

STATE OF NORTH DAKOTA  
COUNTY OF GRAND FORKS

IN DISTRICT COURT  
NORTHEAST CENTRAL JUDICIAL DISTRICT

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STATE OF NORTH DAKOTA, BY AND THROUGH  
THE NORTH DAKOTA STATE BOARD OF HIGHER  
EDUCATION, AND THE UNIVERSITY OF NORTH  
DAKOTA,

Plaintiff,

v.

NATIONAL COLLEGIATE ATHLETIC  
ASSOCIATION,

Defendant.

**COMPLAINT**

Civil No. \_\_\_\_\_

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Plaintiff STATE OF NORTH DAKOTA, by and through the NORTH DAKOTA STATE BOARD OF HIGHER EDUCATION, and THE UNIVERSITY OF NORTH DAKOTA (“UND”) complains and alleges of Defendant NATIONAL COLLEGIATE ATHLETIC ASSOCIATION (“NCAA”) as follows:

**PARTIES**

1. The University of North Dakota is one of eleven public colleges and universities that are part of the North Dakota University System that is governed by the North Dakota State Board of Higher Education, all part of the State of North Dakota.

2. The NCAA is an unincorporated association of more than 1,250 members, including UND, and virtually all public and private universities and four-year colleges conducting major athletic programs in the United States.

**GENERAL ALLEGATIONS**

3. This is a civil action brought for declaratory, injunctive, and associated relief to enforce UND’s contractual and legal rights as a member institution of the NCAA and a civil

action brought under Chapter 51-08.1 of the North Dakota Century Code, the Uniform State Antitrust Act.

4. NCAA member colleges and universities are divided into three major divisions: Division I, II, and III. Annually, the member schools must meet membership criteria for their respective divisions. Each Division is governed by Articles adopted by the vote of the membership.

5. UND is a Division II member organization of the NCAA and is generally subject to the rules and regulations governing Division II; however, UND has sought and obtained “Multidivision Classification,” whereby its ice hockey program is classified as Division I. Accordingly, UND’s ice hockey program is subject to the rules applicable to Division I, while all of UND’s other sports programs are subject to the rules applicable to Division II.

6. UND and the NCAA’s relationship is governed by the Division II Manual (the “**Contract**”).

7. The Articles contained in the Contract are divided into three sub-categories: the Constitution, the Operating Bylaws, and the Administrative Bylaws. Each of these portions of the Contract serves a different function.

8. The NCAA Constitution sets forth basic purposes of the NCAA. The legislation passed by the NCAA membership to promote these purposes and principles are found in the Operating Bylaws. The policies and procedures to implement and enforce the rules and regulations found in the Operating Bylaws are contained in the Administrative Bylaws.

9. There are no bylaws concerning or relating to Native American imagery.

10. The Constitution and Bylaws provide for an Executive Committee responsible for administering the general affairs of the NCAA as a whole. They also provide for an independent

“Presidents Council” within each division (or in Division I, the “Board of Directors”) to set forth the policies, rules, and regulations for operating each division.

11. Complementing these administrative bodies are association-wide and division-specific committees and subcommittees.

12. The NCAA Executive Committee is an administrative body comprised of 19 institutional CEOs appointed by the Division I Board of Directors and the Divisions II and III Presidents Councils.

13. The NCAA Executive Committee has no power to legislate or to enforce bylaws.

14. The Constitution provides that bylaws can be adopted only by the NCAA membership, or in specified limited circumstances, the divisional presidential bodies such as the Division II Presidents Council or Division II Management Council.

15. The NCAA Constitution empowers the membership to adopt new constitutional provisions and to adopt operating bylaws and administrative bylaws.

16. The NCAA Executive Committee is empowered only to forward proposed amendments to the NCAA Constitution, and other dominant legislation, to the entire membership for a vote or call for a vote of the entire membership on the action of any division that it determines to be contrary to the basic purposes, fundamental policies, and general principles set forth in the NCAA constitution.

17. The Constitution guarantees members access to national championships.

18. Only the divisional bodies and the divisional Championships Committee are vested with the power to administer NCAA championships, including all policies and procedures incident thereto.

19. Pursuant to the Contract, in order to be eligible to enter a team in NCAA championship competition, an institution must be a member in good standing in its division; have paid its membership dues; designate its athletic program as Division I, II, or III; and comply with NCAA legislation.

20. Governing sports committees and the Championships Committee are responsible for selecting championship sites.

21. Specific criteria set forth in the Contract that must be considered by the Championships Committee and sports committees in selecting hosting sites for NCAA regional and national championships include the quality and availability of the facility, the revenue potential, possible attendance, and geographic location.

22. The criteria do not include any reference to the use of Native American imagery by NCAA members.

23. The Championship Handbooks do not contain any policies or regulations prohibiting institutions that use Native American imagery, logos, or mascots from hosting or competing in championship competitions.

### **The Policy**

24. On August 5, 2005, the NCAA Executive Committee announced that it had “adopted a new policy to prohibit NCAA colleges and universities from displaying *hostile and abusive racial/ethnic/national origin* mascots, nicknames or imagery at any of the 88 NCAA championships” (emphasis added) (the “**Policy**”).

25. As stated by the NCAA Executive Committee, the Policy prohibits colleges or universities with “mascots, nicknames or images deemed hostile or abusive in terms of race, ethnicity or national origin” from:

- a. displaying Native American imagery at NCAA championship competitions;
- b. hosting any NCAA championship competitions;
- c. displaying or promoting Native American references on mascots, cheerleaders, dance teams and band uniforms or paraphernalia, or wearing any uniforms or paraphernalia depicting such references at NCAA championships; and
- d. selling Native American mascot, nickname, and imagery “related merchandise” at championship venues.

In addition, the Policy urges NCAA member institutions to refrain from scheduling regular season games with schools identified on the list.

26. Any member institution subject to the Policy will be sanctioned by not being allowed to host any post-season championship event—meaning (1) a member institution would not be able to bid for the contracts to host future events at predetermined sites; and (2) a member institution would not be able to host a home play-off game, even though it had earned post-season home field advantage through superior performance during the regular season and qualified by criteria contained in the Contract governing site selection.

27. Although the Policy purports to apply to all “hostile and abusive racial/ethnic/national origin mascots, nicknames, or imagery,” the Executive Committee did not designate colleges and universities with non-Native American ethnic references, such as the University of Louisiana Lafayette that uses the “Rajun Cajun” name, or the University of Notre Dame that uses the “Fighting Irish” name and logo, as being subject to the Policy.

28. UND’s nickname is the “Fighting Sioux,” and that name references the people and culture which populated the territory now comprising the State of North Dakota prior to the westward expansion of the United States in the nineteenth century.

29. UND's logo is a male silhouette of an authentic Sioux Warrior, created by a widely respected American Indian artist, Bennett Brien, who earned a masters degree in Fine Arts from UND.

30. UND does not have a mascot.

31. The "Fighting Sioux" name is a registered trademark of UND and the logo is copyrighted. The name and logo are valuable commercial property, symbolizing the University of North Dakota to people across the State of North Dakota and the United States.

32. On December 21, 2000, the North Dakota State Board of Higher Education voted unanimously that UND should retain the "Fighting Sioux" logo and Native American symbol.

33. The use of Native American names and imagery in the region surrounding UND is commonplace. The North Dakota Highway Patrol uses the profile of an historical Teton Dakotah (Sioux) sub chief as its primary symbol. The Great Seal for the State of North Dakota as well as UND's seal contains Native American imagery.

34. The Office for Civil Rights investigated claims of a hostile or abusive environment at UND in 2001 and made no findings that UND's use of the "Fighting Sioux" name and logo created a hostile or abusive environment for Native Americans or others at UND.

35. UND attracts significant numbers of Native American students, with an estimate of more than 400 Native American students currently enrolled at UND. UND is recognized nationally for the variety and substance of its Native American programs. For example, it is estimated that more than 20 percent of the Native American doctors practicing in the United States today were trained through UND's Indians into Medicine (INMED) program. Other Native American programs include: Working Towards Indian Nursing Development (WIND); Recruitment & Retention of American Indians Into Nursing (RAIN); American Indian Student

Services Academic Advisement Program; American Indian Student Services Comprehensive Recruitment Program; American Indian Student Services New Student Orientation Program; American Indian Student Services Retention Program; American Indian Student Learning Lab; Indians Into Engineering; Indians Into Geological Sciences (INGEOS); Indians Into Psychology Doctoral Education (INPSYDE); Multicultural Scholars Into Dietetics Program (MSDP); and the Northern Plains Indian Law Center (NPILC). In addition, UND maintains a Department of Indian Studies within the College of Arts and Sciences and an American Indian Center located in the heart of campus. The UND campus also routinely hosts Native American cultural events.

### **Enforcement**

36. Under the Contract, members of the NCAA are obligated to enforce legislation. They are not obligated to enforce policies of the Executive Committee.

37. The membership has adopted Article 19 of the Contract, which sets forth penalties for violation of the Bylaws and enforcement procedures. It includes provision for a Committee on Infractions, which is responsible for enforcing NCAA rules.

38. UND has not been referred to the Committee on Infractions for its use of Native American imagery.

39. The Contract also provides for an appeals process conducted by the Infractions Appeals Committee that is comprised of members of the Division II Management Council.

40. UND has not been referred to the Infractions Appeals Committee for its use of Native American imagery.

### **Application of the Policy to UND**

41. In August 2005, UND was placed on a list of eighteen schools that were affected by and subject to the Policy.

42. The NCAA first stated that the standard for “hostile and abusive” would be derived from federal civil rights case law, which employs a reasonable person standard.

43. Disregarding the Contract, the NCAA Executive Committee arbitrarily established an ad hoc “appeals process,” which included a recommendation that schools seek to amend the Policy through legislation.

44. In an August 12, 2005 letter, UND President Charles Kupchella lodged his objections both to the Policy and to its arbitrary and perplexing application to UND. He also requested clarification of the Policy’s basis and scope and information on how the appeals process would work.

45. In an August 19, 2005 press release, the Executive Committee stated that it had further refined the “appeals process.” The press release stated that the Executive Committee had created a “Staff Committee” that would consider “the unique aspects and circumstances” of each particular institution’s use of Native American mascots, names and imagery to determine whether the use was hostile or abusive. The Staff Committee’s review of the Executive Committee’s decision to include UND on the list of institutions subject to the Policy could be appealed only to the Executive Committee, the very entity whose decision was being appealed to the Staff Committee.

### **The Exception**

46. On August 23, 2005, the Executive Committee applied a newly-created exception to exempt Florida State University (“FSU”), a large and influential Division I school, from the Policy. In support of this action, the NCAA issued a press release stating that “[t]he decision of a namesake sovereign tribe, regarding when and how its name and imagery can be used, must be

respected even when others may not agree” all the while maintaining that it still considered FSU’s use of Native American imagery to be “hostile and abusive.”

47. The NCAA Executive Committee subsequently removed Central Michigan University (“CMU”), Catawba College, Mississippi College and the University of Utah from the list of schools prohibited from using Native American names and imagery based upon the namesake tribe exception.

48. The NCAA did not investigate the actual use and depiction of Native American imagery by exempted institutions, nor did the NCAA Executive Committee make any findings that the exempted institutions’ use of Native American imagery would not give rise to a hostile or abusive environment at NCAA championship events, the only events where the Policy purports to apply.

49. FSU uses the name Seminoles for its school’s athletic name. Florida State has a mascot, Chief Osceola—an individual dressed as a stereotypical Native American riding a horse named “Renegade.” FSU uses other stereotypical Native American imagery including tomahawks and spears. During every home football game, the mascot rides onto the football field and throws a flaming spear or lance into the ground at midfield. The FSU marching band, called the “Chiefs,” perform and lead the student body in what is called the “war chant,” accompanied by a chopping motion often referred to as the “tomahawk chop.”

50. CMU was removed from the list of schools prohibited from using Native American mascots, names, and imagery based upon namesake tribe approval from the Saginaw Chippewa Indian Tribe of Michigan. Numerous other federally recognized tribes utilize the “Chippewa” name or refer to themselves as “Chippewa,” including others within the state of Michigan, of which a large number oppose the use of the name by CMU.

51. The NCAA Executive Committee did not consider opposition to CMU's use of the name "Chippewa" by other Chippewa tribal authorities. The NCAA Executive Committee did not inquire about the views of other federally recognized Chippewa tribes other than the Saginaw Chippewa Tribe of Michigan. The NCAA Executive Committee has applied a different "standard" to UND.

52. FSU and other schools removed from the list on the basis of namesake tribe approval are free to participate in any NCAA championship event in any venue while continuing to display their schools' Native American names, mascots, and imagery.

53. The proportionate number of Native American students and the number of substantive programs in support of Native American students at UND exceed that of all of the exempted schools combined.

54. UND does not sanction the use of stereotypical behavior historically associated with Native American imagery, including, but not limited to, drum beats, "tomahawk chops," and the like. Before home games, a short presentation on the history of the "Fighting Sioux" name is shown. All incoming students to UND additionally receive information on cultural diversity generally.

55. The closest federally recognized tribe, the Spirit Lake Nation, endorses UND's use of the Fighting Sioux name and current logo. This endorsement from the Spirit Lake Tribal Council came in December 2000 in direct response to suggestions that UND change its name.

### **The UND Appeals Process**

56. On August 30, 2005, having failed to receive any clarification from the Executive Committee regarding the basis for concluding that UND's use of Native American imagery was "hostile and abusive" or further clarification regarding the evidentiary standards and burdens to

be applied in the appeal, UND submitted a letter to the NCAA challenging the Policy and its application to UND.

57. UND explained that its logo clearly was not “hostile or abusive” to Native Americans, and further stated: (a) UND has received permission to use the “Fighting Sioux” name from the Sioux tribe geographically located closest to UND, the Spirit Lake Nation, qualifying UND for the namesake tribe exemption; (b) UND uses Native American imagery with consummate respect; (c) American Indian images and nomenclature are deeply imbedded in North Dakota’s culture, and are reflected in the name of the State, counties, cities, towns, special districts, geographical landmarks, schools, bridges, etc; (d) the United States Office for Civil Rights conducted an investigation on UND’s campus in 2001, and did not determine that UND’s use of Native American imagery created a “hostile or abusive” environment; and (e) UND has a long history of outreach to the Native American community, enrolls more than 400 Native American students and sponsors more than 25 educational programs designed to support Native American students, representing an investment of over \$5,000,000. UND further sought guidance on the scope of the appeal process and the basis for the Executive Committee’s inclusion of UND on the list of schools subject to the Policy.

58. On September 28, 2005, the Staff Committee issued a response retaining UND on the list of schools subject to the Policy. The Staff Committee’s decision was based upon general opposition by Native American groups. The Spirit Lake Nation’s formal resolution permitting UND to use the “Fighting Sioux” name was discounted as “ambiguous.”

59. In a letter dated November 4, 2005, UND responded, demonstrating that (a) the NCAA’s application of the namesake tribe exception to FSU and CMU was inconsistent with the position taken towards UND, (b) UND’s use of Native American imagery is not “hostile or

abusive” under the meaning given those terms by federal courts, and (c) the NCAA Executive Committee lacks the authority to “penalize” member institutions or promulgate legislation.

60. On December 9, 2005, the Staff Committee issued a response, which, among other things, stated, for the first time, that there was a “presumption” that *all* use of Native American names, logos, or imagery was “hostile and abusive,” regardless of the actual use by any member institution. This presumption could only be rebutted by “evidence that demonstrates clearly” that UND’s use is not hostile or abusive. The Staff Committee indicated the presumption was primarily supported by the (unpublished) research of Stephanie Fryberg, Ph.D., of the University of Arizona (the “Fryberg Study”).

61. The NCAA’s December 9, 2005, reply continued to maintain that UND did not qualify for a namesake exemption, because the Spirit Lake Nation ignored the NCAA’s request for clarification so the Staff Committee “declined to attribute support” for UND’s usage by a namesake tribe.

62. The December 9, 2005, Staff Committee Memo announced new evidentiary standards under which the NCAA would review the application of the Policy to UND, namely that UND must present evidence to disprove the presumption and that, despite earlier statements, the NCAA was not following the standard established in federal civil rights cases for the terms “hostile and abusive.”

63. UND was given ten days to develop evidence clearly demonstrating that its use of the “Fighting Sioux” nickname is not hostile or abusive.

64. In a December 23, 2005 memorandum, UND responded and again objected to the appeals process and the ever-changing standard. UND demonstrated that (a) the Executive Committee plainly lacked the authority under the Contract to promulgate the Policy; (b) UND’s

use of Native American imagery was neither “hostile” nor “abusive” under any objective definition; (c) the Fryberg Study, which provided the basis for the Staff Committee’s “presumption,” was fundamentally flawed, internally inconsistent, outcome-oriented, had not been published or subjected to peer-review, and was accordingly inherently unreliable; and (d) UND was entitled to exemption from the Policy under the namesake tribe exemption.

65. On January 18, 2005, the Staff Committee issued its response, and for the first time informed UND that the appeals process could not be used to challenge the Policy itself. It articulated yet another new evidentiary standard, requiring UND to demonstrate that the NCAA’s application of the Policy to UND was against the “weight of evidence.” The NCAA back-peddled from its earlier reliance on the Fryberg Study and, instead, merely concluded that UND’s use of Native American imagery was hostile or abusive, without ever discussing the actual use at UND.

66. On January 30, 2006, UND delivered another memorandum to the NCAA. UND pointed out that: (a) the appeals process was flawed; (b) the Executive Committee had exceeded its authority; (c) the Policy violated anti-trust law; (d) the Policy was flawed from a sociological and policy perspective; (e) application of the namesake tribe exception to FSU and CMU was inherently inconsistent with the Policy; and (e) under any definition of hostile or abusive, UND’s use was neither.

67. The Executive Committee held a paper-only review on or about April 27, 2006, during which UND’s appeal was finally rejected.

68. On May 15, 2006, the Executive Committee sent UND a letter explaining its decision. Rather than respond to UND’s evidence and substantive legal and other arguments, the Executive Committee did little more than recite the process it had undergone in developing the

Policy and reiterate that political action groups, politically motivated writers, and a number of Native American governing bodies (but not a majority of actual Native Americans) supported the Policy.

### **The Effects on UND**

69. Participation in the NCAA is the only viable alternative in providing a competitive athletic program. Every institution suitable for competition with UND is a member of the NCAA, and the only way to assemble a playing schedule with these institutions is to remain an NCAA member.

70. Funding athletic programs is an essential function of a collegiate athletic department. Application of the Policy to UND will seriously inhibit UND's ability to fund its athletic programs because (a) UND will lose significant revenue if not allowed to host NCAA championship events, (b) fans, alumni, and donors will be less likely to support a team that cannot host a play-off game or fully compete in an NCAA championship event, (c) fans, alumni, and donors are less likely to support an athletic program which has been labeled hostile or abusive, and (d) fan and donor support will likely decrease if the Policy causes the UND programs to become less competitive.

71. UND will lose significant revenue if it is not allowed to host NCAA championship events because of (a) lost honorarium derived from ticket sales at NCAA championship events, (b) lost concession sales at NCAA championship events, (c) lost merchandise sales before and after NCAA championship events, and (d) lost royalty payments from UND trademarked goods sold as a result of NCAA championship events.

72. Recruiting athletes is an essential function of a collegiate athletic department. Application of the Policy to UND will seriously inhibit UND's ability to recruit athletes because

(a) prospective athletes desire to compete against other NCAA member institutions, (b) prospective athletes want to be assured that they will have an opportunity to play in NCAA championship events, (c) prospective athletes wish to be assured that they will be rewarded with home-field advantage in championship play, if earned, (d) prospective athletes do not want to live and compete in an environment that has been labeled as hostile or abusive, and (e) prospective athletes want to be associated with a successful program.

73. Fielding successful teams is an essential function of a collegiate athletic department. While UND is dedicated to a model of sportsmanship and the scholar-athlete, which recognizes that “winning” is not the end-all-be-all of athletic enterprise, it also recognizes that winning is the primary goal and objective of competitive athletic contests. UND athletes deserve a fair and balanced playing field.

74. Application of the Policy to UND will distort this balance and create a competitive disadvantage for UND teams because (a) hosting home-field advantage play-off events is an important reward for superior regular season performance, (b) athletes distracted by political issues at NCAA championship events are less likely to perform at optimum levels, (c) cuts in funding will decrease UND’s ability to maintain and make improvements on its athletic facilities and to safely equip and fund its athletic programs, and (d) long-term cuts in funding and recruiting difficulties will make it more difficult for UND to field teams with the highest caliber athletes.

75. In addition, regular season negotiation with other NCAA institutions is distorted by the Policy. Contracts for regular season games are based upon the competitiveness of the programs, cost of travel, and opportunities for future contests. The Policy urges NCAA member institutions to refrain from scheduling events with schools that remain on the list of prohibited

schools, thereby making the scheduling of regular season events much more difficult, placing UND at a competitive disadvantage, resulting in unequal opportunity and access to championship competition, and diminished commercial opportunities.

76. Compliance with the Policy would require UND to purchase multiple sets of uniforms and athletic paraphernalia, including, but not limited to, actual game uniforms, game warm-ups, travel bags, sideline attire, coaches' attire, player equipment, team accessories, cheerleading uniforms, cheerleading accessories (*e.g.*, megaphones, banners, etc.), band uniforms, and band instruments that do not display its "Fighting Sioux" logos or imagery for its athletes, cheerleaders, and band members.

77. The "Fighting Sioux" logo is permanently embedded into the architecture of the Ralph Engelstad Arena and the Betty Engelstad Sioux Center ("REA") where UND hosts men's and women's hockey, men's and women's basketball, and women's volleyball, including the concrete, masonry, glass, seats, and floor. There are an estimated 2,400 images of UND's "Fighting Sioux" logo prominently featured in nearly every aspect of the architecture and design of the REA. A great number of these images are permanently embedded in stone relief, concrete work, wood engravings, and three-dimensional sculpture.

78. Removal of the thousands of "Fighting Sioux" logos in the REA would be impractical, and replacing all such logos with a new university logo would be extremely expensive.

79. In March 2006, the NCAA West Regional Division I hockey tournament was played in the REA. A bid to host a women's NCAA Division I hockey championship was recently denied while UND's appeal was pending.

80. UND's athletic department is a vital component of its success as an institution of higher education in the State of North Dakota. A substandard athletic offering would reduce UND's enrollment and prestige to such a degree that it could, in turn, force budget cuts and other cutbacks in the services and opportunities UND has to offer its student body as a whole.

81. UND's "Fighting Sioux" name and logo are of tremendous economic value to UND. The Policy harms UND by taking or devaluing the intellectual property interest it has in the "Fighting Sioux" name and logo. Member institutions compete for students and fans by building allegiance to their nickname and logo and by associating their nickname and logo with success on the field. The "Fighting Sioux" name and logo are instantly recognized and associated with UND. The Policy negates years of efforts and identity-building by (1) diminishing the commercial value of UND's nickname and logo; and (2) forcing UND to actually abandon its name and associated trademarks, copyrights, and other valuable intellectual property.

82. The damage that the NCAA has caused and will cause UND is not adequately compensable by money because (a) the Policy harms UND's long-standing reputation as a provider of superior athletic programs and opportunities, and (b) threatens to imminently impact UND athletes and fans during the present athletic season, which can never be replayed.

83. The application of the Policy to UND, which labels UND as a hostile or abusive environment, has already been highly publicized and will likely continue to be publicized. Such negative publicity threatens to harm the reputation of UND and will negatively impact UND's many efforts to cultivate a reputation as an institution of higher learning, with a strong and demonstrated commitment to diversity, as perceived by (a) prospective students, (b) the community, (c) alumni, and (c) prospective athletes.

84. In the Spring 2006, a major media organization acting on behalf of a major corporate sponsor terminated discussions regarding UND's and REA's long term hosting of an annual Division I hockey tournament which would have brought tremendous national exposure and financial benefit to UND's athletic program. The reasons provided were the longstanding contractual relations between the NCAA and the media organization and corporate sponsor and the NCAA name and logo issue as it affected UND athletics.

85. For the 2005-06 budget cycle, the NCAA was to earn in excess of four hundred million dollars from television and marketing fees, plus an additional amount in excess of forty million dollars in championships revenue.

### **FIRST CAUSE OF ACTION**

#### **(Breach of Contract)**

86. Plaintiff realleges and incorporates herein each and every allegation of this Complaint.

87. As stated above, the relationship between UND and other member institutions and the NCAA is a contractual one, governed by the NCAA Constitution and Bylaws.

88. UND has paid its membership dues and, in every other way, performed its obligations under the Contract.

89. The establishment and control of NCAA championships (*i.e.*, games, matches, meets and tournaments) and other athletic events sponsored or sanctioned by the NCAA must be pursuant to legislation passed by the membership.

90. The NCAA Executive Committee does not have authority to adopt legislation, as that term is used in the NCAA Constitution and Bylaws.

91. The NCAA has breached the Contract in promulgating the Policy because the Executive Committee has no power to legislate, and the Policy is legislation, or the equivalent thereof.

92. The NCAA has breached the Contract in promulgating the Policy because the Executive Committee does not have the power to issue such policies.

93. As explained above, the NCAA through the NCAA Executive Committee has breached and continues to breach its obligations to UND by circumventing the clearly defined legislative process, imposing restrictions on site selection, denying member institutions earned home field advantage in championship events, and economically coercing member institutions to change their athletic names and imagery.

94. The Policy has been promulgated in breach of the express obligations of the Contract and obligations owed to all member institutions by the NCAA.

95. Enforcement of the Policy against UND should be enjoined, and UND should be granted injunctive relief allowing it to fully participate in, host, and bid to host NCAA championship events.

96. UND has incurred substantial monetary damages as a result of the Policy and is entitled to recover them in an amount to be proved at trial.

## **SECOND CAUSE OF ACTION**

### **(Breach of Contract – Implied Covenant of Good Faith and Fair Dealing)**

97. Plaintiff realleges and incorporates herein each and every allegation of this Complaint.

98. The implied covenant of good faith and fair dealing, which inheres in every contract, is part of this Contract, and the NCAA owes such obligations to its member schools.

99. The NCAA has a duty to perform and exercise the duties and rights created by the Contract in good faith.

100. The NCAA has a duty to refrain from intentionally or purposely doing anything that would destroy or injure UND's right to receive the fruits of the Contract.

101. The NCAA has a duty to ensure that its actions are reasonable and consistent with the agreed common purpose and the justified expectations of UND.

102. The NCAA is a monopoly, the purpose of which is to financially benefit all of the member institutions. The NCAA and the Executive Committee must fulfill its fiduciary responsibilities by treating all member institutions evenly in all matters impacting the financial benefits that inure to each member by virtue of membership.

103. To this day, the NCAA has failed to announce a clear standard or describe how it would be applied in determining whether a use of Native American mascots, names or imagery is "hostile or abusive" under the Policy. When the NCAA has attempted to announce a standard, it has consistently and brazenly shifted its position in an arbitrary and capricious manner.

104. As explained above, the NCAA has breached the covenant of good faith and fair dealing by failing to follow the terms of the Contract and by failing to delineate and apply a consistent standard to all of its members in its application of the Policy.

105. As adopted, the Policy is to utilize a "hostile or abusive" environment standard as those terms are understood in federal civil rights cases, which incorporates an objective standard to determine if something is hostile or abusive, requires the NCAA to review the particular use and practices, and requires the NCAA to make an individualized factual determination.

106. As stated above, the NCAA has failed to apply the hostile or abusive standard to UND and subjected UND to the Policy, despite the fact that it has not presented any evidence

that UND's particular use creates or leads to a hostile or abusive championship environment. The NCAA's failure to apply a standard it initially announced is arbitrary, capricious and indicative of bad faith.

107. At no time prior to or coincident with the adoption of the Policy had the NCAA provided for appeals process with established procedures designed to protect members' interests in the process. The "appeals process" subsequently provided by the NCAA Executive Committee was woefully inadequate to protect member institutions from arbitrary and irrational determinations.

108. As explained above, the NCAA through the NCAA Executive Committee has breached and continues to breach its obligations to UND by retaining it on the list of schools prohibited from using Native American mascots, names, and imagery at NCAA championships without providing UND a meaningful opportunity to contest that determination.

109. The NCAA has not determined that FSU's use of a Native American mascot, name, and imagery does not create or lead to a hostile or abusive environment at championship events, but has exempted it from the Policy.

110. The determination that FSU may continue to use a Native American mascot, name, and imagery without any championship limitations or repercussions while at the same time determining that UND's use of the "Fighting Sioux" name and associated logo is hostile or abusive and therefore imposing championship restrictions is arbitrary, capricious, and indicative of bad faith.

111. The NCAA Executive Committee cited opposition to UND's use of the "Fighting Sioux" name from tribes other than the Spirit Lake Nation, including reservations outside of

North Dakota, in its decision to retain UND on the list of schools prohibited from using Native American mascots, names, and imagery at NCAA championships.

112. The determination that UND's use of the "Fighting Sioux" name and associated logo is not exempted under the namesake tribe exception, while exempting CMU, under indistinguishable circumstances, is arbitrary, capricious, and indicative of bad faith.

113. As explained above, the Policy has been applied in an arbitrary and unreasonable manner, in breach of the contractual obligation of good faith and fair dealing. Enforcement of the Policy against UND should be enjoined, and UND should be granted temporary, preliminary and permanent injunctive relief allowing it to fully participate in, host, and bid to host NCAA championship events.

114. UND has incurred substantial damages as a result of the Policy and is entitled to recover them in an amount to be proved at trial.

### **THIRD CAUSE OF ACTION**

#### **(Unlawful Restraint on Trade)**

115. Plaintiff realleges and incorporates herein each and every allegation of this Complaint.

116. The member institutions of the NCAA have formed a combination, contract or conspiracy, as those terms are utilized in N.D.C.C. § 51-08.1-02.

117. The relevant market, for purposes of N.D.C.C. § 51-08.1-02, is intercollegiate athletics and all submarkets, including participating in championship events, hosting and bidding to host championship events, and associated marketing and merchandising in the state of North Dakota.

118. The Policy violates N.D.C.C. § 51-08.1-02 as an unreasonable and unlawful restraint of trade or commerce in the relevant market.

119. The NCAA has monopolistic control over intercollegiate athletics. The NCAA maintains unchecked market power over intercollegiate athletic competition at a regional and national level, and in the relevant market of North Dakota intercollegiate athletics.

120. The Policy is an unlawful restraint of trade.

121. The Policy places identified member institutions in North Dakota, specifically UND, at a considerable competitive disadvantage in NCAA championship competition, in maintaining competitive athletic programs, in promoting their unique name identification and related merchandise, and in competing for students and student athletes, all to the detriment of the consuming public, including, but not limited to, the residents of North Dakota.

122. The Policy is a commercial boycott of members. Identified schools may not bid for or host earned championship events and thereby receive the economic and commercial benefits from hosting championship events and NCAA members are urged to stop scheduling regular season games with UND and other identified schools. In most circumstances, the Policy, as an undisputed group boycott, would be struck as a *per se* violation of the antitrust laws.

123. Identified schools may not host home play-off games, despite the fact that these games are awarded, in substantial part, in recognition of excellent performance during regular season play.

124. Identified schools may not participate in any NCAA championship event, unless the school agrees to, and does, purchase an entire set of conforming uniforms and other athletic equipment to participate in those events.

125. The anti-competitive effects of the Policy are clear and readily discernable. They negatively impact multiple groups of consumers in North Dakota, including, but not limited to, member institutions, athletes, fans, and alumni.

126. The NCAA Executive Committee Policy artificially limits the available pool of host sites for NCAA championship competition to the detriment of the consumer.

127. Upon information and belief, the NCAA has formally acted under the policy by denying UND the opportunity to bid to host the 2008 NCAA Division I Women's Ice Hockey Championship.

128. There is no evidence that the market for amateur intercollegiate athletic championship competition is damaged by the use of Native American names, mascots or associated imagery.

129. The NCAA Executive Committee did not adopt the Policy to address competitive fairness between member colleges and universities competing in NCAA championship competition. The Policy does not promote competition between member institutions.

130. The NCAA has failed to announce any procompetitive justification for the Policy.

131. Enforcement of the Policy against UND should be enjoined, and UND should be granted injunctive relief allowing it to participate in, host, and bid for NCAA championship events, pursuant to authority granted by N.D.C.C. § 51-08.1-08(1).

132. UND has incurred damages as a result of the Policy and is entitled to recover them in an amount to be proved at trial. UND is entitled to treble damages under N.D.C.C. § 51-08.1-08(2), because the defendant's group boycott is a flagrant violation of N.D.C.C. § 51-08.1-02.

## **PRAYER FOR RELIEF**

WHEREFORE, UND respectfully requests judgment against the NCAA as follows:

1. For an order of this Court declaring that:
  - a. The promulgation of the Policy by the Executive Committee was a breach of the express provisions of the Contract, because the Executive Committee lacks the authority to pass such legislation.
  - b. To effectuate a rule binding on the NCAA membership, as outlined in the Policy, such rule must be passed by the membership through legislation.
  - c. The *ad hoc* creation of an inadequate appeals process was a breach of the implied covenant of good faith and fair dealing, which inheres in the Contract.
  - d. The creation of the ill-conceived namesake tribe exception for the benefit of influential members was a breach of the implied covenant of good faith and fair dealing, which inheres in the Contract.
  - e. The inconsistent application of the namesake tribe exception was a breach of the implied covenant of good faith and fair dealing, which inheres in the Contract.
  - f. That the Policy, as applied, is a violation of N.D.C.C. § 51-08.1-02 as an unreasonable and unlawful restraint of trade or commerce in the relevant market.
2. For an order of this Court requiring the NCAA to specifically perform its obligations under the Contract as follows:
  - a. That the NCAA not prohibit or otherwise disallow UND from hosting any NCAA championship event or limit its participation in any NCAA championship on the basis of the Policy.

- b. That the NCAA allow UND to bid to host pre-determined NCAA championship events on the same terms and conditions as other member schools, without any restrictions or negative impact on the basis of the Policy.
  - c. That the NCAA award UND “home-field” advantage in NCAA championship events that it otherwise earns as a result of superior play during the regular season and fulfillment of the contracted site selection criteria.
  - d. That the NCAA allow UND athletes and athletic teams to participate and compete as the “Fighting Sioux” in any athletic contest for which they would otherwise qualify in the absence of the Policy.
  - e. That the NCAA not punish, disallow, or otherwise discourage UND from wearing its “Fighting Sioux” team uniforms, or any UND personnel, student groups, or fans from displaying, wearing, or otherwise using any associated paraphernalia at NCAA championship events.
  - f. That the NCAA not restrict sales of “Fighting Sioux” merchandise at championship venues.
3. For money damages, in an amount to be proved at trial;
  4. For treble money damages, in an amount to be proved at trial;
  5. For pre and post judgment interest as allowed by law;
  6. For temporary, preliminary and permanent injunctive relief;
  7. For reasonable attorney’s fees and costs as allowed by law; and
  8. For such other and further relief as the Court may deem appropriate under the circumstances.

**JURY TRIAL DEMAND**

Pursuant to Rule 38 of the North Dakota Rules of Civil Procedure, Plaintiffs demand a trial by jury of nine for all issues so triable.

Dated this \_\_\_\_ day of October, 2006.

State of North Dakota  
Wayne Stenehjem  
Attorney General

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