STATE OF NORTH CAROLINA	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION
COUNTY OF ORANGE	19-CVS-1579
NORTH CAROLINA DIVISION SONS OF CONFEDERATE VETERANS, INC., Plaintiff, v. THE UNIVERSITY OF NORTH CAROLINA and THE UNIVERSITY OF NORTH CAROLINA BOARD OF GOVERNORS, Defendants.	**BRIEF OF AMICUS CURIAE**

University of North Carolina students Alyassa Boyd, De'Ivyion Drew, Elisabeth Jones, Gina Balamucki, William Holland and Liliya Oliferuk, and Associate Professor Michelle Robinson (hereinafter, "Amici" or "Proposed Intervenors") respectfully present this brief as amicus curiae on the question of the Court's jurisdiction over this matter. North Carolina courts may approve consent judgments in settlement of actual controversies before them, but as in any other case, a court must first have jurisdiction over the matter. The Court lacks jurisdiction for three independent reasons: (1) Plaintiff lacks standing to pursue its Claims for Relief in the Verified Complaint, as Plaintiff never has had any ownership interest in the Confederate Monument ("the Monument") and it has not otherwise suffered any legally cognizable injury necessary to establish standing; (2) Plaintiff additionally lacks standing to pursue relief under the Declaratory Judgment Act because this matter does not present an "actual controversy"

necessary to confer jurisdiction on the Court; and (3) because N.C. Gen. Stat. § 100-2.1 establishes no private right of action.

These jurisdictional failures existed at the time of the Court's approval of the Consent Judgment in this case. Without jurisdiction, the Court's ratification of the agreement between the parties was beyond its authority; therefore the Court must declare the Consent Judgment void and dismiss this case. If the judgment is void and the case dismissed, there is no legal basis for the transfer of University property, and Defendants must take all necessary action to recover the Monument and the $2.5 million they transferred to the Monument Trust.

STATEMENT OF INTEREST OF AMICUS CURIAE

As students and faculty of the University and the intended beneficiaries of the University's mission and funds, Amici have a direct and immediate interest in Defendants' transfer of the Monument and $2.5 million in University funds to support an organization espousing "devotion to and reverence for the principles represented by the Confederate States of America." Complaint ¶ 2. These conveyances not only deprive Amici of the material assistance afforded by the diversion of these funds from support of their education and teaching, they also directly contradict the University's stated mission "to serve as a center for research, scholarship, and creativity and to teach a diverse community of undergraduate, graduate, and professional students to become the next generation of leaders." University of North Carolina, Mission and Values, https://www.unc.edu/about/mission (Feb. 2014).

In contrast, Plaintiff North Carolina Division of the Sons of Confederate Veterans, Inc. (hereinafter "Plaintiff" or "SCV") is dedicated to celebrating the Confederate States of America, a treasonous rebellion against the United States founded for the purpose of retaining race-based

chattel slavery. *See* Constitution of the Confederate States, March 11, 1861, https://avalon.law.yale.edu/19th_century/csa_csa.asp. Thus, as a direct operation of the Consent Order, $2.5 million in University funds has been diverted from support of Amici's education and teaching to further activities and goals that propagate white supremacist ideology and otherwise contradict the University's mission.

The Monument was erected like many similar ones across the country during the ascendancy of Jim Crow at the turn of the century. It was part of a campaign by the United Daughters of the Confederacy (UDC) to re-write the history of the Civil War as the so-called "Lost Cause" of a just southern struggle, and slavery as benevolent and benign. *See* Ex. D at 2, attached to Verified Compl.[1] Plaintiff shares the UDC's organizational mission of perpetuating the ahistorical and white supremacist Lost Cause narrative. *See* SCV Articles of Incorporation, attached to Verified Compl. as Ex. A, at 1.

In conveying the Monument and $2.5 million to subsidize SCV's activities, Defendants substantially enhance Plaintiff's ability to perpetuate the white supremacist Lost Cause ideology, which directly and immediately impacts Amici in several ways, as they each describe in detail in their affidavits. *See* Affidavits of Amici, Exhibits 2-8, Motion to Intervene.

[1] *See also* Karen L. Cox, *The whole point of Confederate monuments is to celebrate white supremacy*, The Washington Post (Aug. 16, 2017), https://www.washingtonpost.com/news/posteverything/wp/2017/08/16/the-whole-point-ofconfederate-monuments-is-to-celebrate-white-supremacy/ (last visited Nov. 1, 2019) ("The group responsible for the majority of these memorials [to the Confederacy] was the United Daughters of the Confederacy, among the most influential white women's organizations in the South in the late 1800s and early 1900s. Honoring Confederate heroes, generals and soldiers was one of its primary objectives, and hundreds of monuments serve as testimony to the Daughters' aggressive agenda to vindicate the Confederacy."). As Professor Cox noted, "[The UDC's] installation [of Confederate monuments] came against a backdrop of Jim Crow violence and oppression of African Americans. The monuments were put up as explicit symbols of white supremacy." Monuments glorifying Confederate soldiers such as the one at issue in this case were and continue to be a primary tool to achieve that mission.

Amici are the direct and intended beneficiaries of the public funds at stake in this case. Their interests are also impacted by the Defendants' betrayal of the University's educational mission through the transfer of the Monument and 2.5 million dollars to support the propagation of white supremacist ideals and the false and destructive "Lost Cause" narrative

STATEMENT OF THE CASE

On November, 22, 2019, before any litigation was filed and before any meeting authorizing settlement of any litigation, the Chair of the University of North Carolina Board of Governors ("BOG"), Randy Ramsey, signed the Consent Judgment, Declaratory Judgment and Order ("Consent Order") settling this case and conveying possession of the Confederate Monument known as "Silent Sam" (hereinafter "the Monument") to the Plaintiff. Consent Order at 24. On November 23, the United Daughters of the Confederacy – North Carolina Division, incorporated in 1992 ("1992 UDC"), and the SCV executed a "Memorandum of Assignment" transferring "all of UDC's reversionary and other existing legal or equitable property rights, title, and interests in and to the Confederate Monument presented by UDC to the University of North Carolina on or about June 2, 1913 ("the Monument"), to the extent that North Carolina law provides for such interest(s)." Compl. Exhibit C. On November 26, Interim President of the University of North Carolina, William Roper, signed the Consent Order.

On November 27, 2019 the BOG's Committee on University Governance met, mostly in closed session, and, upon information and belief, voted to approve the settlement that is the subject of this case. Forty-five minutes later, the Verified Complaint was filed, and within the next seven minutes, Defendants' acceptance of service, Answer, and the Consent Order signed by Superior Court Judge Allen Baddour, were all filed. On the same day, Defendants transferred

the Monument to Plaintiff and 2.5 million dollars in University funds to Matthew S. McGonagle, the trustee of the Monument Trust established under the Consent Order, to be used by Plaintiff for "allowable expenses," including (among many other things) legal fees, "security costs" and the construction of a facility to house and maintain the Monument. *See* Motion for Stay Pending Appeal, Ex. 1; Consent Order at 17-19.

Several days after the pleadings and Consent Order were filed, a letter was made public from the SCV's "Division Commander" Kevin Stone to SCV's membership announcing the "confidential negotiations" and "solution." Stone letter, attached to Motion to Intervene as Exhibit 1 at 6. In the letter, Stone states that Plaintiff knew it lacked standing and that any claims it would bring were meritless at the time it filed the verified complaint (*Id.*); that before any SCV complaint existed, the BOG had approached SCV's attorney "want[ing] to open negotiations" regarding disposition of the Monument (*Id.*); and that since then, the SCV had been "working directly with [the BOG]." *Id.* at 8. The letter concludes that "[t]his judicial settlement not only will insure the future of Silent Sam, but also the legal and financial support for [the SCV's] continued and very strong actions in the future." *Id.* at 9.

Within days of publication of the SCV letter, Amici filed a Motion to Intervene in this case and to stay execution of the judgment with motions under Rule 60(b)(for Relief from Judgment) and Rule 12(b)(to dismiss for lack of standing and failure to state a claim) attached. At the hearing on December 20, 2019, the Court stated that he met with the parties in advance of any litigation being filed.[2] This Court then denied the Motion to Intervene, but ordered the

[2] Another irregular and problematic aspect of this case is evidenced by recently released text messagesbetween the Court and counsel for the BOG and UNC, showing that the two of them were discussing this matter outside of court chambers from at least December 18, 2019, met to discuss it on December 19, and met again with counsel for the

parties to brief the issue of whether Plaintiff has standing, and allowed Proposed Intervenors to submit an amicus brief. The Court has also allowed responsive briefs (due February 5). A hearing on the issue is to be held on February 12.

Proposed Intervenors filed a Notice of Appeal of the denial of their Motion to Intervene on January 14, 2020, and, in part because of the irregular and problematic circumstances surrounding this matter, also moved to stay all proceedings pending their appeal.

ARGUMENT

I. THE COURT MUST SET ASIDE THE CONSENT JUDGMENT AND DISMISS THIS CASE FOR LACK OF JURISDICTION.

Jurisdiction refers to "[t]he legal power and authority of a court to make a decision that binds the parties to any matter properly brought before it." *In re T.R.P.*, 360 N.C. 588, 590, 636 S.E.2d 787, 789 (2006). "When a court has no authority to act its acts are void." *Allred v. Tucci*, 85 N.C. App. 138, 142, 354 S.E.2d 291, 294 (1987) (quoting *Monroe v. Niven*, 221 N.C. 362, 364, 20 S.E.2d 311, 312 (1942)). Similarly, a consent judgment entered without jurisdiction is void. *Id.* at 144 ("A void judgment, however, binds no one and it is immaterial whether the judgment was or was not entered by consent."). Furthermore, "it is well settled that consent of the parties to an action does not confer jurisdiction upon a court to render a judgment which it would otherwise have no power or jurisdiction to render." *Id.*; *Bohannan v. McManaway*, 208 N.C. App. 572, 584, 705 S.E.2d 1, 9 (2010) ("The parties cannot confer subject matter jurisdiction upon the court by entry of a consent order regarding child custody.").

Plaintiff on December 20. https://www.wbtv.com/2020/01/29/judge-silent-sam-case-had-frequent-contact-with-unc-lawyer-days-before-lawsuit-was-filed/.

A consent judgment entered without jurisdiction must be vacated. In *Tilley v. Diamond*, the North Carolina Court of Appeals considered a challenge to a consent judgment, which the defendant argued the trial court had approved without subject matter jurisdiction because the plaintiff had no standing to bring the custody action against him. *See Tilley*, 184 N.C. App. 758, 2007 WL 2034088, *2-3 (2007) (unpub.). The court agreed that the plaintiff lacked standing, held that "the trial court erred by denying defendant's motion to set aside the consent judgment for lack of subject matter jurisdiction," and vacated the order. *Id.* at *4. Likewise, in *Bohannan v. McManaway*, the Court of Appeals considered the validity of a consent order, which the trial court had approved even though the plaintiff had failed to file a complaint in the action. *See* 208 N.C. App. 572, 579-81 (2010). Carefully examining the record, the court found that "although the 2003 consent order includes a conclusion of law that the district court has jurisdiction over the parties and subject matter of the proceeding, there appears to be no factual basis to support such a conclusion of law." *Id.* at 584. The court remanded the action to the trial court, admonishing it to consider whether it had subject matter jurisdiction when it approved the consent order. *Id.* at 584-85. *Cf. Daniel v. Moore*, 164 N.C. App. 534, 540 (2004) (vacating a court-approved consent judgment where the trial court had been without power to sign it because one of the parties had withdrawn its consent).

In considering the question of whether it had jurisdiction to enter the Consent Order, this court is exercising its own authority under Rule 60(b). In this procedural posture, this Court has the duty to make sure that the findings of fact in the Consent Order are supported by evidence and the conclusions of law legally correct. *Briley v. Farabow*, 348 N.C. 537, 547, 501 S.E.2d 649, 655 (1998)(citing *Hoglen v. James*, 38 N.C. App. 728, 731, 248 S.E.2d 901, 903 (1978));

Neuse River Found., Inc. v. Smithfield Foods, Inc., 155 N.C. App. 110, 114, 574 S.E.2d 48, 51 (2002). In determining whether the findings of fact are true, this Court can consider matters outside the pleadings. *Harris v. Matthews*, 361 N.C. 265, 271, 643 S.E.2d 566, 570 (2007); *WLAE, LLC v. Edwards*, 809 S.E.2d 176, 181 (N.C. Ct. App. 2017).

A. The court lacked jurisdiction because the Plaintiff lacked standing.

"[S]tanding is a necessary prerequisite to a court's proper exercise of subject matter jurisdiction and can be challenged at any stage of the proceedings, even after judgment." *Willowmere Cmty. Ass'n, Inc. v. City of Charlotte*, 370 N.C. 553, 561, 809 S.E.2d 558, 563 (2018) (internal quotation marks and citations omitted). Standing cannot be conferred by consent, waiver or estoppel by the parties; rather, it must have a factual and legal basis in the record. Any other rule would allow parties to conspire to confer standing when none actually exists. *See, e.g., In re T.R.P.*, supra, at 595, 636 S.E.2d at 793 (holding that parties cannot by consent, waiver, or otherwise confer subject matter jurisdiction of an action over which the court does not have jurisdiction).

"A party seeking standing has the burden of proving three necessary elements: (1) 'injury in fact' -- an invasion of a legally protected interest that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Beachcomber Props., L.L.C. v. Station One, Inc.*, 169 N.C. App. 820, 823, 611 S.E.2d 191, 193 (2005) (holding that plaintiff had no standing to bring a declaratory judgment action when the plaintiff had no legally protected interest or "injury in fact" with respect to the property at issue).

Each element of standing, including the "invasion of a legally protected interest," is "an indispensable part of the plaintiff's case." *State on Relation of City of Albemarle v. Nance*, 831 S.E.2d 605, 609 (N.C. Ct. App. 2019). "In most cases, the issue of standing depends on whether the party has suffered an 'injury in fact.'" *Meadows v. Iredell Cty.*, 187 N.C. App. 785, 787, 653 S.E.2d 925, 928 (2007). An "injury in fact" sufficient for standing must entail "an invasion of a legally protected interest . . . ." *Id.* at 787; *Neuse River Found.*, 155 N.C. App. at 114. And although a showing that an actual loss has been sustained is not required to bring a claim under the Declaratory Judgment Act, the Plaintiff must still demonstrate the risk of harm or injury in fact to a legally protected interest to have standing to invoke the court's jurisdiction. *See Town of Emerald Isle By & Through Smith v. State*, 320 N.C. 640, 360 S.E.2d 756 (1987); *Beachcomber*, 169 N.C. App. at 824, 611 S.E.2d at 194 (2005) ("plaintiff has no legally protected interest, or "injury in fact," and therefore lacks standing to bring this declaratory action against defendant.").

Plaintiff has failed to meet its burden to prove that it has standing because it has failed to establish that it has any legally protected interest in the Monument. Plaintiff claims it acquired ownership of the Monument via the November 23, 2019 assignment of interest by the 1992 UDC. Complaint ¶¶10, 18. However, that claim fails for the following reasons:

1. The United Daughters of the Confederacy – North Carolina Division organized in 1897 *(see* Compl. Ex. D, 1897 UDC Constitution and Bylaws)("1897 UDC") and its local chapter that worked with UNC to raise funds for the Monument were a part of an unincorporated hereditary association that was legally incapable of owning property. See subsection (1)(a) of this section, *infra*.

2. Even if the 1897 UDC could have owned property, Plaintiff concedes that under the arcane Law of Couverture, its local chapter members ("the Chapter members") lacked the capacity to bind the organization in a contract absent the written consent of their husbands, which they did not obtain. Compl. ¶ 37 and Ex. S. As a result, the letters between UNC President Venable and the Chapter members merely document a coordinated fundraising effort, but did not create a legally enforceable contract, either with the sculptor or UNC. Because the 1897 UDC never owned the Monument, as a matter of law it could not gift the Monument to UNC.

3. Even if the 1897 UDC had owned the Monument and conveyed it as a gift to UNC, the statement at the presentation ceremony, "may it stand forever as a memorial," did not create a valid condition subsequent restricting its use and vesting a reversionary interest in the 1897 UDC. Its "gift" to the University was unconditional, and any purported ownership interest would have been permanently severed upon the Monument's installation on campus.

4. Even if the 1897 UDC had retained an interest in the Monument through a "condition subsequent," Plaintiff failed to allege, and can offer no evidence to support, that the 1897 UDC transferred its interests to the 1992 UDC, nor that the 1992 UDC was the 1897 UDC's legal successor in interest.

5. Even if the 1992 UDC had received a transfer of assets or been the successor in interest to the 1897 UDC, the assignment from the 1992 UDC to the Plaintiff is

void as a matter of law pursuant to N.C. Gen. Stat. § 143B-426.40A(b), because upon information and belied, the required audit and warrant never occurred.

Additionally, even if Plaintiff had alleged and could demonstrate all of the requisite elements to establish a legally protected interest in the Monument, Plaintiff would still lack standing to pursue its Declaratory Judgment claims because there is no actual controversy between the parties, and there is no private right of action under N.C. Gen. Stat. 100-2.1.

1. **Plaintiff does not own the Monument.**

a. The 1897 UDC could not own property.

The National Daughters of the Confederacy was an unincorporated women's hereditary association founded in 1894, and in 1895 was renamed "United Daughters of the Confederacy." ("National UDC") Kristen L. Cox, DIXIE'S DAUGHTERS: NEW PERSPECTIVES ON THE HISTORY OF THE SOUTH (2003). The Constitution and bylaws of the National UDC allowed for states to set up "Divisions," and each Division was authorized to open local "Chapters." *See* National UDC Constitution, https://archive.org/stream/constitutionofdaughters/constitutionofdaughtersdjvu.txt. Unlike corporations, "associations" like the UDC could not own property, enter into contracts or be sued. *See Tucker v. Eatough*, 186 N.C. 505, 120 S.E. 57, 58 (1923) ("It has been held by our court that unincorporated associations cannot be sued in the manner attempted in this case, and it has been held by various other courts also that voluntary unincorporated associations have no separate legal existence; that they cannot make contracts or be sued as an association except through the individuals who compose its membership.").

The 1897 UDC Constitution allowed the North Carolina Division to charter local chapters under the Constitution of the National UDC. Compl. Exhibit D, Art. III. Article VII of the North

Carolina Division allowed the Division to make its own rules and regulations "provided such be not repugnant to the laws of North Carolina or Constitution of the United Daughters of the Confederacy." Compl Exhibit D, Art VII.

Because the National UDC was not a corporate entity capable of owning property, neither it nor its NC Division, the 1897 UDC, could have owned the Monument. Allegations in the Complaint regarding the "UDC" acting to acquire an interest in the Monument, or referring to Chapter members as "UDC Representatives" is misleading as a matter of law. Compl. ¶¶26, 29, 32.

b. Even if the 1897 UDC could have owned property, its Chapter members lacked the capacity to bind the organization in a contract.

Plaintiff alleged that UNC President Venable signed the monument sculptor contract as an agent for the UDC because members of the UDC lacked the capacity to enter into contracts because they were women. Compl. ¶¶36-37; Consent Judgment ¶ 27. Notably, the contract itself fails to name any party to the contract other than the sculptor. *See* Compl. Ex. W. Nevertheless, the suggestion that UNC President Venable signed the contract on behalf of UDC members to avoid the doctrine of coverture (Consent Order ¶27) is erroneous and misleading. President Venable could not enter into any legally binding arrangements on behalf of the Chapter members without the written consent of their husbands. *See e.g.*, *Ball & Sheppard v. Paquin*, 140 N.C. 83, 89, 52 S.E. 410, 412 (1905) ("No woman during her coverture shall be capable of making any contract to affect the real or personal estate, except for her necessary personal expenses or the support of her family, or such as may be necessary in order to pay her debts existing before

marriage, without the written consent of her husband, unless she be a free trader, as hereinafter allowed.")

That consent was not present, and Plaintiff admits that Mrs. London, the primary Chapter member communicating with President Venable, told him so: "Your letter with the contract for the monument was received last night. Of course I do not wish to sign it. You are the proper one to do so. . . . Mr. London says he prefers for the business end of it to be handled by you - the money to be collected and turned over to you ...." Compl. Ex. S at 56, 58. Even if the 1897 UDC could own property, and even if a local chapter member could bind the NC Division in a contract to acquire property, the so-called "UDC's representative" did not have her husband's permission to sign the sculptor contract, and therefore UDC was never a party to that contract. For the same reason, the UDC could not have contracted with President Venable to act as its agent. UNC President Venable, who signed all correspondence with the sculptor "President," could only bind himself or the University when he signed the contract. Which is exactly what happened here: UNC signed the contract, the contract was between the UNC and the sculptor, and UNC was always the owner the Monument.[3]

c. Even if the 1897 UDC could own property, and even if the Chapter members could have contracted on behalf of the 1897 UDC through President Venable, the letters between Venable and the Chapter members document a coordinated fundraising effort, not a contractual ownership interest for UDC.

Plaintiff suggests that the correspondence between UNC President Venable and the Chapter members implied a contract for the UDC's ownership of the Monument. Compl. ¶¶79-

[3] It is remarkable that this Consent Order, which facilitates and expands the white supremacist "Lost Cause," fails in part as a result of a historic legal relic of the patriarchal oppression and exploitation of women.

83. Even the selected correspondence cited in the Complaint fails to establish such a contract, and the full historical record shows that the University, not the UDC, owned it.

"A 'contract implied in fact,' . . . arises where the intention of the parties is not expressed, but an agreement in fact, creating an obligation, is implied or presumed from their acts, or, as it has been otherwise stated, where there are circumstances which, according to the ordinary course of dealing and the common understanding of men, show a mutual intent to contract." *Snyder v. Freeman*, 300 N.C. 204, 218, 266 S.E.2d 593, 602 (1980) (quoting 17 C.J.S. Contracts s 4b (1963)). The essence of any contract is the mutual assent of both parties to the terms of the agreement so as to establish a meeting of the minds. *Pike v. Wachovia Bank & Trust Co.*, 274 N.C. 1, 161 S.E.2d 453 (1968). The parties' intent is normally demonstrated by offer and acceptance. "In the formation of a contract an offer and an acceptance are essential elements." *Yeager v. Dobbins*, 252 N.C. 824, 828, 114 S.E.2d 820, 823 (1960). With regard to a contract implied in fact, one looks not to some express agreement, but to the actions of the parties showing an implied offer and acceptance. *Snyder v. Freeman*, 300 N.C. 204, 218, 266 S.E.2d 593, 602 (1980).

Plaintiff includes President Venable's June 5, 1911 letter to Chapter member Mrs. London, informing her that UNC Alumni subscribed for $5,000 of the Monument cost; that Venable "hopes that the U.D.C. *chapters* can raise at least $2,500"; and that he would write to the sculptor and "tell him that he can now go ahead with the making of the monument." Compl. Ex. V (emphasis added). Importantly, Plaintiff omits Venable's June 17, 1911 letter to London in which he asks her to send the UDC chapters' donation to UNC's Bursar, and further states that the sculptor is sending him the contract. *See* Proposed Intervenors' Rule 60(b) Motion, Ex. 2. The Plaintiff also neglects to mention that the UDC chapters' fundraising fell short and the

remaining amount owed to the sculptor was paid directly from University coffers. *See* University of North Carolina Board of Trustees Minutes, October 26, 1914, attached hereto as Exhibit 1.

Taken together, the correspondence between UNC President Venable and the Chapter members shows nothing more than a coordinated fundraising effort for the Monument, with ultimate dominion and control of the Monument always resting with the University. It shows an intent that the UDC chapters would donate a minority portion of the Monument costs to the University; and that UNC President Venable solicited the significant majority of donations from alumni, signed the contract with the sculptor, and paid the sculptor from a University account. There is no evidence that the actions of the parties show an offer and acceptance from which any contract between the 1897 UDC and either UNC or the sculptor could be implied. The existence of actual written contract in fact between UNC and the sculptor further belies any implied contract claim. *Vetco Concrete Co. v. Troy Lumber Co.*, 256 N.C. 709, 713, 124 S.E.2d 905, 908 (1962)("It is a well established principle that an express contract precludes an implied contract with reference to the same matter.").

d. Because the 1897 UDC never owned the Monument, as a matter of law it could not gift the Monument to UNC.

"To constitute a gift there must be an intention to give, and the intention must be consummated by a delivery of, and loss of dominion over, the property given, on the part of the donor." *Buffaloe v. Barnes*, 226 N.C. 313, 318, 38 S.E.2d 222, 225 (1946). The 1897 UDC never had dominion over the Monument; even if it had, in order to constitute a valid gift, there must also have been 1) donative intent; and 2) actual or constructive delivery. *Holloway v. Wachovia Bank & Trust, Co.*, 333 N.C. 94, 100, 423 S.E.2d 752, 755 (1992). These two elements act in concert, as

the present intention to make a gift must be accompanied by the delivery, which must divest the donor of all right, title, and control over the property given. *Buffaloe*, 226 N.C. at 318, 38 S.E.2d at 225; *see also Thomas v. Houston*, 181 N.C. 91, 93, 106 S.E. 466, 468 (1921)(the intention must be executed by a complete and unconditional delivery). The intention to give, unaccompanied by the delivery, constitutes a mere promise to make a gift, which is unsupported by consideration, and, therefore, non-obligatory and revocable at will. *Sinclair v. Travis*, 231 N.C. 345, 353, 57 S.E.2d 394, 400 (1950).

The 1897 UDC local chapters members may well have had donative intent, but they never had the requisite right, title or dominion over the Monument necessary to make a gift, nor was there actual or constructive delivery. Therefore there was no gift.

e. Even if the 1897 UDC had owned the Monument and conveyed it as a gift to UNC, the Chapter member's statement at the ceremony, "may it stand forever as a memorial," did not create a valid condition subsequent restricting its use and vesting a reversionary interest in the 1897 UDC.

Plaintiff alleges that when Mrs. London said, at the ceremony after the Monument was affixed on campus in 1913, "Accept this monument and may it stand forever as a memorial to those sons of the University who suffered and sacrificed so much at the call of duty," (Complaint ¶42; Consent Judgment ¶32) she created "a parol modification of the written contract entered into between UDC and UNC-CH." Compl. ¶ 85. The Consent Order concludes that these words amount to a "condition subsequent" on the UDC's gift of the Monument and created a reversionary interest which the 1897 UDC retained. Consent Judgment, Concl. Of Law ¶9.

This is a clear error. First, any condition on a gift must be clearly stated prior to its delivery, and cannot be made after the fact. *See Courts v. Annie Penn Mem'l Hosp., Inc.*, 111 N.C.

App. 134, 139, 431 S.E.2d 864, 866 (1993). "A person has the right to give away his or her property as he or she chooses and 'may limit a gift to a particular purpose, and render it so conditioned and dependent upon an expected state of facts that, failing that state of facts, the gift should fail with it.'" *Id.* (quoting *Charlotte Park & Recreation Comm'n v. Barringer*, 242 N.C. 311, 321, 88 S.E.2d 114, 123 (1955). "An unconditional inter vivos gift, however, once given is irrevocable." *Courts*, 111 N.C. App. at 139 (citing, *inter alia*, *Atkins v. Parker*, 7 N.C. App. 446, 450–51, 173 S.E.2d 38, 41 (1970) and affirming that "a gift inter vivos is absolute and takes effect at the time delivery is completed, provided there are no conditions attached."). Even if the Monument had originally been the UDC's property intended as a gift to the University, once it was delivered and annexed to campus, Mrs. London's post hoc words at the ceremony could not legally create a reversionary interest.

Second, even if the member's speech had preceded delivery, conditions subsequent are disfavored and must be clearly stated. *Ange v. Ange*, 235 N.C. 506, 508, 71 S.E.2d 19, 20 (1952) ("A clause in a conveyance will not be construed as a condition subsequent unless it expresses, in apt and appropriate language, the intention of the parties to this effect and a mere statement of the purpose for which the property is to be used is not sufficient to create such condition."). *Town of Belhaven, NC v. Pantego Creek, LLC*, 793 S.E.2d 711, 717 (N.C. Ct. App. 2016) (quoting *Prelaz v. Town of Canton*, 235 N.C.App. 147, 155, 760 S.E.2d 389, 394 (2014)) ("For a reversionary interest to be recognized, the deed must contain express and unambiguous language of reversion or termination upon condition broken. A mere expression of the purpose for which the property is to be used without provision for forfeiture or re-entry is insufficient to create an estate on condition."). In addition, the use of the permissive word "may" at the presentation ceremony

further undercuts the Plaintiff's claim that this language created a reversionary condition. "May" indicates a permissive use and not a mandatory restriction on the use. 17A C.J.S. Contracts § 411 ("In the construction of contracts, the word "may" ordinarily is regarded as permissive, rather than mandatory"); *see also, In re Hardy*, 294 N.C. 90, 240 S.E.2d 367 (1978) (noting that the use of the word "may," it ordinarily shall be construed as permissive and not mandatory).

In sum, even if the UDC Chapter *did own* the Monument prior to delivery (which it did not), the member's aspirational statement, "may it stand forever," is merely an expression of purpose, that the Monument be a permanent part of University's real estate. Whatever else those words could mean, they were legally insufficient to create a reversionary interest or binding restriction on the property.

f. Even if the 1897 UDC had retained an interest in the Monument through a "condition subsequent," Plaintiff failed to allege, and can offer no evidence to support, that the 1897 UDC transferred its interests to the 1992 UDC, nor that the 1992 UDC was the 1897 UDC's legal successor in interest.

Plaintiff claims to have acquired a legal interest in the Monument from the 1992 UDC (Verified Complaint, ¶¶ 9-10, 18), but failed to allege or prove that the 1992 UDC ever had any legally cognizable interest in the Monument. Plaintiff did not plead and offers no evidence that the 1992 UDC is a legal successor in interest to the 1897 UDC. Unlike the 1895 National UDC and the 1897 NC UDC, the 1992 UDC is a non-profit corporation and therefore can own property. Compl. ¶10, Exhibit B. However, there are two other North Carolina corporations which have incorporated under the UDC name with claims to the same historical connection to the 1897 UDC that the parties have asserted. (See John Dunham Chapter,

https://www.sosnc.gov/online_services/search/Business_Registration_Results; Johnston Pettigrew Chapter, https://www.sosnc.gov/online_services/search/Business_Registration_Results). There is neither allegation nor evidence that the 1895 National UDC nor its constituent 1897 NC Division ever merged with the corporate nonprofit 1992 UDC referenced in the Consent Order at ¶¶9-10. Similarly, there is no evidence that the 1992 UDC is otherwise the 1897 UDC's successor in interest, which Black's Law Dictionary defines as "one who follows another in ownership or control of property." Black's Law Dictionary (9th Ed.2009) 1571.

Although Amici have not encountered a North Carolina case squarely on point, courts in other jurisdictions have dismissed complaints for lack of standing when plaintiffs cannot show they are a valid successor in interest to the claim they assert. *Butler v. Price*, 212 W. Va. 450, 454, 574 S.E.2d 782, 786 (2002) (dismissing plaintiff's case for lack of standing because "appellant Butler does not have an ownership interest in the property in question. He is neither a successor in the chain of title to the property nor a successor to the agreement of May 24, 1882, which established the railroad right-of way."); *El T. Mexican Restaurants, Inc. v. Bacon*, 921 S.W.2d 247, 252 (Tex. App. 1995), writ denied (Sept. 19, 1996)(dismissing a plaintiff shareholder suit trying to assert claims of a corporation, "If a shareholder acquires beneficial title to corporate assets by the corporation's forfeiture of corporate privileges, when such privileges may still be revived, this shareholder is not properly a "successor in interest" that can recover personally on a corporation's cause of action."); *VAC Serv. Corp. v. Tech. Ins. Co.*, 49 A.D.3d 524, 525, 853 N.Y.S.2d 577 (2008)(denying a cross-motion to substitute as Plaintiff because the limited partnership was not a successor in interest, and noting "Moreover, the record demonstrated that Tucker Partners, LP, was not a successor-in-interest to the plaintiff's rights under the services

agreement."). Furthermore, a party's mere assertion of a connection to a former entity, without more, cannot establish a succession in interest. *See Metcalf v. Black Dog Realty, LLC*, 200 N.C. App. 619, 625–26, 684 S.E.2d 709, 714–15 (2009) (a plaintiff's belief that a property owner was one of his or her ancestors, without evidence establishing that the plaintiff is a lineal descendant of the owner, fails to establish standing to assert any property claims that the claimed ancestor may have had).

The only argument for the presumption that the 1992 UDC acquired all property interests of the 1897 UDC is found in Defendants' December 18, 2019 brief in opposition to the motion to intervene. *See* Brief in Response to Proposed Intervenors' Motion to Intervene, at 6, n.2. Defendants refer to a page on the website for the 1992 UDC entitled "Division History," which reads: "The North Carolina Division United Daughters of the Confederacy was organized by Mrs. William M. Parsley who had heard that there was such an organization in Nashville, Tennessee called the United Daughters of the Confederacy." The webpage states that the organization "was officially organized on 28 April 1897 with Mrs. Parsley as President . . . ." *Division History*, United Daughters of the Confederacy, North Carolina Division, Inc., https://ncudc.org/blog/about/division-history/. Neither this webpage nor any other piece of evidence in the record establish that the 1992 UDC corporation acquired or succeeded to the 1897 UDC's interests.

At most, the website Defendants referenced shows a desire by the 1992 UDC to connect itself with the 1897 association; but such desire cannot establish the 1992 UDC's legal claim to all the legal and property interests that the 1897 association may have had. *See Metcalf, supra.* Furthermore, the untested hearsay in the website Defendants cite—unsupported by any affidavit as to its accuracy or even an allegation in a verified complaint—cannot establish as a matter of

law that the 1992 UDC assumed the legal rights of the 1897 association. Were such evidence sufficient, a party could lay claim to a defunct organization's assets merely by adopting the same name and writing a webpage suggesting a common genesis.

g. Even if the 1897 UDC owned the Monument and, and even if Plaintiff had alleged and could offer evidence that the 1992 UDC-NC either acquired or succeeded the 1897 UDC's interests, the assignment from the 1992 UDC-NC to the Plaintiff is void as a matter of law.

Notwithstanding all of the other fatal flaws in Plaintiff's ownership argument discussed above, if the assignment from the 1992 UDC to Plaintiff is invalid, then Plaintiff has no ownership interest in the Monument and had no standing to bring this action. The assignment from the 1992 UDC-NC to Plaintiff is void because it is an invalid assignment of a claim against the State. N.C. Gen. State. § 143B-426.40 (the "anti-assignment statute") requires the following:

> (a) Definitions.--The following definitions apply in this section:
>
> (1) Assignment. An assignment or transfer of a claim, or a power of attorney, an order, or another authority for receiving payment of a claim.
> (2) Claim. A claim, a part or a share of a claim, or an interest in a claim, whether absolute or conditional. . . .
>
> (b) Assignments Prohibited.--*Except as otherwise provided in this section, any assignment of a claim against the State is void, regardless of the consideration given for the assignment, unless the claim has been duly audited and allowed by the State and the State has issued a warrant for payment of the claim.* Except as otherwise provided in this section, the State shall not issue a warrant to an assignee of a claim against the State.

N.C. Gen. State. § 143B-426.40(a) and (b)(emphasis added).

The UDC's "assignment" fails to qualify as any exception listed in the statute, and the Plaintiff has failed to plead or offer any evidence that it "has been duly audited and allowed by the State and the State has issued a warrant for payment of the claim," In *Bolton Corp. v. State,*

95 N.C. App. 596, 598, 383 S.E.2d 671, 672 (1989), *disc. review denied*, 326 N.C. 47, 389 S.E.2d 85 (1990), the court applied the anti-assignment statute[4] and held the assignee's claim was void. In that case, a subcontractor assigned its claim for damages against the State to the prime contractor and the prime contractor brought suit. On appeal, the court affirmed the trial court's ruling that the subcontractor's assignment of its claim for damages was void under the anti-assignment statute. *Id.* at 599, 383 S.E.2d at 673.

The court addressed "the partial summary judgment order entered against Bolton as assignee of Phillips, and interpreted a previous version of the anti-assignment statute, N.C. Gen. Stat. § 143–3.3 which provided, "[a]ll transfers and assignments of any claim upon the State of North Carolina or any of its departments or ... any State institution, whether absolute or conditional and whatever may be the consideration thereof ... shall be absolutely null and void." The court concluded that dismissal of the claim was proper because the assignment from Phillips to Bolton was void. *Bolton Corp. v. State*, 95 N.C. App. at 599, 383 S.E.2d at 673 ("Where the pleadings or proof of either party disclose that no claim ... exists, summary judgment is proper.").

In 1991, the General Assembly amended the anti-assignment statute to allow for assignment of claims in certain well-defined circumstances, and to prohibit all other assignments "unless the claim has been duly audited and allowed by the State and the State has issued a warrant for payment of the claim." *See* 1991 North Carolina Session Laws Ch. 688 (S.B. 828). None of the listed circumstances are present, and no audit or issuance of a warrant for

[4] This case was decided under the previous version of the anti-assignment statute, which did not include the exception in the current statute for approval of assignment pursuant to a State audit.

payment has been alleged in this case, nor (upon information and belief) have either occurred. Both would be required, as the interest in the Monument assigned to SCV qualifies as "an interest in the claim" under N.C. Gen. State. § 143B-426.40(a)(2), and is the sole basis for Plaintiff's standing. *See* Consent Order ¶ 17.

If the assignment is void, then Plaintiff is without standing to bring its claims. In *WLAE, LLC v. Edwards*, 809 S.E.2d 176, 182 (N.C. Ct. App. 2017), the plaintiff relied upon assignments executed by a trustee and another person to vest itself with the right to pursue such claims. The Court of Appeals analyzed the validity of the assignment to determine whether Plaintiff had standing. *Id.* at 182. The Court reached the merits of the issue of the validity of the assignment in order to conclude "that plaintiff lacked standing at the time its complaint was filed." *Id.* at 182.

B. The Court also has no jurisdiction because this matter does not present an actual controversy and because there is no private right of action under N.C. Gen. Stat. § 100-2.1.

Plaintiff's claim for relief under N.C. Gen. Stat. § 100-2.1. is nonjusticiable as the statute does not provide a private cause of action under which Plaintiff can assert its fictional ownership rights. Moreover, Plaintiff cannot attempt to sidestep this limitation by presenting its claim under § 100-2.1, because it lacks standing to bring a claim under the Declaratory Judgment Act. North Carolina case law "generally holds that a statute allows for a private cause of action only where the legislature has expressly provided a private cause of action within the statute." *Lea v. Grier*, 156 N.C. App. 503, 508, 577 S.E.2d 411, 415 (2003) (emphasis added); *see also Sykes v. Health Network Sols., Inc.*, 828 S.E.2d 467, 474 (N.C.), 830 S.E.2d 830 (N.C. 2019) ("[T]ypically, a statute allows for a private cause of action only where the legislature has expressly provided a private cause of action within the statute...."). Although in the absence of an explicit private cause of

action in a statute, an implicit right may exist when a statute "requires action from a party, and that party has failed to comply with the statutory mandate," *see e.g. Sugar Creek Charter Sch., Inc. v. Charlotte-Mecklenburg Bd. of Educ.*, 195 N.C. App. 348, 356, 673 S.E.2d 667, 673 (2009), Plaintiff here fails to show an injury to any protected legal interest or the existence of an actual controversy to invoke the Court's jurisdiction

While North Carolina courts have yet to specifically consider whether N.C. Gen. Stat. § 100-2.1 creates any private cause of action. However, courts in other jurisdictions have considered whether "monument preservation" statutes like North Carolina's create a private right and determined they do not. In *Mississippi Div. of Sons of Confederate Veterans v. Univ. of Mississippi*, 269 So. 3d 1235, 1242 (Miss. Ct. App. 2018)(affirming dismissal of SCV suit under the Mississippi statute protecting monuments, noting that the statute provides no private right of action). The Western District of Louisiana reached the same conclusion about a claim brought by the Shreveport Chapter #237 of United Daughters of the Confederacy under the National Historic Preservation Act, seeking as alleged owners of the Confederate monument to bar its removal. *See Shreveport Chapter #237 of United Daughters of the Confederacy v. Caddo Par. Comm'*No. CV 17-1346, 2018 WL 566512, at *8 (W.D. La. Jan. 26, 2018) ("UDC failed to cite the Court to any authority to support the proposition that UDC has a private cause of action under the National Historic Preservation Act....").

In the case at hand, Plaintiff brings its principal claim for declaratory relief pursuant to N.C. Gen. Stat. § 100-2.1, arguing that "an 'object of remembrance' located on 'public property' may not be permanently removed from that property and may only be relocated under very limited conditions." Verified Complaint, ¶ 63. Alleging that it is an "owner of any and all existing

legal and equitable rights, title, and interests in the Confederate Monument," Plaintiff suggests that § 100-2.1 provides a private right of action entitling Plaintiff to an order mandating that the "Confederate Monument shall be returned its original location." Verified Complaint, ¶ 74. Defendants have similarly cited § 100-2.1 in defending the Consent Judgment.

Ironically, if Plaintiff owns the Monument as it contends it does, then N.C. Gen. Stat. § 100-2.1. does not even apply. *See* N.C. Gen. Stat. § 100-2.1.(c)(2) ("An object of remembrance *owned by a private party* that is *located on public property* and that is the *subject of a legal agreement between the private party and the State or a political subdivision of the State governing the removal or relocation of the object*.)(emphasis added). This case should have been stopped there, with the plain language of the law. Instead, Defendants claim that § 100-2.1 left them with only three options to "deal[] with the disposition of the monument" following its toppling in August of 2018:

> (1) return[] the 'temporarily relocated' monument to its 'original location' within 90 days of the completion of a project that required its temporary removal;
> (2) relocate[e] it to a 'site of similar prominence, honor, visibility, availability, and access that are within the boundaries of the jurisdiction from which it was relocated' to the extent that appropriate measures were required to preserve the monument and with the approval of the North Carolina Historical Commission;
> (3) form[] an agreement about the removal or relocation of the monument with any private party that had an ownership interest in the monument.

Brief in Response to Proposed Intervenors' Motion to Intervene, at 3-4.

In pursuing the third option, Defendants entered into a consent judgment that it knew or should have known was rife with misstatements of law and fact. In addition to the Consent Order's creative yet plainly erroneous contortions of basic precepts of property law, there is no support for the proposition that Plaintiff had any right under N.C. Gen. Stat. § 100-2.1 to enforce

its alleged ownership interest in the Monument. The parties' interpretation of § 100-2.1 is simply wrong. On its face, the statute provides no express private cause of action under which Plaintiff can assert its alleged rights. *See* N.C. Gen. Stat. § 100-2.1; *see also Sykes v. Health Network Sols., Inc., supra*. Plaintiff and Defendant have also failed to make any arguments that the statute implicitly creates a private right. *See* Verified Complaint, ¶¶ 57-75; Brief in Response to Proposed Intervenors' Motion to Intervene, at 3-4, 5-7. No language in the statute suggests that the North Carolina General Assembly intended for private parties to have any statutory rights under the legislation. *See* N.C. Gen. Stat. § 100-2.1.

The Plaintiff cannot skirt the overt limitations of § 100-2.1 by burying their claim in the Declaratory Judgment Act, and cannot invoke the Court's jurisdiction to consider that claim because this matter does not present an "actual controversy." *Town of Ayden v. Town of Winterville*, 143 N.C. App. 136, 140, 544 S.E.2d 821, 824 (2001) (holding that lack of standing was a sufficient ground upon which to dismiss plaintiff's suit, as was lack of a justiciable controversy between the parties at the time that the action was commenced). In declaratory judgment actions as much as any other case, "an actual controversy between parties **having adverse interests in the matter**" is a "jurisdictional prerequisite." *Gaston Bd. of Realtors, Inc. v. Harrison*, 311 N.C. 230, 234, 316 S.E.2d 59, 61 (1984) (emphasis added). As our state's highest court explained in *Gaston*, the requirement of an "actual controversy" derives from "the ancient and sound juridic concept that the inherent function of judicial tribunals is to adjudicate **genuine controversies** between **antagonistic litigants** with respect to their rights, status or other legal relations." *Id.* at 234 (emphasis added).

The Declaratory Judgment Act does not authorize North Carolina courts to stamp their approval upon agreements between two non-adverse parties. *N. Carolina Consumers Power, Inc. v. Duke Power Co.*, 285 N.C. 434, 451, 206 S.E.2d 178, 190 (1974). In *Consumers Power*, the North Carolina Supreme Court considered the declaratory judgment action brought by the Consumers Power company and the City of Shelby to declare the validity of their agreement for the power company to supply the city with electricity. *Id.*, 285 N.C. at 436. The lawsuit named competitor Duke Power as a defendant, on the assumption that it would contest the contract. *Id.* at 435. The court observed that "[c]learly there is no controversy between the parties to the contract," and that litigation with Duke Power was not unavoidable. *Id.* at 450-51. It therefore held that "there is no Actual [sic] or real presently existing controversy between plaintiffs and defendant," and it affirmed the dismissal of the action. *Id.* at 451.

In this case, the parties have created the pretense of a civil action, with one party pretending to sue the other so that the prearranged agreement could be packaged as a consent judgment ostensibly resolving the fictional civil action. The court stated in *Consumers Power* that if the plaintiffs and defendant were "engaged in a friendly suit or [had] entered into a collusive agreement to set up a fictitious controversy," then there would be no actual controversy between them. *Id.* at 450. Such a "friendly suit" and "collusive agreement" happened here. As the record reflects and the parties have not denied, it was Defendants who approached Plaintiff about an agreement to transfer the Monument to Plaintiff, *see* Motion to Intervene Ex. 1 at 6, 8; the Defendants "work[ed] directly with" Plaintiff to create this litigation, *id.* at 9; and the parties knew even while they were drafting the consent judgment that Plaintiff had no legal claim to the Monument.

Consent judgments remain a valid means of settling genuine disputes among adverse parties, so long as the dispute presents an "actual controversy" necessary for the court's exercise of jurisdiction. In this particular instance, however, that genuineness is absent, the dispute is a fiction, and there is no actual controversy between Plaintiff and Defendants. A court may have jurisdiction over a matter "only when the pleadings and evidence disclose the existence of an actual controversy between parties *having adverse interests* in the *matter in dispute*." *Gaston Bd. of Realtors*, 311 N.C. at 234. The pleadings and the evidence in this case disclose just the opposite. There is no "matter in dispute" between the two parties. They do not have "adverse interests." Rather, their interests have been completely aligned on all factual and legal issues since Defendant approached Plaintiff about instituting this action.

Accordingly, the court lacks jurisdiction over Plaintiff's claims for relief, and the Consent Order is void.

CONCLUSION

For all of the foregoing reasons, the Consent Order should be set aside as void pursuant to Rule 60(b)(4) and the Complaint dismissed for lack of jurisdiction.

This case therefore does not present an "actual controversy," and the Court did not have jurisdiction when it approved the Consent Judgment.

This the 29th day of January 2020.

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EXHIBIT 1

The Governor's Office,
Raleigh, N. C.
October 26, 1914.

At a meeting of the Executive Committee of the Board of Trustees of the University of North Carolina, the following were present: His Excellency Governor Locke Craig, Maj. John W. Graham, Dr. H. H. Lewis, Dr. Charles Lee Smith, Col. A. B. Andrews, and Mr. R. D. W. Connor, Secretary. President Graham was also present.

The following resolution was offered and unanimously adopted:

Whereas, at the time of the erection on the campus of the University of the Monument to the Confederate Soldiers of the University, a balance of $500 was due to the sculptor on his contract, which was paid by President F. P. Venable by his personal note for that amount, and

Whereas, there are sufficient unpaid pledges to the Monument Fund, to cover this amount, therefore be it resolved:

That the Secretary be instructed to proceed with the collection of these unpaid pledges, and to apply any sum which he thus collects to the payment of the above mentioned note; and be it further

Resolved, that any balance which may still be due shall be paid by the University.

CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing BRIEF OF AMICUS CURIAE has been served on all parties and/or counsel by direct transmission to the electronic mailing addresses shown below:

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This the 29th day of January 2020.

Elizabeth Haddix