STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

(FILED: DECEMBER 27, 2011)

THE BIG EAST CONFERENCE	:	
	:	
vs.	:	**C.A. No. PB 11-6391**
	:	
WEST VIRGINIA UNIVERSITY	:	

DECISION

SILVERSTEIN, J. Before this Court is Defendant West Virginia University's (Defendant or WVU) Motion to Dismiss pursuant to Super. R. Civ. P. 12(b)(2) and 12(b)(5). Defendant moves this Court to dismiss Plaintiff The Big East Conference's (Plaintiff or Big East) Complaint for lack of personal jurisdiction and insufficient service of process. Alternatively, Defendant moves the Court to dismiss or stay Plaintiff's Complaint under principles of comity or the doctrine of forum non conveniens.

I

Facts and Travel

WVU is a state university with a main campus located in Morgantown, West Virginia. (Compl. ¶ 9.) The university was created by West Virginia statute and is overseen by a Board of Governors. See W. Va. Code § 18-11-1; see also Def.'s Mem. of Law in Supp. of Mot. to Dismiss (Def.'s Mem.) 3. The WVU Board of Governors "shall be a corporation, and as such may contract and be contracted with, sue and be sued . . . ." W. Va. Code § 18-11-1.

The Big East is a District of Columbia not-for-profit corporation headquartered in Providence, Rhode Island with the purpose of sponsoring, supervising, and regulating men's and women's intercollegiate athletics in twenty-four sports, including football and basketball. (Pl.'s

Resp. in Opp'n to Def.'s Mot. to Dismiss (Pl.'s Resp.) 2.) Members of the Big East include WVU, Providence College, and fifteen other schools across the eastern United States. (Compl. ¶ 13.) The Big East and its members collaborate to create schedules and negotiate and participate in marketing and broadcast arrangements for athletics. (Compl. ¶ 14.) Broadcast arrangements include lucrative contracts with ESPN and CBS to televise basketball and football games through the year 2013, earning the conference and its member schools millions of dollars in revenue. (Compl. ¶¶ 16-18.) However, both CBS and ESPN have the right to negotiate a reduction in fees paid pursuant to the contracts if a member school leaves the conference. (Compl. ¶ 16-18.)

The Big East is governed by Bylaws, with which WVU agreed to comply as a condition of membership in the Conference. (Compl. ¶¶ 19-20, 24; Compl. Ex. A (Bylaws).) WVU has been a member of the Big East conference since 1991. (Compl. ¶ 15.)

The Bylaws contain provisions through which a member school may withdraw from the conference. (Compl. ¶ 21; Bylaws Art. 11.02.) These provisions were adopted unanimously by the member schools, including WVU.[1] (Compl. ¶ 25.) The Bylaws provide, in essence, that a member school may unilaterally withdraw from the Big East only by: (1) providing at least twenty-seven months' written notice of withdrawal to be effective on the following July 1; (2) paying a withdrawal fee of at least $5 million, with $2.5 million due on notice of withdrawal; and (3) participating in all athletic competitions in the conference schedule until the effective date of withdrawal. (Bylaws Art. 11.02(a); Compl. ¶ 21.) The withdrawing member loses all rights in the assets and revenues of the conference upon the effective date of withdrawal; but, immediately upon notice of withdrawal, revenue is credited towards any amounts owed by the member to the conference, and the member is automatically removed from committee

[1] The Big East adopted an October 17, 2011 amendment to the withdrawal provisions. WVU voted in favor of the amendment.

membership and other positions within the conference. (Bylaws Art. 11.02(c).) In the event that a member school does not comply with the requirements for withdrawal, the Bylaws state that non-compliance would cause irreparable harm to the conference, and the Big East is entitled to seek and obtain injunctive relief as well as attorneys' fees and costs. (Bylaws Art. 11.02(b); Compl. ¶ 23.)

On October 28, 2011, WVU announced publicly that it planned to leave the Big East for the Big 12 conference. (Compl. ¶ 28.) WVU also sent notice to the commissioner of the Big East stating that WVU intended to withdraw from the conference effective June 30, 2012. (Compl. ¶ 29.)

On October 31, 2011, WVU[2] filed an action (the West Virginia case) against the Big East in the Circuit Court of Monongalia County, West Virginia, seeking declaratory judgment and permanent injunctive relief and claiming breach of contract. (Pl.'s Resp. 3-4; Def.'s Mem. 3-4.) The very next day, WVU filed an Amended Complaint expounding upon its allegations. (Def.'s Mem. 4.) In the West Virginia case, WVU alleges that the Big East breached its contractual and fiduciary duties to WVU by allegedly failing to maintain the Big East as a viable collegiate football conference. (Def.'s Mem. 4.) WVU seeks, first and foremost, a declaration that the Bylaws are null and void between WVU and the Big East, that the Big East has accepted WVU's proposal to withdraw from the conference, or that the Big East has waived the withdrawal provisions of the Bylaws. (Def.'s Mem. 4.) Further, WVU seeks damages resulting from the

[2] That action was filed by the West Virginia Board of Governors on behalf of WVU. The Court notes that sometimes litigation commenced by the university is brought in the name of the Board of Governors on behalf of West Virginia University, and other times is brought in the name of West Virginia University. See Ex. A of Pl.'s Resp. in Opp'n to Def. West Virginia University's Mot. to Dismiss, a copy of a Complaint in which West Virginia University appears as a plaintiff in a suit against University of Miami and others in the Superior Court for the judicial district of Hartford, Connecticut.

Big East's alleged breaches of the Bylaws and an Order permanently enjoining the Big East from enforcing the withdrawal provisions in the Bylaws against WVU. Id.

The Big East filed its action on November 4, just four days after WVU filed the West Virginia case and within a week of WVU's announcement it would be withdrawing from the conference. (Pl.'s Resp. 4.) In the case at bar, the Big East is claiming breach of contract against WVU and is seeking specific performance, an injunction prohibiting WVU from withdrawing without complying with the Bylaws, damages, and attorneys' fees and costs. (Compl.) On or about November 15, 2011 a summons and a copy of the Complaint in this matter were delivered by certified mail, return receipt requested, to the president of WVU, James P. Clements. (Aff. of Thomas F. Holt, Jr. Ex. F.)

The West Virginia court has recently entered a scheduling order, with a trial date initially set for June 25, 2012, five days prior to WVU's intended departure from the Big East. (Def.'s Reply 1.)

II

Discussion

WVU asks this Court to dismiss or stay further proceedings herein on a number of grounds. First, WVU argues this Court lacks personal jurisdiction to hear the matter, and thus it should be dismissed pursuant to Super. R. Civ. P. 12(b)(2). WVU also argues there was insufficient service of process, and the Court should dismiss the Complaint under Super. R. Civ. P. 12(b)(5). WVU next asserts that WVU is subject to sovereign immunity in West Virginia, and therefore, under principles of comity, this Court should dismiss the action in recognition of WVU's purported sovereign immunity in West Virginia. Additionally, WVU argues the Court should dismiss Plaintiff's Complaint under principles of comity in favor of the first-filed West

Virginia case. Finally, WVU moves for dismissal on the basis of the doctrine of forum non conveniens. The Court will address WVU's arguments in seriatim.

A

Personal Jurisdiction

To survive a motion to dismiss for lack of personal jurisdiction, the plaintiff must allege "sufficient facts to make out a prima facie case of jurisdiction." Cassidy v. Lonquist Mgmt. Co., 920 A.2d 228, 231 (R.I. 2007). The trial justice must determine whether the court has personal jurisdiction under the Rhode Island Long Arm statute, G.L. 1956 § 9-5-33 (Long Arm). Id. at 232. Next, the justice must determine whether the exercise of jurisdiction "comports with the requirements of constitutional due process." Rose v. Firstar Bank, 819 A.2d 1247, 1250 (R.I. 2003).

The Long Arm provides, in pertinent part:

> Every foreign corporation, every individual not a resident of this state or his or her executor or administrator, and every partnership or association, composed of any person or persons not such residents, that shall have the necessary minimum contacts with the state of Rhode Island, shall be subject to the jurisdiction of the state of Rhode Island, and . . . amenable to suit in Rhode Island in every case not contrary to the provisions of the constitution or the laws of the United States. Sec. 9-5-33.

The legislature intended the Long Arm to empower the state's courts to exercise personal jurisdiction over non-resident defendants "subject only to whatever limitations may be imposed by the constitution or laws of the United States." Conn v. ITT Aetna Fin. Co., 105 R.I. 397, 402, 252 A.2d 184, 186 (1969). In fact, the Long Arm was enacted in 1960 at the request of the governor, who recommended the legislation "to direct that the Rhode Island Courts hold non-residents amenable to suit in every case except those where the due process clause of the Federal constitution interferes." Conn, 105 R.I. at 402 n.3, 252 A.2d at 186 n.3. "From the plain

language of this statute it will be seen that the legislature of Rhode Island has chosen to exercise jurisdiction over foreign corporations up to the constitutional limitation." Del Sesto v. Trans World Airlines, Inc., 201 F. Supp. 879, 882 (D. R.I. 1962).

Accordingly, the Long Arm statute itself "permits the exercise of jurisdiction over nonresident defendants to the fullest extent allowed by the United States Constitution." Cerberus Partners, L.P. v. Gadsby & Hannah, LLP, 836 A.2d 1113, 1118 (R.I. 2003); Rose v. Firstar Bank, 819 A.2d 1247, 1250 (R.I. 2003); McKenney v. Kenyon Piece Dye Works, Inc., 582 A.2d 107, 108 (R.I. 1990); see KVH Indus., Inc. v. Moore, 789 F. Supp. 69, 70 (D. R.I. 1992) ("The Rhode Island longarm statute, R.I.G.L. § 9-5-33, permits jurisdiction to the fullest extent permitted by the federal constitution.") (citations omitted). Public corporations also fall within Rhode Island's Long Arm. Cf. Wendt v. County of Osceola, Iowa, 289 N.W.2d 67, 69 (Minn. 1979) (applying similar long arm statute listing "foreign corporation" to include public corporations); R.I. Super. Ct. R. Civ. P. 4(e)(5) (subjecting public corporations to service of process). A number of states' courts, including Rhode Island's, have determined that a state university falls within the long arm of another state. See, e.g., Md. Cent. Collection Unit v. Bd. of Regents for Educ. of Univ. of R.I., 529 A.2d 144, 150 (R.I. 1987) (finding URI subject to Maryland's long arm statute).

Beyond satisfaction of the Long Arm, "certain minimum contacts with the forum state are required such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." Cerberus Partners, 836 A.2d at 1118 (citations omitted). In that sense, the fundamental question is whether the Defendant could reasonably anticipate being sued in that forum. See id. (citations omitted); see also World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980) (explaining "forseeability that is critical to due process analysis . . . is that

the defendant's conduct and connection with the forum state are such that he should reasonably anticipate being haled into court there"). When the contacts with the forum state are "continuous, purposeful, and systematic, a nonresident defendant will subject itself to the general jurisdiction of that forum's courts with respect to all claims . . . ." Cerberus Partners, 836 A.2d at 1118 (citations omitted). When the contacts are insufficient to establish general personal jurisdiction, "a court may exercise specific personal jurisdiction over the nonresident defendant if the claim sufficiently relates to or arises from any of a defendant's purposeful contacts with the forum." Id. at 1119 (citations omitted).

Here, WVU argues that the Long Arm must be construed literally in accordance with its plain language and limited to the enumerated categories of nonresident defendants. (Def.'s Mem. 6-8.) WVU argues that it does not fall within the personal jurisdiction granted by the Long Arm because WVU contends it is not a foreign corporation. See id. The Big East alleges personal jurisdiction over WVU on the basis that WVU is a corporation and that the Long Arm is interpreted to the fullest extent constitutionally permitted. (Pl.'s Resp. 7-9.)

It is evident to this Court that WVU, for all intents and purposes, is a corporation. Although the current statutory language establishing the Institutional Board of Governors does not label the WVU Board of Governors a corporation, the statute originally authorizing the Board of Governors stated that the Board "shall be a corporation." See § 18-11-1 (naming Board of Governors of WVU a corporation); § 18B-2A-1 (continuing Board of Governors at WVU in 2000 and providing terms for Board membership without repealing § 18-11-1); see also W. Va. Univ. Bd. of Governors v. W. Va. Higher Educ. Policy Comm'n, 653 S.E.2d 649, 659 (W. Va. 2007) ("the legislative scheme . . . is replete with instances in which a heightened level of independence has been statutorily granted to the WVU"); 3C Michie's Jurisprudence Colleges &

Universities § 2 ("West Virginia University is an organization endowed with corporate life . . . . a public corporation . . . ."). This Court is of the opinion that the new statute, § 18B-2A-1, continued rather than repealed the former section, § 18-11-1.[3] As such, WVU still acts as a corporation. Similarly, for other purposes, West Virginia courts have treated West Virginia state agencies as public corporations. See, e.g., White v. Berryman, 418 S.E.2d 917, 923-24 (W. Va. 1992) (ruling West Virginia state agency a public corporation for service of process purposes). Foreign public corporations fall within the personal jurisdiction granted by the Long Arm.

Even if WVU is not a corporation, this Court maintains personal jurisdiction under both the Long Arm and constitutional standard of minimum contacts. WVU's only tenable position is that the Long Arm must be literally construed by its plain language. However, a long line of case law in Rhode Island has firmly established that "from the plain language of this statute . . . the legislature of Rhode Island has chosen to exercise jurisdiction . . . up to the constitutional limitation." Del Sesto, 201 F. Supp. at 882; see Cerberus Partners, 836 A.2d 1118 (interpreting Long Arm to apply to fullest extent constitutional). Applying the Long Arm as intended by the General Assembly, WVU falls within the jurisdiction granted. Constitutionally, personal jurisdiction extends so long as there are sufficient minimum contacts. See Cerberus Partners, 836 A.2d at 1118-19 (drawing from long line of federal cases including Int'l Shoe Co. v. Washington, 326 U.S. 310 (1945), and World-Wide Volkswagen v. Woodson, 444 U.S. 286 (1980)). Here, WVU has been a member of the Big East conference, which is headquartered in Rhode Island, for twenty years and has participated in over one hundred athletic contests in the State of Rhode Island. (Pl.'s Resp. 5.) WVU does not contest that it has sufficient minimum

[3] W. Va. Univ. Bd. of Governors v. Rodriguez, 543 F. Supp. 2d 526, 530 n.2 (N.D. W. Va. 2008), provides a summary of the history of the entities governing WVU and their statutory authority.

contacts to be subject to personal jurisdiction in Rhode Island. Accordingly, interpreting the Rhode Island Long Arm to the fullest extent consistent with the Constitution, and considering that WVU does not contest personal jurisdiction on constitutional grounds, this Court finds personal jurisdiction over WVU and denies WVU's 12(b)(2) Motion to Dismiss.

B

Service of Process

WVU contends that by serving the summons and Complaint on the president of WVU by certified mail, return receipt requested, the Big East provided insufficient service of process. The Big East maintains that service was proper under the Rhode Island Long Arm and the Superior Court Rules of Civil Procedure.

The Long Arm provides that service on nonresident defendants may be made in any manner provided by the procedural rules of the court in which the action is brought.[4] Sec. 9-5-33(b). The Rhode Island Superior Court Rules of Civil Procedure provide the standard for service of process outside the state in Rule 4(f). Rule 4(f) delineates service only as between an individual or a foreign corporation. A foreign corporation is properly served "by mailing a copy of the summons and complaint to any such officer or agent . . . by registered or certified mail, return receipt requested . . . ." Super. R. Civ. P. 4(f)(2). In interpreting the Long Arm statute to reach its constitutional limits, this state permits service of process on any nonresident defendant over which the court has personal jurisdiction in accordance with the Rule regarding service outside the state. See Del Guidice v. Robbins, 410 F. Supp. 303, 304-06 (D. R.I. 1976) (noting

[4] By its stated terms, the statute provides for service on a "foreign corporation, nonresident individual or his or her executor or administrator, and such partnership or association." However, like with subsection (a) of the Long Arm, this Court will not interpret this language to limit the forum's reach short of its constitutional limits. Certainly, if the General Assembly intended the Long Arm to apply to the maximum extent constitutionally permitted, it also intended those nonresident defendants to be served with sufficient process.

Long Arm mandates courts to hold nonresidents amenable to suit in every case not contrary to federal constitution and applying Superior Court Rule of Civil Procedure for service out of state).

Because this Court has determined that there is personal jurisdiction over WVU, it follows that service of process is sufficient when made in accordance with the Long Arm and the rule of civil procedure regarding out-of-state service. See Del Guidice, 410 F. Supp. at 304-06 (discussing Long Arm and applying Rule 4(e) (now Rule 4(f)) to determine sufficient service). The Big East's service of process on the president of WVU by certified mail, return receipt requested, complied with Rule 4(f) of this Court's Rules of Civil Procedure. See Super. R. Civ. P. 4(f) (providing service of process "by mailing a copy of the summons and complaint . . . by registered or certified mail, return receipt requested"). Therefore, this Court denies WVU's 12(b)(5) motion to dismiss.

C

Comity—Sovereign Immunity

WVU contends that this Court should dismiss the Big East's Complaint on grounds of sovereign immunity. WVU requests this Court, through principles of comity and deference to West Virginia, apply West Virginia law regarding the professed sovereign immunity of WVU. The Big East maintains this Court need not apply principles of comity and should not dismiss on sovereign immunity grounds.

Sovereign immunity has its foundations in the old axiom that a "King could do no wrong." Nevada v. Hall, 440 U.S. 410, 414-15 (1979); Calhoun v. City of Providence, 120 R.I. 619, 625, 390 A.2d 350, 353 (1978). The immunity of an independent sovereign has been enjoyed by that sovereign in its own courts "as a matter of absolute right for centuries." Nevada, 440 U.S. at 414. In more modern times, this immunity has been based "on the logical and

practical ground that there can be no legal right as against the authority that makes the law on which the right depends." Id. at 416 (quoting Kawananakoa v. Polybank, 205 U.S. 349, 353 (1907)); Pellegrino v. R.I. Ethics Comm'n, 788 A.2d 1119, 1123 (R.I. 2002) (also quoting Kawananakoa, 205 U.S. at 353). This currently controlling interpretation of sovereign immunity "supports the conclusion that no sovereign may be sued in its own courts without its consent, but it affords no support for a claim of immunity in another sovereign's courts." Nevada, 440 U.S. at 416.

A sovereign state will only have immunity in the courts of another sovereign state if there is an agreement between the two states providing for such immunity, or if the forum state voluntarily decides to respect that immunity as a matter of comity. Id. at 416. The United States Constitution and the Full Faith and Credit Clause[5] contained within it "do[] not require a State to apply another State's law in violation of its own legitimate public policy." Id. at 422. Full faith and credit "does not here enable one state to legislate for the other or to project its laws across state lines so as to preclude the other from prescribing for itself the legal consequences of acts within it." Id. at 423-24. A state's sovereign immunity from suit in another state's courts is no more than a matter of comity, and there is nothing in the Constitution implying otherwise. Id. at 425.

In Nevada, a particularly instructive United States Supreme Court case, the Court held that Nevada was not entitled to sovereign immunity in an action brought in California state court by California citizens. 440 U.S. at 411-14, 426-27. The plaintiffs brought a tort claim against the University of Nevada resulting from an automobile collision in California, and Nevada sought to limit its liability based on its Nevada statutory waiver of sovereign immunity only up

[5] U.S. Const. art. IV, § 1.

to $25,000. Id. at 411-13. The California jury awarded the plaintiffs damages in the amount of $1,150,000. Id. at 413. Nevada sought a writ of certiorari from the U.S. Supreme Court claiming the Constitution extended Nevada's sovereign immunity into other states' courts. Id. at 413-14. The Supreme Court disagreed, affirming the California court's ruling and declining to find anything that "authorizes or obligates this Court to frustrate [a sovereign state's] policy out of enforced respect for the sovereignty of Nevada." Id. at 426-27; see Biscoe v. Arlington Cnty., 738 F.2d 1352, 1358 (D.C. Cir. 1984) (ruling where application of Virginia's sovereign immunity laws would frustrate public policy of D.C., D.C. not required to recognize Virginia's sovereign immunity as provided under Virginia laws).

Any legal presumption in favor of comity between the states fails if "the interest or policy of any state requires it to restrict the rule" of comity. Nevada, 440 U.S. at 426. Nothing in the federal Constitution obligates a state to frustrate its own public policies in its own state courts "out of enforced respect for the sovereignty" of another state. Id. at 426. In the absence of some formal agreement between the two sovereign states, it is only a "voluntary decision of the second to respect the dignity of the first as a matter of comity." Biscoe, 738 F.2d at 1359 (quoting Qasim v. Washington Metropolitan Area Transit Authority, 455 A.2d 904, 906 (D.C. 1983) (cert. denied, 461 U.S. 929 (1983))). The forum state "might defer to a sister state's retained immunity, even though it need not do so." Id. at 1357.

It is longstanding Rhode Island law that "[c]omity is not a positive rule of law but one of practicality based on a proper regard for the law of a foreign state." O'Brien v. Costello, 100 R.I. 422, 430, 216 A.2d 694, 699 (1966). Determining whether to apply foreign law under principles of comity "depends on the law of the forum and this rests in turn on the forum's public policy with reference to its own institutions and the interests of its citizens." Id. Comity is a

matter of "judicial discretion." Id. Rhode Island courts may, however, give effect to laws of another state by comity "provided there is no contravention of statute or public policy of this state." Skeadas v. Sklaroff, 84 R.I. 206, 212, 122 A.2d 444, 447 (1956). But, Rhode Island "is not constitutionally obligated to give full faith and credit to a foreign jurisdiction's laws if to do so would violate some 'public policy' of the forum state." Woodward v. Stewart, 104 R.I. 290, 297, 243 A.2d 917, 921 (1968) (citation omitted).

In particular, a court may decline to apply sovereign immunity under principles of comity to the state university of a sister state when to do so would leave the forum state's residents without redress in their state. See Faulkner v. Univ. of Tenn., 627 So. 2d 362, 366 (Ala. 1992). In determining whether to apply comity and sovereign immunity, the forum court should "remain sensitive to the rights of [its] own citizens and [its] duties and obligations to them." Id.; see O'Brien, 100 R.I. at 430, 216 A.2d at 699 (invoking principles of comity depends on interests of forum state's citizens). Residents of a state cannot be left without redress in their state, particularly when their allegations are related to commercial activities within their state. See Faulkner, 627 So. 2d at 366 (concluding principles of comity to provide University of Tennessee with sovereign immunity in Alabama do not override Alabama's interest in providing forum for its citizens).

It is the public policy of Rhode Island, embodied in this state's constitution, that "[e]very person within this state ought to find a certain remedy, by having recourse to the laws, for all injuries or wrongs which may be received in one's person, property, or character." R.I. Const. art. I, § 5. That constitutional provision is to be given broad, independent meaning, as the "basic premise of constitutional interpretation is that every clause must be given its due force, meaning and effect and that no word or section must be assumed to have been unnecessarily used or

needlessly added." Kennedy v. Cumberland Eng'g Co., 471 A.2d 195, 198 (1984) (citations omitted). Rhode Island policy also provides limited sovereign immunity, often by way of statutory provisions waiving immunity. See Andrade v. State, 448 A.2d 1293, 1294-95 (R.I. 1982) (discussing state's relinquishment of some sovereign immunity). Accordingly, this state recognizes a number of exceptions to sovereign immunity, including implied waiver. See Pellegrino 788 A.2d at 1124 (recognizing implied waiver of sovereign immunity in Rhode Island). Of note, under Rhode Island law, the University of Rhode Island (URI) cannot claim sovereign immunity. Wilkinson v. State Crime Lab. Comm'n, 788 A.2d 1129, 1140 n.14 (R.I. 2002) ("URI has long been held amenable to suit") (citing Univ. of R.I. v. A.W. Chesterton Co., 2 F.3d 1200 (1st Cir. 1993)).

A recent case involving the University of Connecticut (UCONN), argued by Defendant in connection with this matter, is easily distinguishable. TA Instruments-Waters, LLC v. Univ. of Conn., No. 6985-VCL, 2011 WL 6116451 (Del. Ch. Nov. 8, 2011). There, the Delaware Chancery court, recognizing that the motion raised principles of comity and judicial efficiency, denied a motion to expedite a hearing before it in order to allow the matter to be filed in Connecticut. Id. at *6-7. The plaintiff was suing UCONN for violation of Connecticut fair bidding and purchasing statutes, and all of the conduct in question took place in Connecticut. Id. at *1, 5. The Delaware court recognized that the case centered on the internal affairs of a Connecticut agency and whether that agency's representatives had complied with Connecticut regulatory duties under Connecticut law. Id. at *5. These issues were of great importance to Connecticut, which has a significant interest in enforcing its own statutes and regulating the internal affairs of its entities. Id. at *5. Further, there was no reason the plaintiff "could not litigate equally well in Connecticut." Id. at *5.

Here, as discussed infra part II(E), the Big East may be precluded from some remedies in West Virginia and perhaps could not "litigate equally well" in that state. See id. Furthermore, TA Instruments involved alleged violations of a state fair bidding statute and state regulations, whereas here, the allegations against WVU are of common law breach of contract. 2011 WL 6116451 at *1, 5. The case at bar does not provide the State of West Virginia with the same "significant interest" that led the Delaware court to encourage the case to proceed in Connecticut.

It is clear to this Court that while Rhode Island may apply any sovereign immunity afforded to WVU under West Virginia law, this Court is under no obligation to do so. WVU has failed to point to any agreement requiring this state to enforce West Virginia's sovereign immunity under principles of comity. In the absence of such agreement, comity is a matter of judicial discretion based on the interests of the forum state. See Nevada, 440 U.S. at 414 (explaining sovereign immunity in other state's courts based on agreement or voluntary decision as matter of comity); O'Brien, 216 A.2d at 699 (holding comity matter of judicial discretion applied based on forum's interests and policies). Nothing requires this state to honor principles of comity when doing so would violate Rhode Island public policy. See Nevada, 440 U.S. at 426 (stating nothing obligates court to frustrate its policy out of respect for other sovereign).

In this matter, invoking WVU's purported sovereign immunity under West Virginia law would violate Rhode Island public policy. There is a strong basis in our constitution to provide our citizens with a remedy for any wrongs they may suffer. See R.I. Const. art. I, § 5. If the Court dismissed this matter by applying West Virginia's sovereign immunity law on the basis of comity, it would likely deprive a Rhode Island citizen, the Big East conference, of its ability to fully pursue a claim. See Faulkner, 627 So. 2d at 366 (concluding providing University of

Tennessee with sovereign immunity in Alabama would interfere with Alabama's interest in providing forum for its citizens).

WVU acknowledges that Rhode Island has generally not extended sovereign immunity to sibling states on the basis of comity. (Def.'s Mem. 11.) This Court declines to begin that practice today. Doing so would interfere with Rhode Island public policy and potentially deprive a Rhode Island citizen of full redress for its grievance. This Court accordingly denies WVU's Motion to Dismiss on claims of sovereign immunity provided by West Virginia law.

D

Comity—First to File

As another ground for dismissal, WVU asserts that this Court should dismiss the Big East's Complaint in favor of the first-filed action in West Virginia on the basis of comity. According to WVU, the first-to-file rule dictates that the Court should stay or dismiss this action, allowing the West Virginia case to proceed on its own. The Big East contends, however, that the West Virginia case was an anticipatory lawsuit, and this Court is not compelled to defer to the earlier-filed action.

There is an established rule in Rhode Island with respect to two actions in two courts within this state that "principles of comity shall control and the court whose jurisdiction is first invoked should resolve the issues presented to it." Barone v. O'Connell, 785 A.2d 534, 535 (R.I. 2001); Lippman v. Kay, 415 A.2d 738, 741 (R.I. 1980) (applying first to file rule with two courts of same state with concurrent jurisdiction); Welsh v. Personnel Bd. of Pawtucket, 101 R.I. 187, 191, 221 A.2d 476, 478 (1966) (same). However, there is very limited law in Rhode Island applying the first to file rule as between a case filed in a court in our state and another case filed in a court of a sister state.

This Court has acknowledged in the past a general rule of judicial discretion that a court may stay or dismiss proceedings when there is a prior case pending in another court of competent jurisdiction involving the same issues and the same parties. See Copley Distributors, Inc. v. Anheuser-Busch, Inc., No. PB-07-0703, slip op. at 3 (R.I. Super. Feb. 13, 2007). This rule, as stated by this Court, is "not a mechanical or inflexible rule." See Greenbytes v. Sun Microsystems, Inc., No. PB-09-3611, Dec. at 7 (R.I. Super. Aug. 17, 2009) (bench decision, copies of which were provided to parties by the Court); see also Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 3 (1983) ("priority should not be measured exclusively by which complaint was filed first"). Another Superior Court case held that "the pendency of an action in another state, even though filed prior to the action pending in Rhode Island, is not a ground to abate the action in Rhode Island." Rubien Eng'g & Consulting Corp. v. Horton, No. 79-2438, 1982 WL 604858, at *1 (R.I. Super. Jun. 4, 1982) (citing Barton Co. v. Goldman, 21 R.I. 280, 43 A. 101 (1899)).

The general rule as between cases in two different states is that "[a] state may entertain an action even though an action on the same claim is pending in another state." Restatement (Second) Conflict of Laws § 86 (1971). In particular, the Restatement explains:

> "where there is a substantial likelihood that plaintiff will not be able to obtain **complete** relief in the first action, such as where it is unlikely to result in final judgment on the merits because of a procedural defect or where the exemption laws of the first state would preclude full satisfaction of plaintiff's claim . . . . the second action will be permitted to continue." Id. at cmt. b (emphasis added).

The Rhode Island Supreme Court, in considering abatement of one of two civil actions commenced in Rhode Island courts, employed an analogous rule. See Pisaturo v. Auto. Mut. Ins. Co. of Am., 102 R.I. 209, 213, 229 A.2d 756, 758 (1967). The Pisaturo court explained that "if

for any reason a prior pending action is so defective that there can be no recovery therein, or no such effectual recovery or relief as is sought and obtainable in the second action, the prior action is not ground for abating the subsequent one." Id. (quoting 1 C.J.S. Abatement & Revival § 68).

Our federal courts have agreed that "[t]he preference for the first-filed action is not a per se rule, but rather a policy governed by equitable considerations . . . ." Feinstein v. Brown, 304 F. Supp. 2d 279, 283 (D. R.I. 2004) (discussing first to file rule in context of two cases in federal courts); Nortek, Inc. v. Molnar, 36 F. Supp. 2d 63, 70 (D. R.I. 1999) (describing first-filed rule as "equitable decision made at the discretion of this Court" with regard to two cases in federal courts). "While the first-filed rule may ordinarily be a prudent one, it is so only because it is sometimes more important that there be a rule than that the rule be particularly sound." Nortek, 36 F. Supp. 2d at 70. Undeniably, there are special circumstances that justify retaining the second or later-filed case. See Feinstein, 304 F. Supp. 2d at 283. Special circumstances must reflect a "balance of convenience" in favor of maintaining the second action. See id. (listing factors to consider towards balance of convenience); Nortek, 36 F. Supp. 2d at 70. The circumstances to consider include blatant forum shopping. Nortek, 36 F. Supp. 2d at 70.

When the first-filed case "is the result of a preemptive 'race to the courthouse,' a court may allow a later-filed case to proceed in place of the first-filed action." Feinstein, 304 F. Supp. 2d at 283 (citing Cianbro Corp. v. Curran-Lavoie, Inc., 814 F.2d 7, 11 (1st Cir. 1987)). A "court may decline to follow the first-to-file rule and dismiss a declaratory judgment action if that action was filed for the purpose of anticipating a trial of the same issues in a court of coordinate jurisdiction." Sutton v. Everset Nat'l Ins. Co., No. 07-CV-00425-WYD-BNB, 2007 WL 2438987, at *3 (D. Colo. Aug. 23, 2007). Where the first-filing party primarily sought a declaration of rights—even though it included claims for fraud and duress—and the party filed in

response to a demand, the first-filed action constituted an improper race to the courthouse, or an anticipatory suit. Id. (declining to hear anticipatory lawsuit that also included claims for fraud and duress); see Ginmar Corp. Promotions, Inc. v. Cardinal Health, Inc., No. 08-CV-4109, 2008 WL 4905994, at *1 (N.D. Ill. Nov. 12, 2008) (stating declaratory judgment suit brought in face of threats of litigation should be closely scrutinized as an anticipatory filing). In determining if a lawsuit is anticipatory, courts have considered factors such as the notice to the plaintiff in the earlier-filed suit, the amount of time between the filing of the two suits, and the nature of the first suit. See id. (noting nature of action primarily declaratory although including other counts); Ginmar Corp. Promotions, 2008 WL 4905994 at *1-2 (determining action filed seven days after letter stating that other party would file if parties could not resolve dispute is anticipatory); Drugstore-Direct, Inc. v. Cartier Div. of Richemont N. Am., Inc., 350 F. Supp. 2d 620, 623 (E.D. Pa. 2004) (holding difference of four days between filing two lawsuits with first filed after communication that would initiate lawsuit if demands not met constituted anticipatory action). A declaratory judgment action including other counts that are "not independent claims but are intertwined" with the declaratory judgment claim may be considered an anticipatory lawsuit. Sutton, 2007 WL 2438987 at *3.

It is apparent that before applying the first-to-file rule as a matter of judicial discretion, the Court should consider whether the plaintiff of the second action could obtain complete relief in the first-filed case and whether the first-filed case was an improperly anticipatory lawsuit. As mentioned previously and as will be addressed infra section II(E), this Court is not convinced the Big East would be afforded complete relief in the first-filed action in West Virginia. See Restatement (Second) Conflict of Laws § 86, cmt. b (1971) (commenting that first-to-file rule not controlling where second plaintiff may not be entitled to complete relief in first-filed case).

Furthermore, the facts before this Court indicate that WVU's first-filed lawsuit in West Virginia state court qualifies as an anticipatory action. In fact, that very complaint filed by WVU indicates that it expects the Big East will seek to enforce the Bylaws. See First Am. Compl. ¶¶ 46, 69, W. Va. Univ. Bd. of Governors v. Big East Conference, No. 11-C-695 (Cir. Ct. Monongalia Cnty., W. Va. Nov. 1, 2011). The facts indicate that on October 28, 2011 the Commissioner of the Big East, John Marinatto, emailed the president of WVU, Jim Clements, stating that WVU had not sent a proper withdrawal notice, could not withdraw from the conference until June 30, 2014, and "[s]hould [WVU] refuse to abide by the Bylaws, the Conference reserves all of its rights to pursue appropriate recourse, including but not limited to the rights referenced in Article 11.02(b) of the Bylaws." (Affidavit of John Marinatto ¶ 24, Ex. D.) Three days later, on October 31, 2011, WVU filed the West Virginia case, seeking declaratory judgment and permanent injunctive relief while also claiming breach of contract. (Pl.'s Resp. 3-4; Def.'s Mem. 3-4.) Just four days later, the Big East filed the instant matter in this Court. (Pl.'s Resp. 4.)

Admittedly on notice that the Big East would pursue remedies to enforce the terms of the Bylaws, WVU filed action in its home court. WVU's action is primarily an action for declaratory judgment. See Sutton, 2007 WL 2438987 at *3 (holding action anticipatory and primarily declaratory even though it included other counts). WVU's claims strike this Court as more akin to affirmative defenses that could properly be raised in the case brought by the proper plaintiff here, the Big East. See Sutton, 2007 WL 2438987 at *2-3 (discussing party improperly reversing position of parties by bringing declaratory judgment anticipatory action). As in Sutton where the party seeking to enforce the agreement was made a defendant in a declaratory

judgment action, here the Big East seeks to enforce its Bylaws and would be the proper plaintiff in such an action. See id.

This Court is not required to defer based on principles of comity to a case filed four days prior. See Feinstein, 304 F. Supp. 2d at 283 (explaining first-to-file not a rule per se, but an equitable concept); Greenbytes, Dec. at 7. WVU, aware that the Big East may bring legal action, brought its own anticipatory action in West Virginia just days prior to the Big East's. This Court in its discretion denies WVU's motion to dismiss based on the first-to-file rule.

E

Forum Non Conveniens

Lastly, WVU moves the Court to dismiss the Big East's Complaint under the doctrine of forum non conveniens. WVU argues that West Virginia state court, where a case is already filed, presents an available and adequate remedy, and public- and private-interest considerations weigh in favor of dismissal. On the other hand, the Big East contends that the West Virginia state court would not provide an adequate remedy, and the same public- and private-interest factors favor this case remaining in Rhode Island.

The doctrine of forum non conveniens "allows a court to decline to exercise jurisdiction when the plaintiff's chosen forum is significantly inconvenient and the ends of justice would be better served if the action were brought and tried in another forum." Kedy v. A.W. Chesterton Co., 946 A.2d 1171, 1178 (R.I. 2008) (recognizing doctrine of forum non conveniens in Rhode Island jurisprudence). The doctrine is "founded in considerations of fundamental fairness and sensible and effective judicial administration." Id. at 1179 (citations omitted). A court may dismiss a case on forum non conveniens grounds "when an alternative forum has jurisdiction to hear [the] case, and when trial in the chosen forum would establish oppressiveness and vexation

to a defendant out of all proportion to plaintiff's convenience, or when the chosen forum [is] inappropriate because of considerations affecting the court's own administrative and legal problems." Id. at 1182-83 (citations omitted).

Before considering forum non conveniens, a court must establish proper jurisdiction and venue. See id. at 1183. Then, the forum non conveniens consideration is a two-prong analysis. See id. First, there must be an available and adequate alternative forum, and second, there must be inconvenience in the chosen forum, considering both private- and public-interest factors. See id. The defendant arguing forum non conveniens "bears a heavy burden in opposing the plaintiff's chosen forum," and carries that burden to prove each prong of the analysis. Id. (quoting Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp., 549 U.S. 422, 423 (2007)).

Forum non conveniens cannot be invoked to dismiss a case if there is not an available and adequate alternative forum. Id. at 1183. An available forum is one in which the defendant is amenable to process. Id. (citing Piper Aircraft Co. 454 U.S. at 255 n.22). An adequate forum requires that the "plaintiff will not be deprived of all remedies or subject to unfair treatment." Id. at 1184 (quoting 14D Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice & Procedure § 3828.3 at 677-82 (3d ed. 2007)). Our Supreme Court cautioned that a mere unfavorable change in the law, such as restrictions on the scope of discovery or the loss of procedural advantages, does not make an alternative forum inadequate. Id. On the other hand, "if the remedy provided by the alternative forum is so clearly inadequate or unsatisfactory that it is no remedy at all, the unfavorable change in law may be given substantial weight." Id. (quoting Piper Aircraft at 254).

In addition to the requirement that there be an available and adequate remedy, before granting a dismissal on the basis of forum non conveniens, a court must consider the

inconvenience of continuing in the forum. Id. at 1184. This calculus requires flexibility, with thought given to both private- and public-interest factors. Id. Private interests for the court to consider include access to sources of proof, availability of processes to compel attendance of the unwilling, access to witnesses, enforceability of a judgment in the alternative forum, and other practical advantages and disadvantages to a fair and expeditious trial. Id. at 1184-85, 1187. In weighing the private interests, the court should also consider that a "plaintiff may not, by choice of an inconvenient forum, 'vex,' 'harass,' or 'oppress' the defendant by inflicting upon him expense or trouble not necessary to his own right to pursue his remedy." Id. at 1185 (quoting Gulf Oil 330 U.S. at 508). Public interest factors include difficulties in judicial administration, burden on the jury, any local interest in the controversy, and avoiding conflicts when applying another state's law. See id. at 1185 (quoting Gulf Oil at 508-09). The court should consider both the private- and public-interest factors. Id. at 1185, 1188 (concluding Rhode Island courts should consider both private- and public-interest factors although not all other jurisdictions require consideration of public-interest factors).

Kedy—the landmark Rhode Island case on forum non conveniens cited by both parties in the case at hand—vacated the Superior Court's denial on the defendants' motion to dismiss and instructed the lower court to enter an order dismissing the complaint conditional on the availability of an alternative forum. Id. at 1189. Kedy involved thirty-nine asbestos claims brought by Canadian residents against corporations conducting business in Rhode Island. Id. at 1175-76. However, all of the alleged asbestos exposure, injury, and treatment occurred in Canada, and none of the remaining corporate defendants was incorporated or had its principal place of business in Rhode Island. Id. at 1176.

On the issue of whether there was an available and adequate alternative remedy, the only viable argument presented by the plaintiffs in Kedy was that discovery practice in Canada was more limited than in this state. Id. at 1186. The Supreme Court held that "differences in discovery standards are not enough to establish the inadequacy of the forum" and opined that "Canada has a legal system capable of affording the possibility of remedies to the plaintiffs . . . ." Id. at 1186-87. Next, considering the private factors, the court noted that no parties were domiciled in the state, none of the allegedly tortious acts occurred in the state, no witnesses and no evidence were located in the state, and the state could not compel any Canadian witnesses to appear. Id. at 1187-88. As to the public factors, the court ruled that they also favored dismissal, as a jury would have to sit through a trial with no connection to the state, the court would have to apply Canadian law, and administrative difficulties would arise with regard to compelling witnesses and producing evidence. Id. at 1188. Bluntly, the court was "unable to discern any nexus with the State of Rhode Island." Id. at 1189.

Here, this Court must follow the two-prong analysis set forth by Justice Suttell in Kedy. As a precursor, based on the pleadings and the findings herein, the Court notes that it does have proper jurisdiction and venue to hear this case. See supra part II(A); Compl. ¶¶ 10-11. As to the first prong, requiring an available and adequate alternative forum, the West Virginia Circuit Court provides an available alternative forum.[6]

This Court is not convinced that the West Virginia state court will provide the Big East with an adequate remedy to justify application of forum non conveniens. As argued by WVU before this Court, WVU is entitled to sovereign immunity in the West Virginia courts. See Univ.

[6] It has been brought to the attention of the Court that the Big East has filed a motion to dismiss in the West Virginia case. Should that court dismiss the Complaint there, of course, there may no longer be an available alternative forum in West Virginia. The following analysis here makes this concern moot.

of W. Va. Bd. of Trustees v. Graf, 516 S.E.2d 741, 745-46 (applying sovereign immunity to WVU); Mellon-Stuart Co. v. Hall, 359 S.E.2d 124, 129-30 (W. Va. 1987) (extending sovereign immunity that cannot be waived by WVU). Despite its claim of sovereign immunity, WVU avers that the West Virginia case will provide an adequate remedy because the Big East could bring counterclaims, could seek injunctive relief, or could bring a separate action in the West Virginia Court of Claims. See Def.'s Reply in Supp. of Mot. to Dismiss 16-17.

However, the counterclaim exception to sovereign immunity would only permit the Big East to assert a counterclaim arising out of the same transaction and would not permit the Big East to recover any amount in excess of what WVU recovered. Mellon-Stuart, 359 S.E.2d at 134 (explaining counterclaim exception as "[e]ssentially . . . a right of setoff in the amount of the judgment obtained . . . but only to the extent that it does not exceed the amount recovered by the State . . . "). While WVU suggests the Big East could seek injunctive relief, the only exception permitting injunctive relief of which this Court is or has been made aware relates to restraining or requiring West Virginia state officers to perform their duties. See Graf, 516 S.E.2d at 745.

Further, suggesting that the West Virginia Court of Claims provides an adequate alternative remedy falls short of at least this Court's standards in considering a forum non conveniens motion. See Kedy, 946 A.2d at 1184 (providing remedy so clearly inadequate as to be no judicial remedy at all precludes dismissal on forum non conveniens). The West Virginia Court of Claims "is not an Article VIII court under the West Virginia Constitution, but rather was created by the legislature." Mellon-Stuart, 359 S.E.2d at 135. Plainly, it is a "legislative creature" and "not a judicial entity." Id. at 128. This "court" is often the "sole forum for relief" for business entities to recover contract damages against West Virginia. See id. at 130. "The Court of Claims is advisory and recommendatory in character . . . . Its function in that manner is

not judicial. The legislature may accept or reject its findings, or approve or disapprove its recommendations." Id. at 132 (quoting State v. Gainer, 170 S.E.2d 817, 822 (W. Va. 1969)). Although WVU cites a case in which the West Virginia legislature did award the amount recommended by the Court of Claims, it is clear that is not always the case. See Mellon-Stuart, 359 S.E.2d at 128 (providing history that "legislature declined to follow the recommendation of the court of claims, and appropriated no money to fund the Mellon-Stuart . . . claim[]").

In at least some instances, the West Virginia Court of Claims provides no remedy at all, and in all instances, the Court of Claims does not provide a judicial remedy. See Mellon-Stuart, 359 S.E.2d at 128, 132 (providing example of legislature declining to fund award recommended by Court of Claims and providing Court of Claims is not judicial). WVU did not demonstrate that the Big East could seek the type of injunctive relief it requests in West Virginia, and although the Big East could assert counterclaims, its recovery would be limited to use as a setoff. See Graf, 516 S.E.2d at 745 (presenting limit to injunctive relief permitted); Mellon-Stuart, 359 S.E.2d at 134 (presenting limit to counterclaims for use as setoff). Thus, it appears, the Big East's remedies in the West Virginia case may well be limited to only a deduction from any award to WVU. This Court gives substantial weight to the inadequate remedy that would likely be provided in the West Virginia case. See Kedy at 1183 ("if the remedy provided by the alternative forum is so clearly inadequate or unsatisfactory that it is no remedy at all, the unfavorable change in law may be given substantial weight"). Unlike the plaintiffs in Kedy who argued only that the alternative jurisdiction provided more limited discovery, here the Big East has shown that West Virginia may provide no judicial remedy at all. See id. at 1186-87 (finding Canada court capable of affording remedies to plaintiffs and holding mere differences in

discovery practice do not constitute inadequate forum). There is not an adequate judicial remedy in West Virginia to compel dismissal of this action on the basis of forum non conveniens.

Although WVU's motion fails the forum non conveniens analysis on the first prong, this Court will address, en arguendo, the second prong. To start, private interest factors do not compel the Court to dismiss this case on forum non conveniens. See Kedy, 946 A.2d at 1184-85, 1187 (setting forth private interest factors). It does not appear that the Big East intended to vex, harass, or oppress WVU by bringing suit in this Court; rather, any inconvenience to WVU is outweighed by other private interests in having the case heard in this forum. See id. at 1185. This case revolves entirely around the provisions of the Bylaws between WVU and the Big East, as well as the actions of both entities. The alleged breach occurred when WVU sent notice to the Big East in Providence that it would be withdrawing in 2012. The Big East is a longstanding corporate resident of Rhode Island, and among its member schools is a private institution located in Providence, Rhode Island. Any evidence not in the custody of WVU is likely located at the Big East's headquarters in Rhode Island. See Pl.'s Resp. 31. Witnesses will likely include persons based in both West Virginia and Rhode Island, and there is no reason the West Virginia court would be better equipped to compel attendance. As opposed to Kedy—where no parties were domiciled in the state, none of the allegedly tortious acts occurred in the state, and no witnesses or evidence were located in the state—here the Big East is located in the state, WVU sent notice allegedly constituting the breach in this state, and evidence is located at the Big East headquarters in the state. See Kedy, 946 A.2d at 1187-88. WVU has the burden of proving that private interests favor dismissal and has failed to carry that burden before this Court.

In addition, public interest factors likewise do not support dismissal. See Kedy, 946 A.2d at 1185 (setting forth public interest factors). Hearing this matter poses no excessive burden on

this Court or on a Rhode Island jury. In fact, there is a significant local interest in deciding this controversy here, as the Defendant is a local citizen and the outcome will effect a local institution. Because the Bylaws are governed under District of Columbia law, neither West Virginia nor Rhode Island has a greater public interest in applying that law. Unlike Kedy—which involved no resident of Rhode Island, no acts within Rhode Island, and the application of Canadian law—here the jury would decide issues integrally related to this state and its citizens, and the law of a third state (in which West Virginia has no greater interest) would be applied. See id. at 1148. As such, public factors do not dictate dismissal on forum non conveniens grounds.

Litigating the matter here will not cause oppressiveness and vexation to WVU out of proportion with the convenience to the Big East. See id. at 1182-83. In this Court's judicial discretion, it believes retaining the matter is not significantly inconvenient, and rather, would better serve the interests of justice. See id. at 1178 (considering if the "ends of justice would be better served" in forum non conveniens determination). Accordingly, WVU's motion to dismiss on the grounds of forum non conveniens is denied.

III

Conclusion

After due consideration, this Court denies Defendant's motion to dismiss on all grounds. This Court finds personal jurisdiction over WVU and sufficient service of process. Further, this Court declines to dismiss the Plaintiff's Complaint on the basis of comity or the doctrine of forum non conveniens. Prevailing counsel may present an Order consistent herewith which shall be settled after due notice to counsel of record.