

**IN THE SUPREME COURT OF FLORIDA**

No. SC23-1470

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THE FLORIDA ATLANTIC UNIVERSITY  
BOARD OF TRUSTEES,

*Appellant / Cross-Appellee,*

v.

HARBOR BRANCH OCEANOGRAPHIC  
INSTITUTE FOUNDATION, INC.,

*Appellee / Cross-Appellant.*

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On Appeal From the Fourth District Court of Appeal  
L.T. Case No. 4D22-0313

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**APPENDIX TO THE INITIAL BRIEF OF  
THE FAU BOARD OF TRUSTEES**

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**CERTIFICATE OF SERVICE**

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# Tab A

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA  
FOURTH DISTRICT

**FLORIDA ATLANTIC UNIVERSITY BOARD OF TRUSTEES,**  
Appellant/Cross-Appellee,

v.

**HARBOR BRANCH OCEANOGRAPHIC INSTITUTE FOUNDATION,  
INC.,**  
Appellee/Cross-Appellant.

No. 4D2022-0313

[September 20, 2023]

Appeal and cross-appeal from the Circuit Court for the Nineteenth Judicial Circuit, St. Lucie County; Elizabeth A. Metzger, Judge; L.T. Case No. 2017CA000508.

Andy Bardos and Ashley H. Lukis of GrayRobinson, P.A., Tallahassee, for appellant.

Stuart H. Singer, Sashi C. Bach, and Jesse Panuccio of Boies Schiller Flexner LLP, Fort Lauderdale, and Joseph G. Galardi, Scott W. Atherton, and Alaina B. Karsten of Atherton Galardi Mullen & Reeder PLLC, West Palm Beach, for appellee.

CIKLIN, J.

This appeal and cross-appeal arise out of a dispute between the appellant/cross-appellee, Florida Atlantic University Board of Trustees (“FAU”), and the appellee/cross-appellant, Harbor Branch Oceanographic Institute Foundation, Inc. (“the Foundation”), regarding the contours of their contractual relationship and the effect of legislation and regulations on that relationship. We affirm the trial court’s astute decision and cite portions of it in support of our holding.

The parties executed a contract whereby the Foundation would become a direct-support organization (“DSO”) of FAU.<sup>1</sup> The Foundation argued

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<sup>1</sup> A DSO is a Florida not-for-profit entity “incorporated under the provisions of chapter 617 and approved by the Department of State and [o]rganized and operated exclusively to receive, hold, invest, and administer property and to make expenditures to or for the benefit of a state university in Florida or for the benefit

below that a post-contract amendment to the statute governing DSOs unconstitutionally impaired its contractual right to make board appointments. The Foundation additionally argued that a post-contract amendment to a Florida Board of Governors (“BOG”) regulation regarding DSO budget approval unconstitutionally further impaired its contractual right to exercise unfettered control over the Foundation budget.

The trial court correctly found in the Foundation’s favor as to its right to appoint all but two directors to its board. The trial court also correctly found in FAU’s favor on the issue of whether FAU has a right of approval of the Foundation’s budget.

### Background

In 2007, FAU and the Foundation, a research institute, executed a contract titled “Memorandum of Understanding” (“MOU”). The MOU provided that the Foundation would become a DSO, retain its current endowment, and transfer its assets, with specified exceptions, and operations to FAU. The MOU’s Section 4 further provided that the Foundation’s “board of directors will have two . . . appointees from FAU,” and that “Foundation distributions shall be made in the sole discretion of the . . . Foundation Board of Directors to defray the expenses of its operations, to restore restricted corpus and retire debt, and to or for the benefit of [the research institute or FAU].”

After the MOU was executed, the BOG amended a regulation related to approval of DSO budgets (“Amended Regulation”). This spurred the Foundation to sue FAU, seeking declaratory relief regarding its control over its budget. Subsequently, the Florida Legislature amended the statute governing DSOs with respect to DSO board appointments (“Amended Statute”). *See* Ch. 2018-4, § 7, Laws of Fla. The Foundation’s refusal to comply with FAU’s request that the Foundation submit board appointments for FAU’s consideration and approval led to FAU bringing a counterclaim against the Foundation, seeking a declaratory judgment plus injunctive relief. The Foundation asserted below that the Amended Statute and Amended Regulation unconstitutionally impaired the MOU.

The parties filed several motions for summary judgment, resulting in the trial court determining that parol evidence was required to resolve latent ambiguities in the MOU as to the issues of budget control and board appointments. After a four-day trial, the trial court entered an amended

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of a research and development park or research and development authority affiliated with a state university and organized under part V of chapter 159.” § 1004.28(1)(a)2., Fla. Stat. (2007).

final judgment, partly finding in each party's favor. The court ruled that the Amended Statute unconstitutionally impaired the MOU by substantially weakening the Foundation's control over its board. However, the court found no impairment in applying the Amended Regulation regarding the budget approval, as the MOU did not contain a provision addressing adoption of the Foundation's budget.

Consequently, the trial court declared that (1) "all appointments made on or after July 1, 2018[,] to the Foundation's board of directors do not require the approval of the FAU board" pursuant to the Amended Statute, and (2) pursuant to the Amended Regulation, "the Foundation's operating budget shall be approved by the Foundation's governing board and FAU's board of trustees."

### Overview of Legal Analysis

The parties have raised numerous issues on appeal and cross-appeal. We write to address the ultimate issues of whether the Amended Statute unconstitutionally impaired the MOU and whether the MOU addressed budget approval. We do not address the remaining issues.

The United States and Florida Constitutions prohibit the passage of laws impairing the obligation of contracts. See Art. I, § 10, cl. 1, U.S. Const.; Art. I, § 10, Fla. Const. "The Florida Constitution offers greater protection for the rights derived from the Contract Clause than the United States Constitution." *Sears, Roebuck & Co. v. Forbes/Cohen Fla. Props., L.P.*, 223 So. 3d 292, 299 (Fla. 4th DCA 2017).

"To impair a preexisting contract, a law must 'have the effect of rewriting antecedent contracts' in a manner that 'chang[es] the substantive rights of the parties to existing contracts.'" *Searcy, Denney, Scarola, Barnhart & Shipley, etc. v. State*, 209 So. 3d 1181, 1191 (Fla. 2017) (alteration in original) (quoting *Manning v. Travelers Ins. Co.*, 250 So. 2d 872, 874 (Fla. 1971)).

"Total destruction of contractual expectations is not necessary for a finding of substantial impairment." *Sears*, 223 So. 3d at 299 (quoting *U.S. Fid. & Guar. Co. v. Dep't of Ins.*, 453 So. 2d 1355, 1360 (Fla. 1984)). "Rather, impairment is defined as 'to make worse; to diminish in quantity, value, excellency or strength; to lessen in power; to weaken.'" *Id.* (quoting *Pomponio v. Claridge of Pompano Condo., Inc.*, 378 So. 2d 774, 781 n.41 (Fla. 1979)). "[A]ny deviation from [a contract's] terms," including the imposition of "conditions not expressed in the contract, . . . impairs an obligation." *Pudlit 2 Joint Venture, LLP v. Westwood Gardens Homeowners*

*Ass'n, Inc.*, 169 So. 3d 145, 150 (Fla. 4th DCA 2015) (quoting Joseph Story, *A Familiar Exposition of the Constitution of the United States* § 244, at 197 (Regnery Gateway, Inc. 1986) (1859)).

When a statute impairs a contract, the court must “determine whether the nature and extent of the impairment is constitutionally tolerable in light of the importance of the State’s objective, or whether it unreasonably intrudes into the parties’ bargain to a degree greater than is necessary to achieve that objective.” *Searcy*, 209 So. 3d at 1192 (quoting *Pomponio*, 378 So. 2d at 780). “[V]irtually no degree of contract impairment is tolerable.” *Id.*

But “[a]n impairment may be constitutional if it is reasonable and necessary to serve an important public purpose.” *Id.* “[W]here the impairment is severe, ‘[t]he severity of the impairment is said to increase the level of scrutiny to which the legislation will be subjected.’” *Id.* (second alteration in original) (quoting *U.S. Fid. & Guar. Co.*, 453 So. 2d at 1360). “There must be a ‘significant and legitimate public purpose behind the regulation.’” *Id.* (quoting *Energy Rsrvs. Grp., Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 411 (1983)).

“A trial court’s interpretation of a contract is reviewed *de novo*.” *Nationstar Mortg. Co. v. Levine*, 216 So. 3d 711, 714 (Fla. 4th DCA 2017) (quoting *19650 NE 18th Ave. LLC v. Presidential Ests. Homeowners Ass’n*, 103 So. 3d 191, 194 (Fla. 3d DCA 2012)). “If ambiguous, ‘we review the trial court’s interpretation of the [contract] for competent substantial evidence.’” *Janoura Partners, LLC v. Palm Beach Imports, Inc.*, 264 So. 3d 942, 946 (Fla. 4th DCA 2018) (alteration in original) (quoting *Hastie v. Ekholm*, 199 So. 3d 461, 464 (Fla. 4th DCA 2016)).

But “[t]he interpretation or construction of a contract that is clear and unambiguous is a matter of law that is reviewed *de novo*.” *Summitbridge Credit Invs. III, LLC v. Carlyle Beach, LLC*, 218 So. 3d 486, 488 (Fla. 4th DCA 2017) (quoting *Smith v. Shelton*, 970 So. 2d 450, 451 (Fla. 4th DCA 2007)). In the context of a contract impairment analysis, we review the constitutionality of a statute *de novo*. *Sears*, 223 So. 3d at 298.

### I. The Board Appointment Issue

FAU’s appeal involves the provision of the Amended Statute related to DSO board appointments. When the MOU was executed, section 1004.28, Florida Statutes (2007), provided that the chair of the university’s board of trustees “may appoint” a director to the DSO board, and that the university’s president or a designee “shall also serve on the board of

directors . . . of [the DSO].” § 1004.28(3), Fla. Stat. (2007). The Amended Statute, which became effective on March 11, 2018, added that “[t]he university board of trustees shall approve all appointments to any direct-support organization not authorized by this subsection.” Ch. 2018-4, § 7, Laws of Fla.; § 1004.28(3), Fla. Stat. (2018). Subsequently, the BOG and FAU adopted conforming regulations.

FAU then requested the Foundation submit for its consideration and approval all appointments to the board from July 1, 2018, onward, but the Foundation did not comply. FAU brought a counterclaim, seeking in part a declaration that: (1) the Foundation is subject to the Amended Statute and conforming regulations; (2) aside from FAU’s two appointments, all appointments to the Foundation’s board made on or after July 1, 2018, require both boards’ approvals.

In its final judgment, the trial court found the MOU “in essence incorporated the DSO board of director requirements contained within Fla. Stat. § 1004.28(3) (2007), which specifically limited FAU’s involvement with the Foundation’s board of directors to 2 appointees.” The court further reasoned:

Clearly, allowing 2 board member appointments to emanate from FAU versus from the Foundation membership was not the norm for Florida Corporations and was only permitted per Fla. Stat. § 1004.28 and agreement of the parties. Both FAU and the Foundation clearly understood and agreed that FAU would not be entitled to have any other “say-so” in the Foundation board membership other than the 2 appointees noted in the MOU and per the documents that legally were required to set forth how the Foundation directors must be elected or appointed. Furthermore, FAU approved the Foundation’s articles of incorporation and by-laws as required by the MOU and in connection with the MOU transaction. The Foundation’s articles of incorporation and by-laws, as required by Florida Statutes, specifically set forth the total number of Foundation board of directors and how they were to be elected or appointed. The Foundation’s articles of incorporation approved by FAU, as required by the MOU specifically: noted the 2 FAU board appointments agreed upon by the parties and as required by Florida Stat. § 1004.28(3); required **at least 5 directors**, with the board of directors (other than the 2 FAU appointments) being **elected by the members of the Foundation**.

(Emphases in original).

The trial court found the Amended Statute impaired the MOU, reasoning the Amended Statute “less[e]ned or weakened the Foundation’s right to control its board of director appointments emanating from the MOU contract,” and “substantially lessened the Foundation’s power to control its own board of directors.”

The court then addressed FAU’s “public purpose argument . . . that the State of Florida has a substantial interest in overseeing university DSOs.” The court found FAU “did not present any evidence regarding the purpose behind or justification for the [Amended Statute]” and “failed to present evidence showing that Florida’s actual interest resulting in the [Amended Statute] outweighs the severe impairment the amendment places on the Foundation’s power to approve its own board members other than the FAU appointees it agreed to via the MOU.”

The court further determined FAU’s justification for application of the Amended Statute was neither “significant” nor “legitimate,” “particularly where the DSO Statutes and regulations already entitled FAU to 2 seats on the Foundation’s board, which ensures ‘oversight’ relating to the Foundation board activities.”

We find no error in the trial court’s determination that the Amended Statute unconstitutionally impaired the MOU. Consistent with the version of section 1004.28, Florida Statutes, in effect when the MOU was executed, the MOU provides FAU was to have two seats on the Foundation’s board. The Amended Statute, for the first time, gave FAU approval power over all other appointments to the board.<sup>2</sup>

The Amended Statute effectively rewrote the parties’ contract by requiring the Foundation’s board appointments to be approved by FAU. *See Citrus Cnty. Hosp. Bd. v. Citrus Mem’l Health Found., Inc.*, 150 So. 3d 1102, 1108 (Fla. 2014) (holding that a special law unconstitutionally impaired contracts between a foundation and a hospital board where it turned a foundation’s governance over to the hospital board in disregard

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<sup>2</sup> The parties do not dispute that pursuant to the Amended Statute’s language, the Foundation’s board appointments are subject to FAU’s approval. This interpretation of the statute’s language is consistent with legislative history reflecting the statute was amended “to enhance transparency and strengthen accountability for state university DSOs.” Fla. S. Comm. On Approp., CS for SB 4 (2018) Post-Meeting Staff Analysis (Dec. 7, 2017) (available at <https://www.flsenate.gov/Session/Bill/2018/4/Analyses/2018s00004.ap.PDF>)

of the foundation's status as a separate legal entity, eliminated the foundation's ability to operate and manage the hospital as it had contracted to do, and obligated the foundation to comply with public accountability and financial responsibility measures mentioned nowhere in the contracts and that are in addition to what is required by statute).

Additionally, based on the record before us, we find no error in the trial court's conclusion that FAU did not establish an interest outweighing the substantial impairment to the MOU.

## II. The Budget Approval Issue

The Foundation's cross-appeal involves the Amended Regulation, which relates to DSO budgets. The MOU provided that the Foundation "will not become a subsidiary of Florida Atlantic University Foundation, Inc. and shall continue to support FAU [or the research institute] as long as [the research institute] continues as a part of FAU." Further, the Foundation's "endowment will remain with the . . . Foundation," and Foundation "distributions shall be made in the sole discretion of the . . . Foundation Board of Directors to defray the expenses of its operations, to restore restricted corpus and retire debt, and to or for the benefit of [the research institute] or FAU." The MOU provided a non-exhaustive list of items distributions may fund.

At the time the MOU was executed, the operative budget regulation provided the following:

(3) Operating budgets of direct support organizations shall be prepared at least annually, approved by the organization's governing board and recommended by the university president to the Board of Governors for review.

(4) Expenditure plans of direct support organizations shall be reviewed and approved quarterly by the university president or designee, who shall be a vice president of the university or other senior officer of the university reporting directly to the president.

(5) Direct support organizations shall provide for an annual audit and management letter, as prescribed by internal memoranda, which shall be forwarded to the Board of Governors for review and oversight.

Fla. Bd. of Govs. Reg. 9.011 (2007). The post-MOU Amended Regulation

required that “[o]perating budgets of support organizations shall be prepared at least annually, and approved by the organization’s governing board and the university board of trustees or designee.” Fla. Bd. of Govs. Reg. 9.011 (as noticed for amendment on June 25, 2009).

In 2017, the Foundation sued FAU, seeking a declaration that FAU “is not permitted to impose its proposed budget on [the Foundation], or any other budget that would substantially impair or destroy [the Foundation’s] discretion to make distributions and ensure that its grants are properly administered and accounted for,” and that it could not “take . . . action that will in any way impair or diminish the right to [the Foundation’s] permanent independence with ‘sole discretion’ over its operations and decision making about its distributions.” FAU’s counterclaim sought, in part, a declaration that the Foundation’s annual operating budget requires both boards’ review and approvals.

The trial court ultimately found that the Amended Regulation did not alter the MOU. Based on the evidence introduced at trial, the trial court elaborated on the Foundation’s primary concern when it negotiated the MOU:

When [the Foundation] insisted and requested its independence if it became a DSO of FAU, [its] focus was on independence from the existing FAU Foundation and not on independence from FAU. [The Foundation] recognized that if it became a DSO of FAU it could not be completely independent of FAU as there would be required legal “restrictions” imposed on their relationship. [The Foundation] understood and acknowledged that if it elected to accept FAU’s offer and became a DSO, it would be subject to all applicable DSO laws. Understanding the restrictions and limitations associated with becoming a DSO, [the Foundation] focused on its primary concern that if it elected to become a DSO of FAU, its discretion to expend funds “to or for the benefit” of FAU may be impeded by FAU and/or the FAU Foundation. [The Foundation] was assured by FAU that [it] would maintain the sole discretion to expend it[s] funds “to or for the benefit” of FAU. Ultimately, in order to ensure continuation of operations and research at the Harbor Branch Institution and to honor the vision and legacy of Seward Johnson, [the Foundation] decided to accept FAU’s proposal to become a DSO of FAU and executed the MOU.

After the MOU was executed, at times the Foundation

board exhibited signs of discontent regarding its status as a DSO of FAU. The evidence reflected that some Foundation board members even mentioned potential “decertification” as a DSO. However, as Foundation board member Sherry Plymale so aptly put it during . . . the Foundation board meeting held on January 24, 2017 . . . “it struck me then” at the time of the MOU execution “and it strikes me more now that perhaps when we put all that together, everybody is left with their own idea of what it meant as opposed to what it means . . . we [the Foundation] are a DSO, which we may not like, that’s another question . . . but in the eyes of the law” we are a DSO “but . . . our budget does go to the board of trustees and then it will go to the board of directors . . . .” The Foundation knew it had agreed to be a DSO, perhaps not happily, but with the DSO designation, the Foundation knew that its budget would go to FAU’s board of trustees and allowed it to do so in 2015 and 2016.

Along this line, approval of the Foundation’s budget was not an issue of contention between FAU and the Foundation until 2017 when FAU’s Dr. Flynn began discussing the possibility of FAU taking on certain administrative functions of the Foundation. It is true that from 2008-2014, the full and complete budgets of the Foundation (and for that matter, the FAU Foundation) were not separately reviewed by the FAU board[.] In approximately 2014, FAU noticed it was approving the annual budgets of two of its DSOs, but it was not separately approving the complete annual budgets of the Foundation and the FAU Foundation. Once this was recognized, the full budgets of the Foundation and the FAU Foundation were reviewed and approved by FAU per section 1004.28(2), BOG Reg. 9.011(4) and FAU Reg. 6.013. In 2015 and 2016 the FAU board of trustees voted to approve the Foundation’s budget. No one from the Foundation raised objections to these Foundation budget approvals by the FAU board in either 2015 or 2016.

(Footnotes omitted).

The trial court then addressed whether the MOU’s section 4 constituted an agreement that the Foundation’s operating budget was to be approved solely by the Foundation’s board. Based on the language of the MOU and the trial evidence, the court determined no such agreement existed:

The intent of the MOU language contained in section 4 that “distributions shall be made in the sole discretion of the . . . Foundation Board of Directors to defray the expenses of its operations, to restore restricted corpus and retire debt, and to or for the benefit of FAUHBOI or FAU” was to memorialize the agreement between the parties that the Foundation had sole discretion to expend/distribute its funds “to and for the benefit” of FAU (the MOU statutory requirement) versus the FAU Foundation or FAU having the ability to “weigh in” on such DSO expenditure decisions. The credible negotiation and course of dealing evidence does not reflect an intent, agreed upon by the parties, that the MOU language regarding “sole discretion” of “distributions” was tied to the development of the Foundation budget or approval of such budget. The Foundation and FAU did not negotiate or contractually agree to (via the MOU) the Foundation, once it became a DSO, having sole discretion to approve the Foundation budget; the Foundation budget was not the negotiated issue, the Foundation’s “to or for the benefit” expenditures to FAU (as required by the DSO Statute) was the specific negotiated issue contained within the MOU. It also noted that the MOU negotiations always contemplated establishing the Foundation’s offices on FAU’s campus, which occurred soon after the transaction closed; the Foundation did not leave FAU’s campus until 2019. As a result, at the time the MOU was executed and at the time Dr. Flynn proposed changes to the Foundation budget in 2017, FAU indeed had the authority to engage in budget and audit review and oversight of the Foundation’s budget pursuant to section 1004.28(2), Florida Statutes.

The trial court concluded that because the MOU’s section 4 did not contain an agreement addressing budget approval, the Amended Regulation did not rewrite the MOU or materially impair it.

We agree with the trial court that the MOU’s section 4 does not address budget approval, and that, consequently, the Amended Regulation does not rewrite or materially impair the MOU by requiring both a DSO and the related university to approve the DSO budget. Our holding does not affect the Foundation’s exclusive discretion to make distributions as provided in the MOU.

Accordingly, we hold the trial court correctly found the Amended Statute unconstitutionally impaired the MOU to the extent it gives FAU

the right of approval over Foundation board seats other than the two granted to FAU in the MOU. Additionally, we hold the MOU did not address adoption/approval of the Foundation's budget, and thus the Amended Regulation, which required approval of the Foundation's budget by both the Foundation and FAU, does not unconstitutionally impair the MOU.

*Affirmed.*

MAY and CONNER, JJ., concur.

\* \* \*

***Not final until disposition of timely filed motion for rehearing.***

# Tab B

**IN THE CIRCUIT COURT OF THE NINETEENTH JUDICIAL CIRCUIT  
IN AND FOR ST. LUCIE COUNTY, FLORIDA**

HARBOR BRANCH OCEANOGRAPHIC  
INSTITUTE FOUNDATION, INC.,

Plaintiff / Counter-Defendant,

v.

CASE NO.: 2017-CA-000508

THE FLORIDA ATLANTIC UNIVERSITY  
BOARD OF TRUSTEES ("FAU"),

Defendant / Counter-Plaintiff.

\_\_\_\_\_ /

**AMENDED FINAL JUDGMENT ON PLAINTIFF/COUNTER-DEFENDANT'S  
SECOND AMENDED COMPLAINT AND ON DEFENDANT/COUNTER-  
PLAINTIFF'S AMENDED COUNTERCLAIM  
(AMENDED SOLELY TO CORRECT SCRIVENER'S ERROR)**

**THIS ACTION** was tried before the Court without a jury on the remaining issues associated with Plaintiff/Counter-Defendant, Harbor Branch Oceanographic Institute Foundation, Inc.'s (the "Foundation") Second Amended Complaint and Defendant/Counter-Plaintiff, FAU's First Amended Counterclaim. The Court, having considered the previous summary judgment rulings, the evidence admitted at trial, which included the determination of credibility and believability of trial witnesses, as well as applicable law, makes the following findings and conclusions.

**PROCEDURAL HISTORY**

The Foundation's Second Amended Complaint was filed October 17, 2019 (the "SAC"). Count I of the SAC seeks Declaratory Judgment in the Foundation's favor. Specifically, the Foundation, within Count I of the SAC, seeks a declaration from this Court that "FAU is not permitted to impose its proposed

budget on the Foundation, or any other budget that would substantially impair or destroy the Foundation's discretion to make distributions" pursuant to a December 2007 Memorandum of Understanding (the "MOU") entered into between the parties. The Foundation also has brought action against FAU for anticipatory breach of the MOU. FAU on the other hand asserts that the Board of Governors ("BOG") Regulation 9.011(4) requires both the Foundation board of directors and FAU's board of trustees to approve or disapprove the Foundation's budgets. FAU also asserts that the MOU does not address approval of the Foundation's budgets and that, even if it did, BOG Regulation 9.011(4)'s application to the Foundation would not unconstitutionally impair the MOU because the State of Florida's interest in that regulation outweighs any interest of the Foundation in the MOU.

FAU filed its First Amended Counterclaim on January 14, 2021 (the "Counterclaim"). Count I of the Counterclaim seeks Declaratory and Injunctive Relief. Per the Counterclaim, FAU seeks a declaration from this Court that the Foundation is subject to the requirements of BOG Regulation 9.011 and that the Foundation's operating budget requires the review and approval of both the Foundation's board of directors and FAU's board of trustees. FAU further contends that at the time the MOU was signed, the Foundation was contemplating the use of FAU property and, did in fact use FAU property until 2019. In line with this, FAU asserts that the Direct Support Organization ("DSO") Statute in effect when the MOU was signed by the parties provided for FAU review and oversight of the Foundation's budget. FAU further seeks a declaration that

all appointments made on or after July 1, 2018, to the Foundation's board of directors (other than the FAU president or his or her designee and the FAU Board Chair's appointment) require the approval of both the Foundation's board of directors and the FAU board per section 1004.28(3), Florida Statutes and BOG Regulation 9.011(9). The Foundation contends that the BOG Regulation 9.011 in effect at the time the MOU was signed did not authorize FAU's board of trustees to approve or disapprove the Foundation's budget. The Foundation also maintains that: (1) the MOU itself makes clear that the Foundation is not subject to amendments to the DSO Statute or BOG Regulations after the MOU was executed; (2) there is no parol evidence to the contrary; and (3) the application of such laws and regulations to the Parties' contractual relationship severely and significantly impair the essential consideration for the MOU.

The Court issued summary judgment rulings on July 1, 2021, July 13, 2021, and July 26, 2021.

In the July 1, 2021 summary judgment order (the "7/1/2021 SJ Order") the Court declared that Fla. Stat. § 1004.28 did not grant FAU the power to approve the Foundation budget as the Foundation, **at the time of the hearing on such motion**, did not use FAU property, facilities or personal services.

In the July 13, 2021 summary judgment order (the "7/13/2021 Order") the Court declared that: the BOG had the authority to adopt Regulation 9.011; based upon the clear and unambiguous language of the 2007 version of Regulation 9.011 when the MOU was signed, DSO budget approval power was vested solely with the DSO's governing board; when the BOG amended

Regulation 9.011 in 2009, it clearly and expressly elected to change the 2007 Regulation language to require more than a recommendation to the BOG for review, that is, it required the university board of trustees or its designee to approve a DSO's operating budget; a latent ambiguity in Section 4 of the MOU existed, which did not allow the Court to determine, via summary judgment, if the MOU contained a provision intended to address an agreement that the Foundation would maintain sole approval power over its operating budget.

In the July 26, 2021 summary judgment order (the "7/26/2021 Order") the Court declared that: at the time the MOU was executed, FAU had the statutory right of two seats at the Foundation board of directors table and such was specifically noted in the MOU; the "BOARD OF DIRECTORS" section of Fla. Stat. § 1004.28 remained the same until 2018, at which time this statutory section was amended to require that university boards of trustees approve all appointments to any DSO board of directors; in November 2018, the BOG amended Regulation 9.011(9) requiring university boards of trustees to approve all appointments to any DSO Board other than the chair's representative or president or president's designee; a latent ambiguity in Section 4 of the MOU existed, which did not allow the Court to determine, via summary judgment, if the MOU contained a provision intended to address an agreement between the parties that the Foundation maintained the sole right to appoint all Foundation board of directors other than the two (2) FAU board appointees.

## UNDISPUTED FACTS

In December 2007 the Harbor Branch Oceanographic Institution, Inc. (“HBOI”) and FAU entered into the MOU. The MOU is an enforceable contract. Per the MOU: HBOI agreed to become a certified direct service organization of FAU; HBOI, on or before the “closing date” was to amend its Articles of Incorporation and By-laws to change its name to Harbor Branch Oceanographic Institution Foundation, Inc. (the “Foundation”)<sup>1</sup>; the Foundation agreed that the Foundation’s “distributions shall be made in the sole discretion of the...Foundation Board of Directors to defray the expenses of its operations, to restore restricted corpus and retire debt, and to or for the benefit of FAUHBOI or FAU.”; and, the Foundation’s board of directors will have two appointees from FAU. Under paragraph 1 of the MOU, the Foundation agreed to amend its articles of incorporation and bylaws as necessary to remain a charity and to become a separate, stand-alone DSO, certified by FAU. Paragraph 4 of the MOU also provided that the Foundation would not become a subsidiary of the **Florida Atlantic University Foundation, Inc.** (“FAU Foundation”) and would retain its endowment. On December 31, 2007, the Foundation amended its articles of incorporation and bylaws in conformity with the MOU. Effective July 1, 2008, FAU’s board of trustees certified the Foundation as a DSO. The Foundation acknowledged and accepted the DSO certification on July 1, 2008. The MOU

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<sup>1</sup> It is noted that the MOU and Foundation documentation refers to Harbor Branch Oceanographic Institution Foundation, Inc. however, the pleadings in this action refer to the Foundation as Harbor Branch Oceanographic Institute Foundation, Inc. The court assumes the foregoing references, despite the differences (Institution versus Institute) are one in the same and will be referred to in this order as the Foundation.

included an office space provision. The Foundation moved its offices onto FAU property, and the offices remained there until June 2019. On July 30, 2009, the parties executed an addendum to the MOU. The First Addendum facilitated the Foundation's sale of real property to the State of Florida and reaffirmed the validity of the MOU. On October 3, 2012, the parties executed a Second Addendum to the MOU. The Second Addendum made no substantive changes to the MOU and was executed at FAU's request to support the renewal of FAU's accreditation. The Second Addendum to the MOU expressly references and reaffirms Paragraph 4 of the MOU. The Foundation and FAU agreed at trial that they both intended to comply with all statutes, rules and regulations that applied to Florida DSOs at the time the MOU was executed.

**BOG REGULATION 9.011 AND FLA. STAT. § 1004.28**

In 2007, when the MOU was executed, BOG Regulation 9.011<sup>2</sup> provided in part that:

(3) Operating budgets<sup>3</sup> of direct support organizations shall be prepared at least annually, approved by the organization's governing board and recommended by the university president to the Board of Regents for review.

BOG Regulation 9.011(3) was amended in August 2009 in part as follows:

(3) Operating budgets of support organizations shall be prepared at least annually, and approved by the organization's governing board **and the university board of trustees or designee.** (Emphasis added.)

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<sup>2</sup> The version of 9.011 that was in effect in 2007 is now found at 6C-9.011, Florida Administrative Code. The BOG adopted all existing Board of Education rules, formerly known as the rules of the Board of Regents, including Rule 6-C-9.011, at its first meeting on January 7, 2003. See *NAACP, Inc. v. Fla. Bd. of Regents*, 876 So. 2d 636, 639 (Fla. 1<sup>st</sup> DCA 2004).

<sup>3</sup> BOG Regulation 9.011 separately makes reference to operating budgets and expenditures.

BOG Regulation 9.011(3) was amended in September 2018 in part as follows:

(4) Operating budgets of support organizations shall be prepared at least annually, and approved by the organization's governing board and the university board of trustees.

Section 1004.28, Florida Statutes, in effect in 2007, when the MOU was executed, applied to all state university DSOs. Section 1004.28(2), Florida Statutes provided:

(2) USE OF PROPERTY... (b) The board of trustees [of a state university], in accordance with rules and guidelines of the Board of Governors, shall prescribe by rule conditions with which a university [DSO] must comply in order to use property, facilities, or personal services at any state university. Such rules shall provide for **budget and audit review and oversight by the board of trustees.**

(Emphasis added.)

In 2007, when the MOU was executed, Fla. Stat. § 1004.28, which specifically pertains to DSOs (like the Foundation), contained a separately designated section entitled "BOARD OF DIRECTORS". The board of directors section of the DSO statute in effect at the time the MOU was executed stated:

(3) BOARD OF DIRECTORS. The chair of the university board of trustees may appoint a representative to the board of directors and executive committee of any direct-support organization established under this section. The president of the university for which the direct-support organization is established, or his or her designee, shall also serve on the board of directors and the executive committee of any direct-support or organization established to benefit that university.

The "BOARD OF DIRECTORS" section of Fla. Stat. § 1004.28 remained the same until 2018, at which time the specific "BOARD OF

DIRECTORS” section was amended to include the following language: “The university board of trustees shall approve all appointments to any direct-support organization not authorized by this section.” Soon thereafter, in November 2018, the BOG likewise amended Regulation 9.011(9) to provide, in part: “The university board of trustees shall approve all appointments to any DSO Board other than the chair’s representatives(s) or the president or president’s designee.” At the time the MOU was executed, FAU had the statutory right, per the “BOARD OF DIRECTORS” section of the DSO Statute, to two (2) seats at the Foundation’s board of directors table and such statutory right was specifically noted in the MOU. The 2018 amendment to 1004.28 took “effect upon becoming law” on March 11, 2018.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

##### ***HBOI was in a difficult financial predicament; it needed to act and did.***

In the 2006/2007 timeframe, HBOI clearly recognized, due to its unenviable financial status, that it was essential for the organization to explore reorganization/sale alternatives to avoid the worst case scenario of “non-existence.” In an effort to explore viable options, the HBOI board engaged in meaningful discussions with Senator Ken Pruitt and FAU President Frank Brogan. Such discussions revolved around the goal of saving the valued research institute. Initially, the proposed plan contemplated FAU acquiring the

Harbor Branch Institution and folding it into the existing FAU Foundation.<sup>4</sup> In response, HBOI made it clear that it did not want to be absorbed into the FAU Foundation and disappear; HBOI wanted to maintain its existence as an organization, separate from the FAU Foundation. Ultimately, FAU made a proposal to HBOI which would result, in among other things, the establishment of a FAU campus on HBOI property, a provision to address repayment of HBOI debt and a subsidy for the HBOI annual operating costs. During the course of negotiations between HBOI and FAU, FAU specifically put HBOI on notice that it would have to become a DSO of FAU. According to FAU, such requirement was not negotiable and thus, a deal maker or breaker. HBOI's initial reaction to FAU's insistence that it become a DSO of FAU was not positive as HBOI felt such status would be "too restrictive." On the other hand, HBOI desired and requested to remain "independent" of the FAU Foundation. HBOI sought assurances from FAU verbally and in writing that: if it became a DSO of FAU, it would not, in essence, be folded into the existing FAU Foundation; and, once HBOI became a DSO of FAU, it would not have to consult/work with the **FAU Foundation** when making decisions on how to expend its funds "to or for the benefit" of FAU.<sup>5</sup> HBOI indeed was assured by FAU that if it elected to become a DSO of FAU it would be "independent" from the **FAU Foundation** and as President Brogan

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<sup>4</sup> The FAU Foundation was and is a separate DSO of FAU.

<sup>5</sup> As an example of HBOI's focus on "the latitude in expenditure of funds that will be afforded HBOI as" a DSO of FAU, see Joint Exhibit 20 which is a 5/25/2007 letter from Mr. Stewart, counsel for HBOI to FAU Provost, Dr. Pritchett. Within Mr. Stewart's letter, he does not mention concern over HBOI's budget approval but rather directly focuses on "the latitude" HBOI will have, as a DSO, when making expenditures "to or for the benefit of" FAU. See Joint Exhibit 22, as another example of HBOI's focus on assurances from FAU regarding the latitude HBOI will have to expend "to or for the benefit of" FAU if it were to become a DSO of FAU.

stated, “HBOI would have the same discretion with the expenditure of its funds as the FAU’s foundation has with the expenditure of its funds.”<sup>6</sup> President Brogan advised the HBOI board that “[t]his is the first time that FAU has permitted a separate DSO apart from its own foundation.”<sup>7</sup> When HBOI insisted and requested its independence if it became a DSO of FAU, HBOI’s focus was on independence from the existing FAU Foundation and not on independence from FAU.<sup>8</sup> HBOI recognized that if it became a DSO of FAU it could not be completely independent of FAU as there would be required legal “restrictions” imposed on their relationship. HBOI understood and acknowledged that if it elected to accept FAU’s offer and become a DSO, it would be subject to all applicable DSO laws. Understanding the restrictions and limitations associated with becoming a DSO, HBOI focused on its primary concern that if it elected to become a DSO of FAU, its discretion to expend funds “to or for the benefit” of FAU may be impeded by FAU and/or the FAU Foundation. HBOI was assured by FAU that HBOI would maintain the sole discretion to expend it funds “to or for the benefit” of FAU.<sup>9</sup> Ultimately, in order to ensure continuation of operations and research at the Harbor Branch Institution and to honor the vision and legacy of Seward Johnson, HBOI decided to accept FAU’s proposal to become a DSO of FAU and executed the MOU.

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<sup>6</sup> Joint Exhibit 20, Minutes of the Board of Directors of HBOI, held on March 1 and 2, 2007 at page 9.

<sup>7</sup> *Id.*

<sup>8</sup> The Foundation’s attempt to argue that it negotiated its independence from FAU (versus from the FAU Foundation) despite electing to become a DSO of FAU is not supported by the credible parol evidence admitted during trial.

<sup>9</sup> Mr. Stewart’s email dated 7/6/2012 (Joint Trial Exhibit 74) confirms that the issue of HBOI having the ability to expend funds “to or for the benefit of FAU” “was fundamental to the decision to move forward with the MOU in the first place”.

After the MOU was executed, at times the Foundation board exhibited signs of discontent regarding its status as a DSO of FAU. The evidence reflected that some Foundation board members even mentioned potential “decertification” as a DSO. However, as Foundation board member Sherry Plymale so aptly put it during at the Foundation board meeting held on January 24, 2017, ( Joint Trial Exhibit 125) “it struck me then” at the time of the MOU execution “and it strikes me more now that perhaps when we put all that together, everybody is left with their own idea of what it meant as opposed to what it means...we [the Foundation] are a DSO, which we may not like, that’s another question....but in the eyes of the law” we are a DSO “but...our budget does go to the board of trustees and then it will go to the board of governors....” The Foundation knew it had agreed to be a DSO, perhaps not happily, but with the DSO designation, the Foundation knew that its budget would go to FAU’s board of trustees and allowed it to do so in 2015 and 2016.

Along this line, approval of the Foundation’s budget was not an issue of contention between FAU and the Foundation until 2017 when FAU’s Dr. Flynn began discussing the possibility of FAU taking on certain administrative functions of the Foundation. It is true that from 2008-2014, the full and complete budgets of the Foundation (and for that matter, the FAU Foundation) were not separately reviewed by the FAU board, In approximately 2014, FAU noticed it was approving the annual budgets of two of its DSOs, but it was not separately approving the complete annual budgets of the Foundation and the FAU Foundation. Once this was recognized, the full budgets of the Foundation

and the FAU Foundation were reviewed and approved by FAU per section 1004.28(2), BOG Reg. 9.011(4) and FAU Reg. 6.013. In 2015<sup>10</sup> and 2016 the FAU board of trustees voted to approve the Foundation's budget. No one from the Foundation raised objections to these Foundation budget approvals by the FAU board in either 2015 or 2016.

***Did Section 4 of the MOU contain a specific contractual agreement between the Foundation and FAU that the Foundation's operating budget was to be approved solely by the Foundation board?***

After carefully reviewing the MOU language and considering/weighing the parol evidence presented at trial (see 7/13/2021 Order regarding latent ambiguity finding and need for the court to consider parol evidence to interpret Section 4 of the MOU), the answer to the foregoing question is NO.<sup>11</sup> The intent of the MOU language contained in section 4 that "distributions shall be made in the sole discretion of the...Foundation Board of Directors to defray the expenses of its operations, to restore restricted corpus and retire debt, and to or for the benefit of FAUHBOI or FAU" was to memorialize the agreement between the parties that the Foundation had sole discretion to expend/distribute its funds "to and for the benefit" of FAU (the MOU statutory requirement) versus the FAU Foundation or FAU having the ability to "weigh in" on such DSO expenditure

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<sup>10</sup> As an example of the Foundation's knowledge of and non-objection to FAU's review and approval of the Foundation's budget, see Joint Trial Exhibit 100 at page 3 which indicates that Ms. Katha Kissman, the Executive Director of the Foundation, was present at the FAU board of trustees meeting and "provided additional information regarding HBOIF" and its budget. At that meeting, the FAU board audit and finance committee recommended FAU board of trustee "approval of the" Foundation "Operating Budget and" authorized FAU's "President to amend the Budget as necessary consistent with Board of Governors and Board of Trustees directives and guidelines."

<sup>11</sup> The court additionally finds that the MOU did not **incorporate** specific, existing law regarding approval of the Foundation's operating budget. Therefore, the lack of the language "as amended from time to time" in the MOU did not affect, the applicability of changes to laws/regulations concerning approval of DSOs operating budgets.

decisions. The credible negotiation and course of dealing evidence does not reflect an intent, agreed upon by the parties, that the MOU language regarding “sole discretion” of “distributions” was tied to the development of the Foundation budget or approval of such budget. The Foundation and FAU did not negotiate or contractually agree to (via the MOU) the Foundation, once it became a DSO, having sole discretion to approve the Foundation budget; the Foundation budget was not the negotiated issue, the Foundation’s “to or for the benefit” expenditures to FAU (as required by the DSO Statute) was the specific negotiated issue contained within the MOU. It also noted that the MOU negotiations always contemplated establishing the Foundation’s offices on FAU’s campus, which occurred soon after the transaction closed; the Foundation did not leave FAU’s campus until 2019. As a result, at the time the MOU was executed and at the time Dr. Flynn proposed changes to the Foundation budget in 2017, FAU indeed had the authority to engage in budget and audit review and oversight of the Foundation’s budget pursuant to section 1004.28(2), Florida Statutes.

***Inasmuch as Section 4 of the MOU did not contain a specific contractual agreement addressing approval of the Foundation’s Budget, there is no Constitutional impairment of the MOU.***

BOG Regulation 9.011 and § 1004.28, Fla. Stat. require FAU board approval of the Foundation’s budget as the Foundation is a DSO of FAU. The Foundation argues that changes to BOG Regulation 9.011 and § 1004.28, Fla. Stat. made after the MOU was signed, violate the Contracts Clause of the Florida Constitution. To overcome the strong presumption in favor of the constitutionality of the applicable law, the Foundation must demonstrate their

invalidity beyond any reasonable doubt. *See Searcy, Denney, Scarola, Barnhart & Shipley, P.A. v. State*, 209 So. 3d 1181 (Fla. 2017). To contravene the Contracts Clause “a law must have the effect of rewriting antecedent contracts in a manner that changes the substantive rights of the parties.” *Id.* at 1191. The law must modify an identifiable provision of the contract. *See Gen. Motors Corp. v. Romein*, 503 U.S. 181, 186-87 (1992). Because this court has found that the MOU did not address the Foundation’s budget approval, the changes that occurred within BOG Regulation 9.011 and § 1004.28, Fla. Stat., post-MOU execution, did not rewrite the MOU or materially impair it and thus, did not unconstitutionally impair the MOU contract.

***The Foundation’s affirmative defenses directed toward Count I of FAU’s First Amended Counterclaim fail.***

The Foundation’s waiver and estoppel defenses fail as FAU did not promise the Foundation control over the adoption of the Foundation’s budget in the MOU or otherwise. Due to this, FAU did not waive, nor is it estopped from asserting its legal authority to approve DSO budgets. It is also noted that the MOU contains an integration clause that expressly disclaims all promises, agreements, and understandings not stated in the MOU.

As for the Foundation’s impracticability defense, it claims that exclusive control over its budget was the essential consideration for its assent to the MOU, and that the challenged regulation destroys that consideration. However, the MOU does not confer on the Foundation the exclusive power the Foundation claims was the essential consideration.

The Foundation's unclean-hands defense likewise fails. An equitable defense cannot strip a public entity of its authority to perform public functions. "Equity follows the law" and cannot "change or unsettle" rights that are "clearly defined and established by law." *State v. Brena*, 278 So. 3d 850, 855 (Fla. 3d DCA 2019).

***The Foundation was a Not for Profit Corporation governed by Chapter 617, Florida Statutes with Articles of Incorporation and Bylaws which were reviewed and approved in conjunction with the MOU process.***

HBOI was a Not for Profit Corporation governed by Chapter 617, Florida Statutes at the time the MOU was signed. Once HBOI became the Foundation and a DSO, it remained a Not for Profit Corporation, but it was subject to DSO law. Not for Profit Corporations in Florida, including "provisions for" appointment of the Corporation's board of directors, are governed by Chapter 617, Florida Statutes. "All corporate powers must be exercised by or under the authority of, and the affairs of the corporation managed under the direction of its board of directors. . . ." Fla. Stat. § 617.0801 The board of directors of a Florida Not for Profit Corporation must consist of three or more individuals, with the number stated **within the corporation's articles of incorporation or bylaws.** Fla. Stat. § 617.0803(1). Directors **shall be elected or appointed** in the manner and for the terms **provided in the bylaws or articles of incorporation.** Fla. Stat. § 617.0803(3). "Board of directors' means the group of persons vested with management of the affairs of the corporation. . . ." Fla. Stat. § 617.01401(2). A Not for Profit Corporation's articles of incorporation "must set forth . . . [a] statement of the manner in which the directors are to be

elected or appointed.” Fla. Stat. § 617.0202(1)(d). In lieu of the foregoing, “the articles of incorporation may provide that the method of election of directors be stated in the bylaws.” *Id.* HBOI/the Foundation’s amended and restated articles of incorporation dated 1/2/2008 (Joint Trial Exhibit 44), which were approved by FAU per the MOU, contains language regarding the Foundation’s board of directors and how they must be seated. The Foundation’s amended and restated articles specifically provided within Article VI, Board of Directors that: “[t]he affairs of this Corporation shall be managed by a Board of Directors consisting of not less than five (5) Directors and not more than fifteen (15) Directors, exclusive of *ex officio*, designated appointed and non-voting Directors.” Article VI further provided that the Directors shall be elected by the Members per the bylaws and, in addition to the Directors elected per the bylaws, the Chair of the Board of Trustees of FAU may appoint a representative to serve on the Foundation board, and the President of FAU or his designee shall serve on the Foundation’s board. The Foundation’s bylaws dated December 31, 2007 likewise tracked the language of the articles of incorporation which ensured that the Foundation, even with the two (2) FAU Foundation board seats, would have a board majority. Per the Foundation’s articles of incorporation and bylaws, which FAU knew about and approved, Foundation board appointees would remain in the majority and were not subject to approval by FAU.

While this case was pending, FAU sent an email to the Foundation dated 5/24/2019 (Joint Trial Exhibit 173) stating that an amendment to the DSO statutes, effective 7/1/2018, required that all DSO board of directors be

approved by the university's board of trustees, and requested that the Foundation forward the names of any directors appointed by the Foundation since 7/1/2018 for FAU board approval. The Foundation responded to FAU (Joint Trial Exhibit 174) stating that FAU's request would be an impairment of the MOU contract. FAU had not requested or claimed authority to approve members of the Foundation's board before the May 2019 email. Furthermore, no evidence was admitted at trial reflecting that FAU suggested or requested that the Foundation articles of incorporation or bylaws, which were approved by FAU as part of the MOU transaction process, needed to be amended to change the way directors were elected or appointed.<sup>12</sup> Shortly after the Foundation's response letter, FAU filed a counterclaim (on 6/5/2019) seeking in part, a declaration that the Foundation must submit board appointments to FAU for approval.

***Did Section 4 of the MOU contain a contractual agreement between the Foundation and FAU that the Foundation maintained the right to appoint all Foundation board of directors, other than the 2 FAU board appointees mentioned in the MOU and the 2007 version of Fla. Stat. § 1004.28?***

After carefully reviewing the MOU language and considering/weighing the parol evidence presented at trial (see 7/26/2021 Order regarding latent ambiguity finding and need for the court to consider parol evidence to interpret Section 4 of the MOU), the answer to the foregoing question is YES. The MOU in essence incorporated the DSO board of director requirements contained

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<sup>12</sup> As noted within this Order, Fla. Stat. § 617.0803(3) requires that directors of the Foundation shall be elected or appointed in the manner and for the terms provided in the bylaws or articles of incorporation.

within Fla. Stat. § 1004.28(3) (2007), which specifically limited FAU's involvement with the Foundation's board of directors to 2 appointees. Clearly, allowing 2 board member appointments to emanate from FAU versus from the Foundation membership was not the norm for Florida Corporations and was only permitted per Fla. Stat. § 1004.28 and agreement of the parties. Both FAU and the Foundation clearly understood and agreed that FAU would not be entitled to have any other "say-so" in the Foundation board membership other than the 2 appointees noted in the MOU and per the documents that legally were required to set forth how the Foundation directors must be elected or appointed. Furthermore, FAU approved the Foundation's articles of incorporation and by-laws as required by the MOU and in connection with the MOU transaction. The Foundation's articles of incorporation and by-laws, as required by Florida Statutes, specifically set forth the total number of Foundation board of directors and how they were to be elected or appointed. The Foundation's articles of incorporation approved by FAU, as required by the MOU specifically: noted the 2 FAU board appointments agreed upon by the parties and as required by Florida Stat. § 1004.28(3); required **at least 5 directors**, with the board of directors (other than the 2 FAU appointments) being **elected by the members of the Foundation**. Based upon the parol evidence presented at trial, which includes, course of dealing and the Foundation's articles of incorporation and bylaws approved by FAU during the MOU process, Section 4 of the MOU contains an agreement between the Foundation and FAU that the Foundation maintained

the right to appoint all Foundation board of directors, other than the 2 FAU board appointees noted in the MOU and required by Fla. Stat. § 1004.28 at the time.

***Did the 2018 amendment to Fla. Stat. § 1004.28 unconstitutionally impair the Foundation's right to contract?***

Article I, section 10 of the Florida Constitution prohibits the enactment of any law impairing the obligation of contracts. If a contract (in this case, the MOU) does not state that it will be subject to the law “as amended from time to time”, it is not subject to changes to then existing law. *Cohn v. Grand Condo. Ass’n, Inc.*, 62 So. 3d 1120, 1121-22 (Fla. 2011); *Pudlit 2 Joint Venture, LLP v. Westwood Gardens Homeowners Ass’n*, 169 So. 3d 145, 149 (Fla. 4th DCA 2015); *Tropicana Condo Ass’n, Inc. v. Tropical Condo, LLC*, 208 So. 3d 755, 75 (Fla. 3d DCA 2016) (parties do not intend to be bound by future changes in applicable law unless they expressly agree to do so in the contract). The MOU does not contain language that the parties expressly agreed to be bound by future changes in applicable law. The MOU also contains an integration clause. To contravene the Contracts Clause, “a law must have the effect of rewriting antecedent contracts in a manner that changes the substantive rights of the parties.” *Searcy, Denney, Scarola, Barnhart & Shipley, P.A. v. State*, 209 So. 3d 1181, 1191 (Fla. 2017). In other words, the law must modify an identifiable provision of the contract. *Gen. Motors Corp. v. Romein*, 503 U.S. 181, 186-87 (1992). “Total destruction of contractual expectations is not necessary for a finding of substantial impairment.” *U.S. Fid. Guar. Co. v. Dep’t of Ins.*, 453 So. 2d 1355, 1360 (Fla. 1984). “Rather, impairment is defined as ‘to make worse; to

diminish in quantity, value, excellency or strength; **to lessen power; to weaken.**” *Pomponio v. Claridge of Pompano Condo., Inc.*, 378 So. 2d 774, n. 41 (Fla. 1979) (emphasis added). “[I]t is a well-accepted principle that virtually no degree of contract impairment is tolerable.” *Pudlit*, 169 So. 3d at 150. However, some impairment may be tolerable “where the governmental actor can demonstrate a significant and legitimate public purpose behind the regulation.” *Sears, Roebuck & Co. v. Forbes/Cohen Florida Properties, L.P.*, 223 So. 3d 292, 299 (Fla. 4th DCA 2017); *Searcy*, 209 So. 3d at 1192.

The Foundation argues that the change to Fla. Stat. § 1004.28 in 2018, unconstitutionally impaired its MOU contractual rights. This court agrees and finds that the 2018 amendment to Fla. Stat. § 1004.28 unconstitutionally impaired the Foundation’s right to contract. The amendment to Fla. Stat. § 1004.28 in 2018 lessened or weakened the Foundation’s right to control its board of director appointments emanating from the MOU contract. *See Pudlit*, 69 So. 3d at 150. The statute amendment at-issue substantially lessened the Foundation’s power to control its own board of directors; it substantially affected the Foundation’s articles of incorporation and bylaws as it relates to the corporation’s approval of its own board of directors. *See Citrus County Hospital Board v. Citrus Memorial Health Foundation, Inc.*, 150 So. 3d 1102 (Fla. 2014).

Having concluded that the 2018 amendment to Fla. Stat. § 1004.28 is an impairment of the MOU contract, the court must consider “whether the nature and extent of the impairment is constitutionally tolerable in light of the importance of the State’s objective, or whether it unreasonably intrudes into the

parties' bargain to a degree greater than is necessary to achieve that objective.” *Searcy*, 209 So. 3d at 1192 (quoting *Pomponio*, 378 So. 2d at 780). FAU’s public purpose argument is that the State of Florida has a substantial interest in overseeing university DSOs. FAU goes on to state that the State has an interest in laws that promote accountability and a harmony of interests between universities and DSOs. However, FAU failed to present evidence showing that Florida’s actual interest resulting in the 2018 amendment to Fla. Stat. § 1004.28 outweighs the severe impairment the amendment places on the Foundation’s power to approve its own board members other than the FAU appointees it agreed to via the MOU. In fact, FAU did not present any evidence regarding the purpose behind or justification for the 2018 amendment to Fla. Stat. § 1004.28. FAU therefore failed to establish that the 2018 amendment to the DSO Statute concerning “BOARD OF DIRECTORS” was “enacted to deal with a broad, generalized economic or social problem” sufficient to outweigh the significant and severe impairment to the MOU. *Pomponio*, 378 So. 2d at 779. It is noted that the amendment became law during the course of this protracted litigation, but for what significant and legitimate public purpose, it is unclear. The justification for the 2018 amendment to Fla. Stat. § 1004.28 pertaining to “BOARD OF DIRECTORS” is neither “significant” or “legitimate,” particularly where the DSO Statutes and regulations already entitled FAU to 2 seats on the Foundation’s board, which ensures “oversight” relating to the Foundation board activities.

***Did FAU anticipatorily breach the MOU?***

Based upon the trial evidence, the Court finds FAU's interpretation of the MOU appears to be made in a good faith belief that its interpretation was correct and thus, FAU did not anticipatorily breach the MOU. *Seawatch at Marathon Condo. Ass'n, Inc. v. Guar. Co. of N. Am.*, 286 So. 3d 823 (Fla. 3d DCA 2019). The parties genuinely disagreed on their interpretation of the MOU, which resulted in the filing of this declaratory action. *Id.*

In light of the foregoing findings and conclusions, it is hereby,

**ORDERED AND ADJUDGED** as follows:

1. The court declares that pursuant to BOG Regulation 9.011(4), the Foundation's operating budget shall be approved by the Foundation's governing board and FAU's board of trustees. Furthermore, at the time the MOU was signed, the Foundation was contemplating the use of FAU property and, did in fact use FAU property until 2019, and as such, the DSO Statute in effect at the time of MOU execution provided for FAU review and oversight of the Foundation's budget.
2. The court declares that all appointments made on or after July 1, 2018 to the Foundation's board of directors do not require the approval of the FAU board per Section 1004.28(3), Florida Statutes as application of the 2018 amendment to Fla. Stat. § 1004.28, unconstitutionally impaired the Foundation's right to contract via the MOU.
3. The Foundation failed to meet its burden regarding Count II of the Second Amended Complaint for Anticipatory Breach of Contract.

Therefore, the Foundation takes nothing as it relates to Count II of the Second Amended Complaint for Anticipatory Breach of Contract and FAU shall go hence without day as it relates to Count II of the Foundation's Second Amended Complaint.

**DONE AND ORDERED** in Fort Pierce, Saint Lucie County, Florida, on December 3, 2021.

A handwritten signature in blue ink on a black background. The signature appears to be "Ernie P. Hertz" or similar, written in a cursive style.

Copies furnished via the e-filing portal to:

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