

CIVIL CASE INFORMATION STATEMENT
(Civil Cases Other than Domestic Relations)

FILED

I. CASE STYLE:

IN THE CIRCUIT COURT OF CABELL COUNTY, WEST VIRGINIA FEB 22 A 11:07

MARSHALL UNIVERSITY
BOARD OF GOVERNORS,

MIKE WOELFEL
CIRCUIT CLERK
CABELL CO. WV

Plaintiff,

Civil Action No. 22-C-66

v.
CONFERENCE USA,

/s/ CHRISTOPHER D. CHILES

Defendant.

II. TYPE OF CASE:

- General Civil
- Mass Litigation (As defined in T.C.R. 26.04(a))
 - Asbestos
 - FELA Asbestos
 - Other: _____
- Adoption
- Administrative Agency Appeal
- Civil Appeal from Magistrate Court
- Miscellaneous Civil Petition
- Mental Hygiene
- Guardianship
- Medical Malpractice
- Habeas Corpus/Other Extraordinary Writ
- Other: Declaratory Judgment, Injunction

III. JURY DEMAND: Yes No CASE WILL BE READY FOR TRIAL BY: 8/2022

IV. DO YOU OR ANY OF YOUR CLIENTS OR WITNESSES IN THIS CASE REQUIRE SPECIAL ACCOMODATIONS?

IF YES, PLEASE SPECIFY:

- Wheelchair accessible hearing room and other facilities
- Interpreter or other auxiliary aid for the hearing impaired
- Reader or other auxiliary aid for the visually impaired
- Spokesperson or other auxiliary aid for the speech impaired
- Other: _____

Yes No

Attorney Name: Perry Oxley, Brian Morrison, and Eric Salvers

Firm: Oxley Rich Sammons, PLLC

Address: 517 9th Street, Suite 1000, Huntington, WV 25701

Telephone: (304) 522-1138

Dated: February 22, 2022

Representing:

- Plaintiff
- Defendant
- Cross-Complainant
- Cross-Defendant
- 3rd Party Plaintiff
- 3rd Party Defendant

Signature

SUMMONS

COPY
FILED

IN THE CIRCUIT COURT OF CABELL COUNTY, WEST VIRGINIA: 58

MARSHALL UNIVERSITY
BOARD OF GOVERNORS,

MIKE WOELFEL
CIRCUIT CLERK
CABELL CO. WV

Plaintiff,

Civil Action No. 22-C-666

v.
CONFERENCE USA,

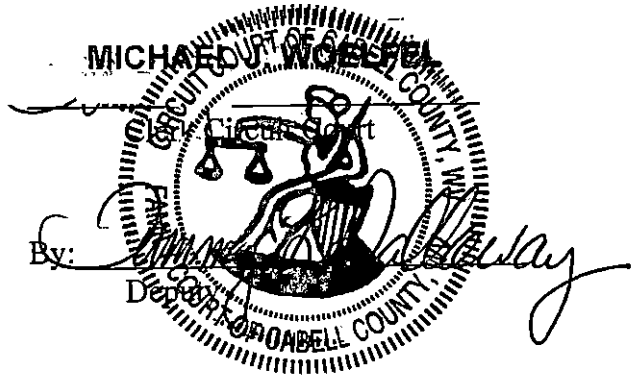
/s/ CHRISTOPHER D. CHILES

Defendant.

To the above named defendant(s): Conference USA
3100 Olympus Blvd., #400
Coppell, Texas 75019

IN THE NAME OF THE STATE OF WEST VIRGINIA, you are hereby summoned and required to serve upon **Perry W. Oxley, Esq.** Plaintiff's Attorney, whose address is **Oxley Rich Sammons, PLLC, 517 9th Street, Suite 1000, Huntington, WV 25701** an answer including any related counterclaim you may have, to the complaint filed against you in the above styled action, a true copy of which is herewith delivered to you. You are required to serve your answer within **30** days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint and you will be thereafter barred from asserting in another action any claim you have which must be asserted by counterclaim in the above styled civil action.

Dated: February 22, 2022



- Service - Certified (RD)
- Service - Sheriff
- Returned to Atty. for Service
- Returned to Pltf. for Service

FILED

MARSHALL UNIVERSITY
BOARD OF GOVERNORS,

2022 FEB 22 A 11: 07

Plaintiff,

v.

MIKE WOELFEL
CIRCUIT CLERK
CABELL CO. WV

Civil Action No. 22-C-66

CONFERENCE USA,

Defendant.

/s/ CHRISTOPHER D. CHILES

**COMPLAINT FOR DECLARATORY
JUDGMENT AND OTHER SPECIFIC RELIEF**

COMES NOW the Plaintiff, Marshall University Board of Governors (“Marshall”), by and through counsel, Perry W. Oxley, Brian D. Morrison, Eric D. Salyers, Christopher K. Weed, and the law firm of Oxley Rich Sammons, PLLC, and alleges by way of its Complaint for Declaratory Judgment and Other Specific Relief the following against the Defendant, Conference USA (“C-USA”):

PARTIES

1. Marshall is a public university created by the State of West Virginia. Marshall’s main campus is located in Huntington, Cabell County, West Virginia.
2. At all times relevant hereto, upon information and belief, C-USA is a not-for-profit corporation organized under Illinois law with a principal place of business in Dallas, Texas that acts as a intercollegiate athletic conference. C-USA has members across ten states including Texas, Louisiana, Mississippi, Alabama, Florida, Tennessee, Kentucky, Virginia, and West Virginia.
3. Marshall is a member of C-USA. As a result of C-USA’s relationship with Marshall, C-USA conducts business in Huntington, Cabell County, West Virginia.

JURISDICTION

4. Jurisdiction is proper in this Court as the Defendant C-USA regularly conducts business in Cabell County, West Virginia.

5. Pursuant to *West Virginia Code* § 56-3-33(1) and (2), this Court has jurisdiction over C-USA. Specifically, C-USA transacts business in West Virginia and has contracted with Marshall since October 24, 2003, to provide services in West Virginia by operating and conducting conference functions in Huntington, Cabell County, West Virginia.

6. The Court has general jurisdiction to issue an injunction pursuant to *West Virginia Code* § 53-5-4, which establishes general jurisdiction regarding the awarding of injunctions, regardless of whether the proceeding enjoined be in or out of this circuit or the party against whose proceeding the injunction is asked reside in or out of the same.

7. Further, pursuant to *West Virginia Code* § 55-13-1, et seq., the Court has jurisdictional “power to declare rights, status and other legal relations whether or not further relief is or could be claimed.” As such, the Court has general jurisdictional power to declare the rights of the parties in this case.

FACTS

8. On October 24, 2003, then Marshall University president, Dan Angel, signed a “New Member Agreement” with C-USA. *See* New Member Agreement, attached hereto as **Exhibit A**. Marshall subsequently joined C-USA effective July 1, 2005, and its sports teams have competed as members of C-USA since that time.

9. The New Member Agreement states “Marshall agrees fully and completely to abide by and comply with all provisions and conditions of the Bylaws.” *See* Exhibit A, para. 4.

10. However, a copy of the Bylaws that existed at that time was not attached to the New Member Agreement.
11. Upon information and belief, at the time Marshall announced its intent to join C-USA in October 2003, the Bylaws did not include language requiring arbitration as to disputes regarding the termination of a school's membership of the conference.
12. Notably, the New Member Agreement indicates that the withdrawal section of the Bylaws is section 3.07 or 3.07A. *See* Exhibit A.
13. Under the current Bylaws, the withdrawal section is 3.06. *See* Current Conference USA Bylaws, attached hereto as **Exhibit B**.
14. Section 3.07 addresses suspension and expulsion. *See* Exhibit B. Thus, the current Bylaws are obviously different than the Bylaws that existed in 2003.
15. The current C-USA Bylaws do not have an effective date, nor do they contain a signature page. *See* Exhibit B.
16. On November 1, 2021, Marshall served C-USA with a withdrawal notice indicating its intent to withdraw from C-USA.
17. On January 12, 2022, Marshall notified C-USA that it would end its membership with C-USA effective July 1, 2022.
18. On January 20, 2022, Marshall again notified C-USA that it would end its membership with C-USA effective July 1, 2022 and requested not to be placed on any C-USA athletic schedule going forward
19. On January 25, 2022, Marshall again notified C-USA that it would end its membership with C-USA effective July 1, 2022 and requested not to be placed on any C-USA athletic schedule going forward.

20. Despite these notices, on or about February 11, 2022, C-USA released its 2022 football schedule, which included Marshall.

21. On or about February 15, 2022, C-USA filed a Demand for Arbitration against Marshall seeking to compel Marshall to arbitrate its dispute with C-USA in Dallas, Texas. *See* Demand for Arbitration, attached hereto as **Exhibit C**.

22. C-USA has a history of selectively enforcing provisions of its Bylaws. Specifically, On December 2, 2014, C-USA member school University of Alabama Birmingham (“UAB”) announced it would no longer field a football program despite a C-USA bylaw requirement that member schools sponsor a football program.

23. C-USA permitted and condoned UAB’s knowing violation of the Bylaws.

24. UAB ultimately did not sponsor a football team for the 2015 or 2016 football seasons in violation of C-USA Bylaws for membership; however, UAB, one of the original full members at the conception of the conference, did not lose its membership status with the conference, as C-USA disregarded its Bylaws.

25. The Demand for Arbitration centers around C-USA’s claim that Marshall is in breach, or intends to breach, its alleged contract with C-USA.

26. The Demand for Arbitration seeks to compel Marshall to answer and respond to the arbitration in Dallas, Texas.

27. On February 17, 2022, Marshall received a letter from Kathleen A. Gossett-Cantrell on behalf of the American Arbitration Association (“AAA”). *See* Letter from Gossett-Cantrell, Feb. 17, 2022, attached hereto as **Exhibit D**.

28. The AAA set a deadline to provide availability for an administrative conference by February 22, 2022, answer the Demand for Arbitration by March 3, 2022, and to submit a Checklist of Conflicts form by March 3, 2022. *See* Exhibit D.

COUNT I – DECLARATORY JUDGMENT

Sovereign Immunity

29. Marshall repeats and reasserts the allegations contained in paragraph 1 through 28 above as if fully set forth herein verbatim.

30. Marshall is an arm or instrumentality of the State of West Virginia.

31. As an arm or instrumentality of the State of West Virginia, Marshall enjoys sovereign immunity pursuant to the Eleventh Amendment to the United States Constitution, including immunity from C-USA’s Demand for Arbitration.

32. Further, Article VI, § 35 of the *West Virginia Constitution* provides:

The State of West Virginia shall never be made defendant in any court of law or equity, except the State of West Virginia, including any subdivision thereof, or any municipality therein, or any officer, agent or employee thereof, may be made defendant in any garnishment or attachment proceeding, as garnishee or suggestee. The state and its agencies performing state functions statewide are entitled to this absolute immunity.

33. As an arm or instrumentality of the state of West Virginia, Marshall does not possess the power to waive sovereign immunity.

34. As an arm or instrumentality of the State of West Virginia, regardless of the type of relief sought by C-USA against Marshall for breach of contract, the Demand for Arbitration is barred by the Eleventh Amendment and Article VI, § 35 of the West Virginia Constitution.

35. As a result, the arbitration clause in the Bylaws attached as Exhibit B cannot be effectuated by compelling Marshall to be a defendant to any arbitration because the provision violates the Eleventh Amendment and Article VI, § 35 of the West Virginia Constitution.

36. Moreover, as a knowledgeable party, C-USA has implicitly agreed to submit any contractual disputes with or against Marshall for resolution with the West Virginia Legislative Claims Commission.

37. This Court has the power to declare rights, status and other legal relations between the parties pursuant to the Uniform Declaratory Judgments Act, *West Virginia Code* § 55-13-1, *et seq.* In that regard, any person interested in a written contract or other writing constituting a contract, or whose rights, status or other legal relations are affected therefrom, may have any questions of construction or validity determined such to obtain a declaration of rights, status or other legal relations thereunder. *W. Va. Code* § 55-31-2.

38. Based upon the foregoing, Marshall seeks and is entitled to the following declaratory judgment:

- (a) The arbitration provision set forth in the Bylaws attached as Exhibit B is void as to its enforcement against Marshall because it violates the Eleventh Amendment and Article VI, § 35 of the West Virginia Constitution.
- (b) That Marshall enjoys sovereign immunity from being made a defendant in any civil action, claims or arbitration asserted by C-USA, which arise out of an alleged breach of contract;
- (c) That Marshall enjoys sovereign immunity from any arbitration filed by C-USA, its successors, or other persons or entities for the facts made the basis of this civil action; and,
- (d) That any civil action or claim alleging breach of contract asserted by C-USA be addressed before the West Virginia Legislative Claims Commission as the sole

body permitted to address such claims pursuant to *West Virginia Code* §§ 14-2-4 and 14-2-13.

COUNT II – DECLARATORY JUDGMENT

Lack of Mutual Assent

39. Marshall repeats and reasserts the allegations contained in paragraph 1 through 38 above as if fully set forth herein verbatim.

40. In order to establish mutual assent to the arbitration clause within the Bylaws attached hereto as Exhibit B, C-USA references the New Member Agreement from October 24, 2003.

41. The Bylaws attached hereto as Exhibit B were enacted years after the New Member Agreement with a completely different set of teams after multiple changes to the conference membership.

42. The Bylaws attached hereto as Exhibit B are not referenced by the New Membership agreement because they did not exist at the time the New Membership agreement was signed.

43. In West Virginia, to incorporate an arbitration clause by reference, the document referencing the arbitration agreement must make a clear reference to the other document so that the parties' assent to the reference is unmistakable, the writing must describe the other document in such terms that its identity may be ascertained beyond doubt, and it must be certain the parties to the agreement had knowledge of and assented to the incorporated document to avoid harm and undue hardship. *State ex rel. U-Haul Co of West Virginia v. Zakaib*, 232 W. Va. 432, 752 S.E.2d 586 (2013).

44. No writing signed by Marshall clearly references the current Bylaws or the arbitration clause with certainty as required by West Virginia law.

45. Marshall did not have knowledge or assent to the incorporation of the arbitration into the Bylaws, and as a result, there is no mutual assent to their inclusion.

46. Based upon the foregoing, Marshall seeks and is entitled to the following declaratory judgment that the arbitration provision was not agreed to by the parties and as a result it is unenforceable.

COUNT III – DECLARATORY JUDGMENT

Arbitration Clause Not Applicable

47. Marshall repeats and reasserts the allegations contained in paragraph 1 through 46 above as if fully set forth herein verbatim.

46. Members who have reached the decision to withdraw from the conference are referenced in the Bylaws as “withdrawing members.” For example, Section 3.06 of the Bylaws describes how “withdrawing members” lose rights that conference members otherwise have including loss of revenue distribution, loss of right to have a representative on the Board of Directors, and loss of the right to attend any meeting of, vote on any matter before, receive notice of any meeting, or receive copies of any materials distributed to the Board of Directors. Accordingly, C-USA classifies and distinguishes “members” from “withdrawing members” as it pertains to its Bylaws and rights, obligations and duties under the same.

47. The Bylaws attached as Exhibit B states in pertinent part:

14.01 Arbitration. All disputes, controversies, claims, demands, and differences (herein all referred to as “dispute”).

(a) Between or among the Conference and any one of more *members, former members, suspended members, or expelled members* of the Conference; or

- (b) Between or among two or more members, former members, suspended members, or expelled members of the Conference arising from or relating in any respect to the Conference or to the participation of any member of the Conference in the affairs of the Conference, shall be resolved by final and binding arbitration in Dallas, Texas, or the city in which the Conference Office is located before a panel of three arbitrators, at least two of which shall be licensed attorneys, pursuant to the rules of the American Arbitration Association in effect at the time the dispute arises.

(emphasis added).

48. The arbitration specifically applies to “members, former members, suspended members, or expelled members,” but does not apply to “withdrawing members” which are excluded from the list of those for whom the arbitration provision applies.

49. Despite not including “withdrawing member” in the arbitration provision, the term withdrawing member is referenced in the Bylaws.¹

50. Because Marshall is a withdrawing member in this instance, the arbitration provision does not pertain to it.

51. Based upon the foregoing, Marshall seeks and is entitled to the following declaratory judgment that the arbitration provision does not apply to Marshall because it is a withdrawing member, and as a result, C-USA cannot proceed with arbitration.

COUNT IV – INJUNCTIVE RELIEF

52. Marshall repeats and reasserts the allegations contained in paragraph 1 through 52 above as if fully set forth herein verbatim.

53. There is a strong likelihood that Marshall will suffer actual, imminent, immediate, and irreparable harm in the absence of preliminary relief, and the balance of hardships weighs in the Plaintiff’s favor.

¹ For example, see Section 3.06, page 5, where the term “withdrawing member” is mentioned multiple times.

54. Marshall's request for injunctive relief is designed only to forestall the actions of C-USA with the American Arbitration Association to preclude the same from proceeding so that the Court can more fully address, consider, and rule upon the declaratory judgment action. The injunction is necessary to prevent the evasion of an important public policy, to prevent a multiplicity of suits that result in delay, inconvenience, expense, inconsistency, or will be a "race to judgment." Further, injunctive relief will protect Marshall from vexatious, inequitable, and/or harassing legal proceedings via the arbitration forum.

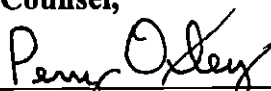
55. The injunctive relief is in the interest of the public, as the injunctive relief involves Marshall, a public institution, as well as several other public universities regarding the scheduling of athletic events for the 2022-2023 athletic season, along with the general public supporters of each institution.

WHEREFORE, the Plaintiff, Marshall University Board of Governors, demands specific relief in the form of a declaratory judgment as set forth above and temporary, preliminary, and permanent injunctions against Conference USA in proceeding with arbitration. The Plaintiff further seeks any and all other relief this Court deems just and proper.

THE PLAINTIFF DEMANDS A TRIAL BY JURY.

MARSHALL UNIVERSITY BOARD OF GOVERNORS,

By Counsel,



Perry W. Oxley (WV Bar # 7211)
Brian D. Morrison (WV Bar # 7489)
Eric D. Salyers (WV Bar # 13042)
Christopher Weed (WV Bar # 13868)
Oxley Rich Sammons, PLLC
P.O. Box 1704
Huntington, WV 25718
(304) 522-1138

IN THE CIRCUIT COURT OF CABELL COUNTY, WEST VIRGINIA

MARSHALL UNIVERSITY
BOARD OF GOVERNORS,

Plaintiff,

v.

Civil Action No. _____

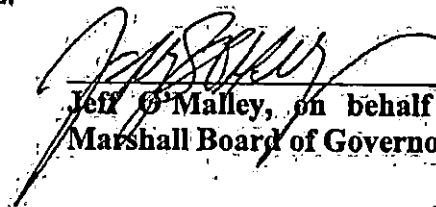
CONFERENCE USA,

Defendant.

VERIFICATION

I, Jeff O'Malley, on behalf of the Marshall University Board of Governors, after making an oath or affirmation to tell the truth, say the facts and allegations stated in the Plaintiff's Complaint for Declaratory Judgment and Other Specific Relief filed in this action are true to the best of my personal knowledge; and if I have relied upon information given to me by others, I believe that information to be true.

Executed on this 22 day of February, 2022.


Jeff O'Malley, on behalf of the
Marshall Board of Governors

STATE OF WEST VIRGINIA,
COUNTY OF CABELL, TO-WIT:

This Verification was sworn to or affirmed before me on the 22 day of February, 2022.

My commission expires Sept. 10, 2025.

