because Miami has demonstrated that it is unwilling to reschedule the game within a reasonable time frame, despite having the ability to do so, Arkansas State University is left with no choice other than to seek damages for Miami's breach. When this contract was executed, all parties agreed that if one party did not appear, the other party would receive a liquidated damages payment of $650,000.00. Under the terms of the contract, that payment is due on February 15, 2018.
>
> During our telephone conversation on Friday, you indicated that Miami has no intention of paying Arkansas State University the liquidated damages amount of $650,000.00. Unless Miami changes course on or before February 15, 2018, we will begin the process of filing a lawsuit against the University of Miami in the appropriate Arkansas state court."

See Letter from ASU to UM, attached as Exhibit A.

ASU did not file suit before February 15, 2018, because the liquidated damages payment deadline had not yet arrived and because it was making a good faith attempt to reschedule the game with UM to resolve UM's breach and avoid the necessity of demanding that UM pay liquidated damages. In direct response to ASU's February 12, 2018 letter, UM immediately filed its declaratory judgment action on February 13, 2018, in the Miami-Dade County Circuit Court.

Despite UM's attempts to twist the facts and manipulate the law and judicial process to its self-serving interests, this lawsuit has been properly filed in this Court and UM's motion to dismiss should be denied.

II. <u>This Court is the proper forum to adjudicate this action.</u>

This Court is the proper forum for this action pursuant to well-established and long-standing law. Although UM claims that this lawsuit should be dismissed for *forum non conveniens*, its argument is flawed and without legal or factual basis. This Court is the appropriate forum because (1) Florida courts do not have jurisdiction; (2) the doctrine of *forum non conveniens* does not apply; (3) UM's lawsuit and this lawsuit may proceed simultaneously; and (4) UM's first-filed action has no bearing on this case.

a. Florida courts have no jurisdiction over this action.

Not only is this Court a proper forum, but it's the *only* proper forum because the Miami-Dade County Circuit Court does not have jurisdiction. There are a number of reasons why no Florida courts have jurisdiction over this matter, a significant one being that they do not have personal jurisdiction over ASU.[1] Florida's Long-Arm Statute cannot in any way subject ASU to jurisdiction in any of its courts. The statute states in relevant part:

> (1) Any person, whether or not a citizen or resident of this state, who personally or through an agent does any of the acts enumerated in this subsection thereby submits himself or herself…to the jurisdiction of the courts of this state for any cause of action arising from the doing of any of the following acts:
>
> (a) Operating, conducting, engaging in, or carrying on a business or business venture in this state or having an office or agency in this state.

[1] ASU will be filing a motion to dismiss in UM's Florida lawsuit that provides greater detail on the reasons why the Miami-Dade County Circuit Court does not have jurisdiction over this matter, and ASU adopts and incorporates its arguments in that pleading pursuant to Arkansas Rule of Civil Procedure 10(c).

> (b) Committing a tortious act within this state.
>
> (c) Owning, using, possessing, or holding a mortgage or other lien on any real property within this state.
>
> (d) Contracting to insure any person, property, or risk located within this state at the time of contracting.
>
> (e) With respect to a proceeding for alimony, child support, or division of property in connection with an action….
>
> (f) Causing injury to persons or property within this state arising out of an act or omission by the defendant outside this state….
>
> (g) Breaching a contract in this state by failing to perform acts required by the contract to be performed in this state.
>
> (h) With respect to a proceeding for paternity, engaging in the act of sexual intercourse within this state with respect to which a child may have been conceived.
>
> (2) A defendant who is engaged in substantial and not isolated activity within this state, whether such activity is wholly interstate, intrastate, or otherwise, is subject to the jurisdiction of the courts of this state, whether or not the claim arises from that activity.

Fla. Stat. § 48.193.

UM's complaint in the Florida lawsuit—in conclusory fashion—alleges that "ASU is subject to [the Florida] 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." *See* Miami Complaint, ¶ 6. Neither section 48.193(1)(a) nor (g), however, confer personal jurisdiction over ASU.

There is no personal jurisdiction over ASU pursuant to 48.193(1)(a) because ASU does not operate, conduct, or carry on business ventures in Florida. ASU is an institution of higher education and an agency of the State of Arkansas. *See* Ark. Code Ann. § 6-65-201, et seq. It is

located in Jonesboro, Arkansas, and has no campus, office, or agency outside of the State of Arkansas. The most UM can show is that ASU has attended occasional and isolated athletic or educational higher-education events in Florida, which falls far short of what is required to establish a basis for personal jurisdiction.

UM's jurisdictional argument also fails under 48.193(1)(g) because UM does not—and cannot—show any facts that ASU breached the contract in Florida (or breached the contract anywhere for that matter). The sole dispute between the parties is whether *UM* breached the contract by failing to play a football game in *Arkansas*.

In short, ASU is not subject to personal jurisdiction in the Miami-Dade County Circuit Court. Because the Florida court does not have jurisdiction over ASU, it is not a proper forum to entertain this breach of contract case. This Court is the only forum that has jurisdiction and may rule on this case.

b. The doctrine of* forum non conveniens *does not apply under these circumstances.

Even assuming *arguendo* that the Miami-Dade County Circuit is an appropriate forum to adjudicate this matter, it is not the more convenient forum under the doctrine of *forum non conveniens*. The application of the doctrine "lies within the sound discretion of the trial court." *Harvey v. Eastman Kodak Co.*, 271 Ark. 783, 788 (1981). And there is no requirement for a court to exercise the discretion given to it. *Helm v. Mid-America Ind., Inc*., 301 Ark. 521, 525 (1990).

The Arkansas Supreme Court has expressed that "several factors have a bearing on the question of accepting or rejecting jurisdiction, such as; the inconveniences that might accrue to either side in the matter of obtaining witnesses or documents…the condition of the trial docket, the probable expense of the trial, and any other facts or circumstances affecting a just determination." *Running v. Southwest Freight Lines, Inc.*, 227 Ark. 839, 843-44 (1957).

Notably, it is "the duty of one wishing to avail himself of the doctrine of *forum non conveniens* to produce evidence to sustain the allegations of the motion. …[P]leadings and stipulations alone [are] insufficient to form a basis upon which the court [can] decide the issue of inconvenient forum." *Country Pride Foods Ltd. v. Medina & Medina*, 279 Ark. 75, 77 (1983) (citing *Running*, *supra*). UM bears this burden and UM has failed its duty. UM merely asserts conclusory claims unsupported by any evidence that it is the more convenient forum. There is not a scintilla of evidence that any of the *forum non conveniens* factors weigh in Florida's favor and, as such, this instant action should not be dismissed.

i. The inconveniences of obtaining witnesses or documents.

UM claims that Florida is the most convenient forum because all the witnesses to the anticipated landfall of Hurricane Irma and UM's cancellation of the game are located in South Florida. *UM's Motion to Dismiss*, p. 3. In so arguing, UM intentionally turns a blind eye to the numerous potential witnesses who reside in Arkansas, including but not limited to: ASU personnel involved in the contract and the game-related issues, ASU football players and staff, housing authorities, transportation authorities, and persons with relevant documents. Arkansas may be a less convenient forum for UM, but Florida is an inconvenient forum for ASU. UM has proffered no evidence that the inconvenience to its witnesses in litigating a case in Arkansas is greater than the inconvenience to ASU's witnesses in litigating a case in Florida.

ii. The condition of the trial docket.

UM argues 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." *UM's Motion*

to Dismiss, p. 5. The converse is equally true. The condition of the trial dockets of this Court and the Miami-Dade County Circuit Court are simply unknown. At best, this factor results in a draw.

iii. The probable expense of the trial.

UM once again makes the unsupported claim that there would "undoubtedly be greater expenses in litigation this matter here versus in Florida because of the number of witnesses that would be required to travel to this Court from Florida." *UM's Motion to Dismiss*, p. 5. Contrary to UM's accusation, there certainly is doubt. As noted above, there would also be many witnesses who would be required to travel from Arkansas to Florida. Litigating this matter in Florida could very well require greater expenses. Ultimately, UM has not established that it will incur greater expenses to litigate the matter in this Court than ASU will incur to litigate the matter in the Florida court.

UM also erroneously argues that since this case concerns a public university, it "militates in favor of dismissal." There exists no law supporting this incredulous statement. The case relied upon by UM has no relevance as it merely states that Wal-Mart, a corporation that has extensive business dealings throughout the entire country, might be expected to find that its resident forum is not the most convenient. Those facts are wholly inapposite to ASU's situation. ASU is a university located in Arkansas providing higher-education services in Arkansas. It is not a national corporation conducting substantial business throughout the country. No Arkansas statute or case law holds that the mere fact that a lawsuit involves a public university warrants dismissal under the *forum non conveniens* doctrine.

iv. Any other facts or circumstances affecting a just determination.

In an attempt to convince this Court that this final factor strongly favors dismissal, UM misrepresents existing law. Arkansas law does not hold that the analysis for cases in two different states' courts is "the same" as it is for cases in two Arkansas courts, nor is it that the first-filed lawsuit has priority. *See UM's Motion to Dismiss*, p. 5-6. In fact, clearly-established Arkansas law holds exactly the opposite. Section II.c below sets forth the Arkansas law concluding that UM's Florida lawsuit (if Florida actually had proper jurisdiction) and this lawsuit can proceed at the same time.

Additionally, UM ignores the most relevant fact that weighs heavily in favor of allowing this case to proceed in this Court: *UM's breach of contract occurred in Arkansas*. A breach that occurred in Arkansas makes this Court, not the Miami-Dade County Circuit Court, the more convenient forum to hear this matter.

c. Arkansas law is clear that UM's Florida lawsuit and this lawsuit may proceed simultaneously.

Even if the Miami-Dade County Circuit is both a proper forum and a more convenient forum, neither of which is the case, this case may and still should proceed. The Arkansas Supreme Court and Court of Appeals have held on numerous occasions that identical cases in two different courts may proceed simultaneously:

- "Rule 12(b)(8) does not confer any discretion upon an Arkansas court confronted with a motion to dismiss when the same action is pending between identical parties in a different 'jurisdiction,' such as a federal court or the court of another state."
  - *Williams v. Stant USA Corp.*, 2015 Ark. App. 180, *5 (2015) (*quoting Nat'l Bank of Commerce v. Dow Chem. Co.*, 327 Ark. 504, 507 (1997).

- The pendency of a lawsuit in Louisiana on the same subject matter "was no impediment" to the lawsuit in Arkansas because "identical cases in different states can be pending in each court at the same time."
  - *White v. Toney*, 37 Ark. App. 36, 39 (1992).

- When a state-court action is filed subsequent to a federal-court suit, there is "no such requirement" that the state claim be dismissed because of the prior pending action.
  - *Helm v. Mid-America Ind., Inc*., 301 Ark. 521, 525 (1990).

- Arkansas trial court was not compelled to dismiss the state action because of the pending federal proceeding because "identical cases between the same parties may be pending in each court at the same time."
  - *Country Pride Foods Ltd. v. Medina &Medina*, 279 Ark. 75, 78 (1983).

- "The general rule is that the pendency of an action in the courts of one state or nation is not a bar to the institution of another action between the same parties for the same cause of action in the same courts of another state or nation, nor is it the duty of the court in which the latter action is brought to stay its proceedings pending determination of the earlier action, even though the court in which the earlier action has been brought has jurisdiction sufficient to dispose of the entire controversy."
  - *Cotton v. Cotton*, 3 Ark. App. 158, 162 (1981) (*citing* 24 C.J.S. 585, Courts, § 548).

- When there are "identical claims involving the same parties concerning the same subject matter pending in two courts at the same time," both courts can have jurisdiction at the same time. Identical cases between the same parties can be pending at the same time in courts in different states because they "are separate jurisdictions."
  - *Carter v. Owens-Illinois, Inc.*, 61 Ark. 728, 729-30 (1977).

Numerous decades of Arkansas law unmistakably hold that a lawsuit in an Arkansas court can and should proceed even if there is a pending lawsuit in another state's court. To be clear, ASU's current action in this Court may continue even though UM filed a declaratory judgment action in Florida.

d. UM's first-filed action has no bearing because it is not the legal standard, and even if it were, the UM action is an anticipatory suit.

Contrary to UM's misstatement of the law, UM's first-filed action in Florida has no bearing on this lawsuit. The Arkansas Supreme Court has stated in no uncertain terms that, in a situation where identical cases are filed in courts in two different states, "the first forum to dispose of the case by trial enters a judgment that is binding on the parties." *Carter v. Owens-Illinois, Inc.*, 261 Ark. 728, 729-30 (1977); *see also*, *White, supra* (holding that in a situation where identical cases in different states are pending at the same time, "the parties are bound by the judgment of the forum which first disposes of the case by trial," and since pending litigation in the Louisiana case was merely in the pleading stages, there was no merit in the argument that the Arkansas court lacked jurisdiction due to the Louisiana action).

Even if UM's first-filed action in Florida had any bearing on this action, UM's lawsuit loses its priority because it is an anticipatory suit. "Factors that weigh against enforcement of the first-to-file rule include extraordinary circumstances, inequitable conduct, bad faith, anticipatory suits, and forum shopping." *Zide Sport Shop of Ohio, Inc. v. Ed Tobergte Assocs., Inc.*, 16 F. App'x 433, 437 (6th Cir. 2001); *Alltrade, Inc. v. Uniweld Prods., Inc.*, 946 F.2d 622, *628 (9th Cir. 1991). Federal courts have long recognized that an exception to the first-filed rule is the "anticipatory suit" exception, which works to prevent an injustice upon the second-filing party.

The purpose of the anticipatory suit exception is to discourage procedurally unfair lawsuits. "Where a party is prepared to file a lawsuit, but first desires to attempt settlement discussions, that party should not be deprived of the first-filed rule's benefit simply because its adversary used the resulting delay in filing to proceed with the mirror image of the anticipated suit." *Ontel Prods., Inc. v. Project Strategies Corp*, 899 F. Supp. 1144, 1150 (S.D.N.Y. 1995). "Potential plaintiffs should be encouraged to attempt settlement discussions (in good faith and with dispatch) prior to

filing lawsuits without fear that the defendant will be permitted to take advantage of the opportunity to institute litigation in a district of its own choosing" before the plaintiff files a complaint. *Columbia Pictures Indus., Inc. v. Schneider*, 435 F. Supp. 742, 747 (S.D.N.Y. 1977), *aff'd*, 573 F.2d 1288 (2d Cir. 1978).

In deciding whether the anticipatory suit exception applies, courts look at the pre-filing history of the dispute between the parties. Perhaps the most important consideration is pre-filing communications. Numerous jurisdictions across the nation hold that a demand or notice letter stating an intent to sue if some condition is not met is evidence that the recipient of the letter anticipated the lawsuit and the recipient's first-filed lawsuit does not receive priority.

- When a plaintiff filed a declaratory judgment action one day after the government advised the plaintiff that it would institute judicial proceedings to collect a penalty, and the government then filed its threatened suit one week after the plaintiff's action, the district court did not abuse its discretion in declining to entertain the plaintiff's declaratory judgment action. The declaratory judgment action was filed "in apparent anticipation of imminent judicial proceedings."
  - *Ven-Fuel, Inc. v. Dep't of the Treasury*, 673 F.2d 1194, 1195 (11th Cir. 1982).

- The district court did not abuse its discretion in allowing the second-filed action to proceed because the plaintiff of the first-filed declaratory judgment action was filed in anticipation of the defendant's threatened suit in another state. "When the declaratory judgment action has been triggered by a notice letter, this equitable consideration may be a factor in the decision to allow the later filed action to proceed to judgment in the plaintiffs' chosen forum."
  - *Factors Etc., Inc. v. Pro Arts, Inc.*, 579 F.2d 215, 219 (2d Cir. 1978), *abrogated on other grounds by Pirone v. MacMillan, Inc.*, 894 F.2d 579 (2d Cir. 1990).

- There was sufficient evidence to support the trial court's finding that the action filed by the plaintiff was the immediate result of receiving a letter inviting it to appear in a lawsuit initiated by the defendant and that the plaintiff's petition for declaratory judgment was in anticipation of the suit. This was an "equitable consideration which the district court was entitled to take into account" in refusing to hear the plaintiff's petition.

- *Amerada Petroleum Corp. v. Marshall*, 381 F.2d 661 (5th Cir. 1967).

- When the defendant sent the plaintiff a cease-and-desist letter with a response deadline, and stated that if the matter was not resolved it would proceed to litigation, and the plaintiff filed its declaratory judgment action before the deadline, the plaintiff's lawsuit was "not entitled to 'the deference ordinarily reserved for first-filed actions.'" The plaintiff "took advantage of [the defendant's] good faith attempt to resolve this dispute out of court… [and it] would be inequitable to prevent [the defendant] from litigating in its chosen forum because it tried to resolve its dispute before rushing to the courthouse. …To impose the first-to-file rule in this circumstance would unfairly penalize [the defendant] for its attempt to resolve this dispute without litigation."
  - *Smilecareclub, LLC v. Coast Dental Servs., Inc.*, No. 3:14-CV-2895-CAB-BGS, 2015 WL 11582835, at *3-4 (S.D. Cal. Jan. 29, 2015).

- The court exercised its discretion in rejecting the application of the first-filed rule because the first-filed lawsuit was triggered by the defendant's letter proposing further settlement discussion and notifying the plaintiff that failure of the negotiations would lead to legal action.
  - *Capitol Records, Inc. v. Optical Recording Corp.*, 810 F. Supp. 1350, 1354 (S.D.N.Y. 1992).

While the anticipatory suit exception is traditionally applied by federal courts, widely and frequently, ASU respectfully submits that this court should apply the anticipatory suit exception based upon the same rationales and principles of fairness and justice. On February 12, 2018, ASU sent UM a letter clearly stating that it would file suit if UM did not pay liquidated damages by the contracted deadline of February 15, 2018. The very next day, on February 13, 2018, UM filed its declaratory judgment suit in the Miami-Dade County Circuit Court to win the procedurally-irrelevant first-filed race. A federal court would find that these facts meet the anticipatory suit exception, and this Court should likewise not reward UM's bad faith actions.

III. ASU's Complaint is valid on its face.

UM claims that ASU's Complaint is incurable and barred because ASU cannot allege both that (1) it is entitled to liquidated damages since there was no force majeure requiring UM to cancel the game and that (2) it made good faith attempts to reschedule the game, which would only occur if there was a force majeure event that forced a cancellation. *UM's Motion to Dismiss*, p. 8-9. But despite UM's attempt to misrepresent the allegations in ASU's Complaint, just like it manipulates the facts and the law, the complaint is clear and valid.

ASU has always maintained that there was no reason to cancel the September 9, 2017 game. ASU never agreed that Hurricane Irma was a force majeure event that made it "impossible" for UM to appear for and play the game in Jonesboro. In fact, ASU offered a number of available accommodations to UM, evidencing that it was possible for UM to still travel to Arkansas and play the contracted game, despite the projected arrival of the hurricane in the South Florida area. UM is the party who insisted that Hurricane Irma was a force majeure event, and again, ASU could not physically force UM to travel to Jonesboro to play the game.

Since UM refused to play the game in Jonesboro on September 9, 2017, or the alternative date of September 8, 2017, ASU was left with no choice but to either initiate litigation or attempt to reschedule the game. Surely it is indisputable that amicably rescheduling the game is preferable to high-stakes litigation for both parties. And certainly being paid $300,000 for rescheduling and playing a game is financially better for UM than having to pay $650,000 in liquidated damages.

As a gesture of good will, ASU tried repeatedly to reschedule the game with UM. UM, however, refused to timely reschedule the game for dates that it did, indeed, have available for earlier football seasons. And now UM is attacking ASU for its good faith efforts to reschedule the game, help UM fulfill its obligations under the contract, and cure UM's breach without court

intervention. UM strung ASU along for months, and then when ASU notified UM that it would have to file suit if UM continued to breach the contract, UM underhandedly filed suit first in Florida in an attempt to gain advantages in this dispute.

ASU's attempt to work with UM to reschedule the game after UM breached the contract by refusing to appear for the September 9, 2017 game is equivalent to a party attempting settlement negotiations before having to file a lawsuit. Following UM's faulty logic that ASU is now barred from filing suit because it tried to work with UM to reschedule the game rather than immediately initiating litigation, any aggrieved party that attempts to negotiate a resolution of a dispute prior to court intervention has waived their right to seek legal redress and is barred from later filing suit. There is no such law stating that a party who in good faith tries to resolve a contractual dispute pre-litigation waives it right to later sue for breach of contract.

ASU's Complaint is valid and consistent. The allegations in the Complaint are not mutually exclusive and ASU is not asking this Court to rewrite the contract. ASU is merely asking the Court for the liquidated damages mandated under the contract because UM breached the contract by refusing to appear for and play the contracted football game in Jonesboro, Arkansas, when it was not impossible for UM to do so.

IV. Conclusion.

UM's motion to dismiss fails because this Court has proper jurisdiction. The Miami-Dade County Circuit Court does not have jurisdiction to adjudicate this matter, and even if it did, this Court is the more convenient forum under the doctrine of *forum non conveniens*. Arkansas courts consistently find that identical lawsuits in courts in two different states may proceed simultaneously, and UM's first-filed action has no bearing on this case. Moreover, ASU's Complaint is valid on its face. This Court should deny UM's motion to dismiss.

RESPECTFULLY SUBMITTED, this 2nd day of April, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that on the 2nd day of April, 2018, I electronically filed the foregoing with the clerk of the Court by using the eFlex system, which will send electronic notice to all counsel of record in the eFlex system.

I hereby certify that I mailed the foregoing via First Class Mail to the following counsel of record who are not in the eFlex system:

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/s/ Delena C. Hurst
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