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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.

**PLAINTIFF’S MEMORANDUM IN  
SUPPORT OF MOTION FOR  
PRELIMINARY INJUNCTION**

**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”) submits the following memorandum in support of its Motion for Preliminary Injunction against the National Collegiate Athletic Association (NCAA) in order to prevent tremendous consequences to UND and its athletic and academic programs by immediate application of an absurd, unauthorized and unlawful Policy of the NCAA.<sup>1</sup>

**INTRODUCTION**

The Executive Committee of the NCAA refuses to play by the rules—both those of the NCAA and those imposed by law. Under the NCAA Constitution and Bylaws, only a super majority of the NCAA membership, not the Executive Committee, has the power to legislate. Deliberately bypassing this legislative process, the Executive Committee has adopted legislation

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<sup>1</sup> At the present time, it appears that UND teams will likely make post-season play and be a top-seeded team. Because of uncertainty on the timing in which the NCAA will solicit bids for hosting regional play competitions, which ordinarily are awarded to a top-seeded team, UND may be forced to request a temporary restraining order before a hearing can be held on the Motion for Preliminary Injunction. Based upon records from last season, regional competition sites may be awarded as early as October 20, 2006, and injunctive relief prior to that time would be imperative.

disguised as a “Policy” that declares UND’s “Fighting Sioux” name and logo “hostile and abusive.” Under the “Policy,” UND is prohibited from hosting any post-season NCAA championship competition—meaning--UND will not be provided any earned home field advantage in the playoffs, regardless of its win-loss record, the quality of its facilities or attendance potential and UND will be further prohibited from competing with other member institutions to host lucrative post-season championship competition predetermined through competitive bidding. In addition, UND is forbidden from displaying its “Fighting Sioux” name or logo on its athletic, cheerleading, dance, and band uniforms at post-season championship competitions and from selling merchandise with the name and logo at these post season venues.

Not only was the “Policy” implemented in contravention of the NCAA Constitution and Bylaws, it has been applied in an arbitrary and inequitable manner. While the NCAA publicly proclaimed that UND could “appeal” the Executive Committee’s application of the Policy to UND, the process was a sham. Over the course of the last year, the Executive Committee repeatedly changed the rationale for the Policy, the basis upon which it was applied to UND, and the evidentiary burden to be borne by UND.

At the same time, the Executive Committee disregarded the proclaimed basis for the Policy to permit a few powerful member institutions such as Florida State University (“**FSU**”) to continue using Native American names and imagery without any championship restrictions or repercussions from the NCAA. The absurdity of these rulings is well illustrated by UND President Kupchella in his most recent open letter to the NCAA:

Imagine a scenario in which we bow to the NCAA and remove every vestige of our connection to our traditional nickname, and we earn the right to host one of the exempted schools, say Florida State, in a championship game. Your policy would allow Florida State to come into town with its logo and nickname proudly displayed, led by someone who paints himself up like an Indian “on the warpath” and carries a flaming spear. He could ride into our stadium on a horse and lead FSU fans in a tomahawk chop and an Indian chant. This, while our fans, then the obvious victims of an **unfair** and **irrational** policy, seethe in rightful anger.

As a member of the NCAA, UND has been held captive by the Executive Committee's unilateral and unauthorized assertion of power. This action constitutes not only a breach of the NCAA's contractual obligations to UND, but a breach of the implied covenant of good faith and fair dealing and a violation of state anti-trust law.

### **Breach of Contract**

The relationship between UND and the NCAA is contractual. All members of the NCAA, including UND, agreed to a set of policies and regulations governing intercollegiate athletic competition and national athletic championships, which are set forth in the NCAA Constitution and Bylaws. The NCAA Constitution and Bylaws specifically provide that “[a]ll legislation of the Association that governs the conduct of the intercollegiate athletics programs of its member institutions shall be adopted by the membership in Convention assembled.” The legislative process has produced countless by-laws which regulate the conduct of intercollegiate athletics down to such minute detail as the time of day a coach is permitted to telephone a potential recruit.

Critically, the NCAA Constitution and Bylaws do not vest the NCAA Executive Committee with *any* legislative authority. Rather, the Executive Committee is empowered only to “forward proposed amendments to [the Constitution] and other dominant legislation to the entire membership for a vote,” or “[c]all 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 Association's constitution.”

The Executive Committee did not pursue either of these contractually permitted alternatives in addressing the issue of the use of Native American imagery by member institutions. Instead, the Executive Committee sought to bypass the legislative process by characterizing its legislation as mere “policy” for which membership approval was not required. The NCAA Constitution and Bylaws simply do not permit the Executive Committee to adopt legislation prohibiting institutions from using Native American imagery in championship competition or from hosting NCAA championships, regardless of whether that legislation is

characterized as mere “policy.” Such action by the Executive Committee is a breach of the NCAA’s contractual obligations to UND.

### **Breach of the Implied Covenant of Good Faith and Fair Dealing**

While the NCAA Executive Committee acted in breach of its contractual obligations in promulgating the Policy in the first instance, it also breached the implied covenant of good faith and fair dealing in the arbitrary, self-serving, and contradictory manner in which it interpreted and applied the Policy. For example, throughout the impromptu “appeals” process arbitrarily established by the Executive Committee whereby affected institutions could appeal their inclusion on the list of members covered by the Policy, the Executive Committee repeatedly altered the evidentiary basis for its determination that UND was subject to the Policy, eventually adopting evidentiary “presumptions” against UND. This and other action by the Executive Committee throughout the “appeals” process expose it as a sham, conducted in bad faith.

The Executive Committee’s bad faith is further demonstrated by the arbitrary manner in which it crafted an “exception” to the Policy for a wealthy and powerful Division I member, FSU, just days after receiving FSU’s “appeal.” The “exception” provided that approval of a “Namesake Tribe” would exempt an institution from application of the Policy. Not only was this “exception” plainly created out of expedience—to avoid a confrontation with FSU—it also entirely contradicted the Executive Committee’s express rationale for the Policy in the first place. Moreover, as if crafting the “exception” itself were not enough, the Executive Committee then willfully refused to apply the “exception” to UND, despite the fact that UND has the approval of a “namesake tribe.” Such transparent bad faith is a clear breach of the implied covenant of good faith and fair dealing.

### **Violation of State Antitrust Laws**

It is undisputed that intercollegiate athletics represent a multi-billion dollar industry, over which the NCAA enjoys a complete monopoly. While certain necessary restraints imposed by the NCAA have historically survived anti-trust scrutiny, this Policy is not a necessary restraint.

Instead, the Executive Committee's Policy constitutes an unlawful exercise of the NCAA's monopoly power.

In promulgating the Policy, the Executive Committee has stated, in no uncertain terms, that it will not consider a competitive bid from UND to host a predetermined NCAA championship event, even though UND has one of the premier hockey facilities in the country. Such action constitutes a clear group boycott against competitive bidding, a quintessential *per se* violation of antitrust law. While many of the NCAA's rules are necessary to preserve the very nature of amateur collegiate athletics and therefore survive anti-trust scrutiny, there are limits to this protection. Courts considering the issue have applied a two step analysis: (1) an anti-trust plaintiff must show the anti-competitive effects of a NCAA regulation, and then (2) the NCAA must justify these effects with proof of sufficient procompetitive effects. UND can easily show that the Policy has dramatic anti-competitive effects. Indeed, the significant economic benefits of hosting an NCAA championship event are trumpeted by the NCAA itself as filled with "economic impact and prestige" for a host and its community. Because UND has met its burden, the NCAA must demonstrate, at a minimum, that an otherwise unreasonable restraint on trade such as the Policy's group boycott exhibits procompetitive effects. Because the NCAA has not, and cannot, show sufficient procompetitive effect for the current Policy, it violates North Dakota antitrust laws and therefore must be enjoined.

The NCAA Executive Committee has vastly exceeded its authority in promulgating and applying the Policy, thereby breaching its contractual obligations to UND, breaching the implied covenant of good faith and fair dealing, and violating state anti-trust law. Not only has application of the Policy produced glaringly inconsistent and inequitable results, continued enforcement will cause irreparable injury to UND's reputation and to its athletic and academic programs that cannot be remedied by money damages. UND's only recourse is either capitulate and discontinue the use of its historic and economically valuable "Fighting Sioux" name and logo or challenge the Executive Committee's unlawful abuse of power. UND has chosen to do the latter, and until a decision on the merits can be rendered, this Court should issue a

preliminary injunction prohibiting the NCAA from applying the Policy to UND, thereby preserving the status quo, preventing the harm from occurring, and protecting UND's rights until a decision on the merits can be rendered.

## **STATEMENT OF FACTS**

### **The Parties**

1. UND 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. (Affidavit of Charles Kupchella dated Oct. 3, 2006, ¶ 2).

2. The NCAA is an unincorporated association of more than 1,250 members, including virtually all public and private universities and four-year colleges conducting major athletic programs in the United States. (Kupchella Aff., ¶ 3).

3. The NCAA's members also include athletic conferences and non-profit sports organizations affiliated with amateur athletics. (Kupchella Aff., ¶ 4).

4. The NCAA is a voluntary member organization governed by documents organized into "Articles" for each of Divisions I, II, and III, which were adopted by a vote of the Association membership. For ease of reference, in this memorandum, the Division II Manual, which contains the Constitution and Bylaws, will be referred to as the "Contract"<sup>2</sup> (the "Contract"). A true and correct copy of the Contract is attached hereto as Exhibit "A". (Kupchella Aff., ¶ 5).

5. NCAA member colleges and universities are divided into three major divisions: Division I, II, and III. The member schools must annually meet membership criteria for their respective divisions. Ex. A, Contract, Art. 20.

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<sup>2</sup> Each Master Manual contains the NCAA Constitution and "legislation specific to the applicable division" but omitting "legislation pertaining only to one or both of the other divisions." Ex. A, Contract, at xiii. These "Master Manuals" will hereafter be identified as either the "Division I Manual," the "Division II Manual," (or "Contract") or the "Division III Manual." In addition, the NCAA publishes a new Manual for each Division each academic year, with pertinent changes adopted by the membership in convention incorporated into each respective Manual. The Division II Manual attached to this memorandum is the 2005-2006 Division II Manual, but the 2006-2007 Division II Manual is identical in all material respects, and noticeably does not contain anything addressing Native American imagery.

6. UND has been a member of the NCAA since September 1, 1949. UND is currently a Division II member organization of the NCAA and is generally subject to the rules and regulations governing Division II. UND has, however, sought and obtained “Multidivision Classification,” whereby its ice hockey program is classified as Division I. (Kupchella Aff., ¶ 6); Ex. A, Contract, Arts. 20.02.1, 20.4.

7. 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. (Kupchella Aff., ¶ 7); Ex. A, Contract, Art. 20.7.1.

### **NCAA Constitution and Bylaws**

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

9. The Contract provides that whereas the Constitution “sets forth basic purposes, fundamental policies and general principles that generally serve as the basis on which the legislation of the Association shall be derived,” Ex. A, Contract, Art. 5.2.1, “[a]ll regulations governing the administration of intercollegiate athletics appear in the bylaws.” Ex. A, Contract, at ix (emphasis added).

#### ***The NCAA Constitution***

10. The Constitution “consists of information relevant to the purposes of the Association, its structure, its membership and legislative-process information, and the more important principles for the conduct of intercollegiate athletics.” Ex. A, Contract, at ix.

11. Article 4 of the Constitution guarantees members access to national championships. Ex. A, Contract, Art. 4.01.2.2.

#### ***The NCAA Operating Bylaws***

12. The Operating Bylaws “consist of *legislation* adopted by the membership to promote the principles enunciated in the constitution and to achieve the Association’s purposes.” Ex. A, Contract, at ix (emphasis added).

### *The NCAA Administrative Bylaws*

13. The Administrative Bylaws “set forth policies and procedures for the implementation of (a) the general legislative actions of the Association, (b) the NCAA championships and the business of the Association, (c) the Association’s enforcement program, and (d) the Association’s athletics certification program.” Ex. A, Contract, at ix.

14. Under the foregoing structure, the Constitution sets forth basic purposes of the Association. The legislation passed by the Association 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. Ex. A, Contract, at ix & Art. 5.2.3.

15. There are no Bylaws concerning or relating to Native American imagery. *See generally* Ex. A, Contract, Arts. 10-21.

### **NCAA Governance Structure**

16. The NCAA is a bottom-up, democratic organization with a “federated” governance structure, in part the result of a restructuring in 1997 intended to “achieve greater legislative and policy autonomy for each membership division.” 2002 NCAA Ad Hoc Review Committee Report (the “**NCAA Review Committee Report**”), a true and correct copy of which is attached hereto as Exhibit “B”.

17. Under the federated structure, the Constitution and Bylaws provide for an Executive Committee responsible for administering the general affairs of the Association as a whole and for an independent “Presidents Council” within each of the three membership divisions (or in Division I, the “Board of Directors”) to “set forth the policies, rules and regulations” for operating each division. Ex. A, Contract, Arts. 4.01.1 & 4.3.1.

18. Complementing these administrative bodies are association-wide and division-specific committees and subcommittees. Ex. A, Contract, Art. 21.

### *The NCAA Executive Committee*

19. 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. Ex. A, Contract, Arts. 4.1.1 & 4.1.3.

20. The Executive Committee is generally charged with overseeing “Association-wide issues” and ensuring “that each division operates consistent with the basic purposes, fundamental polices, and general principles of the Association.” Ex. A, Contract, Art. 4.01.1.

21. More specifically, the Constitution provides that the Executive Committee has the following “Duties and Responsibilities:”

- a. Provide final approval and oversight of the Association’s budget;
- b. Employ the Association’s chief executive officer (president), who shall be administratively responsible to the Executive Committee and who shall be authorized to employ such other persons as may be necessary to conduct efficiently the business of the Association;
- c. Provide strategic planning for the Association as a whole;
- d. Identify core issues that affect the Association as a whole;
- e. Act on behalf of the Association to resolve core issues and other Association-wide matters;
- f. Initiate and settle litigation;
- g. Convene at least one combined meeting per year of the three divisional presidential governing bodies;
- h. Convene at least one same-site meeting per year of the three divisional Management Councils;
- i. *Forward proposed amendments to Constitutions 1 and 2 and other dominant legislation to the entire membership for a vote;*
- j. *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 Association’s constitution. This action may be overridden by the Association’s entire membership by a two-thirds majority vote of those institutions voting;*
- k. Call for an annual or special Convention of the Association;

- l. Review and coordinate the catastrophic-injury and professional career insurance (disability injury/illness) programs; and
- m. Compile the names of those individuals associated with intercollegiate athletics who died during the year immediately preceding the annual Convention.

Ex. A, Contract, Art. 4.1.2 (emphasis added).

22. The foregoing are the only duties and powers granted to the Executive Committee under the Contract. Significantly, the Executive Committee does not possess any legislative authority, nor is the Executive Committee empowered to administer NCAA championships. Ex. A, Contract, Art. 4.1.2.

### *The Divisional Presidents Councils*

23. The Presidents Councils (called “Board of Directors” in Division I) are to “set forth the policies, rules, and regulations for operating the division.” Ex. A, Contract, Art. 4.01.1.

24. The members of the Presidents Councils are drawn from chief executive officers of member institutions in the applicable division. Ex. A, Contract, Art. 4.3.1.

25. The specific duties and responsibilities assigned to the Division II Presidents Council by Article 4 of the Constitution are in pertinent part as follows:

- a. Implement policies adopted by the Association’s Executive Committee;
- b. Establish and direct the general policy of Division II;  
\* \* \*
- e. Adopt non-controversial and intent-based amendments, administrative bylaws, and regulations to govern Division II;
- f. Sponsor Division II legislation;  
\* \* \*
- p. Approve regulations providing for the administration of Division II championships.

Ex. A, Contract, Art. 4.3.2.<sup>3</sup>

26. Whereas the Executive Committee has no legislative or championship administration responsibilities, the divisional presidential bodies have the power to adopt “non-

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<sup>3</sup> The Division I Board of Directors and the Division III Presidents Council have similar duties for their respective divisions.

controversial” amendments, bylaws, and regulations, and approve regulations governing administration of championships. *Compare* Ex. A, Contract, Art. 4.1.2. *with* Art. 4.3.2.

### ***NCAA Committees***

27. The Contract establishes several types of committees to aid the Association in accomplishing its objectives. The NCAA committees are generally classified as either: 1) Association-Wide Committees; 2) Common Committees; or 3) Federated Committees. Ex. A, Contract, Art. 21.02.

28. Only select Common and Federated Committees have administrative authority, including the power to develop and implement policies and procedures relating to NCAA championships. The Association-Wide Committees, such as the Executive Committee, have no such authority or power. *See* Ex. A, Contract, Art. 21.

### **NCAA Legislative Process and Authority**

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

All legislation of the Association that governs the conduct of the intercollegiate athletics programs of its member institutions shall be adopted by the membership in Convention assembled, or by the presidential administrative groups<sup>4</sup> and the division management councils as set forth in Constitution 4, as determined by the constitution and bylaws governing each division....

Ex. A, Contract, Art. 5.01.1.

30. The Constitution states in its “Approaches to Legislative Process” that “the Association recognizes that certain fundamental policies, practices and principles have applicability to all members, while others are applicable to division groupings of members....”

Ex. A, Contract, Art. 5.01.2.

31. Accordingly, the requirements for passing new legislation or amendments to the existing Constitution, Operating Bylaws, or Administrative Bylaws depend upon the nature of

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<sup>4</sup> This is the Board of Directors in Division I and the Presidents Council in Divisions II and III.

the legislation or amendment. Legislation is therefore classified as Dominant, Division Dominant, Common, or Federated. Ex. A, Contract, Art. 5.02.1.

32. Dominant legislation is “a regulation that applies to all members of the Association and is of sufficient importance to the entire membership that it requires a two-thirds super-majority vote of all delegates present and voting” in order to take effect. Ex. A, Contract, Art. 5.02.1.1.

33. Division Dominant legislation is legislation that applies to all members of a specific division and is of sufficient importance that it requires a two-thirds majority of the applicable division to pass. Ex. A, Contract, Art. 5.02.1.1.1.

34. Common legislation is a regulation that applies to more than one of the Association divisions, and must be separately approved by each impacted division in order to pass. Ex. A, Contract, Art. 5.02.1.2.

35. Federated legislation is legislation that only applies to those divisions who adopt it by a majority vote. Ex. A, Contract, Art. 5.02.1.3.

### ***Legislation***

36. The Constitution empowers the membership to adopt new Constitutional provisions and to adopt Operating Bylaws and Administrative Bylaws. Ex. A, Contract, Art. 5.2.

37. Specifically, the Constitution provides that “[t]he *membership* may adopt legislation to be included in the constitution of the Association.” Ex. A, Contract, Art. 5.2.1 (emphasis added).

38. Article 5.2.2 of the Constitution provides that “[e]ach *division* may adopt legislation to be included in the *operating bylaws* of the Association, which provide rules and regulations not inconsistent with the provisions of the constitution.” The Constitution mandates that these Operating Bylaws “*shall* include, but not be limited to, the following particulars:”

- a. The administration of intercollegiate athletics by members of the Association;

- b. The establishment and control of NCAA championships (games, matches, meets and tournaments) and other athletic events sponsored or sanctioned by the Association;
- c. The procedures for administering and enforcing the provisions of the constitution and bylaws; and
- d. The adoption of rules of play and competition in the various sports, and the delegation of authority in connection with such subjects to individuals, officers or committees.

Ex. A, Contract, Art. 5.2.2 (emphasis added).

39. In addition to Operating Bylaws, the membership is empowered to adopt Administrative Bylaws, which “provide rules and regulations for the implementation of policy adopted by the membership as set forth in the constitution and operating bylaws.” Ex. A, Contract, Art. 5.2.3. Administrative Bylaws are distinct from the Operating Bylaws “in that, to provide greater flexibility and efficiency in the conduct of the affairs of the Association, they may be adopted or amended by the applicable division presidential administrative group per constitution 4.2, 4.3, and 4.4.” Ex. A, Contract, Art. 5.2.3.<sup>5</sup>

40. Under the legislative system set forth above, the Association membership and the divisional presidential administrative groups are vested with *all* legislative authority, and are expressly vested with the power to administer and operate NCAA championships and administer and operate the NCAA enforcement program. Ex. A, Contract, Art. 5.

41. In contrast, the Executive Committee has no such legislative or enforcement authority. Ex. A, Contract, Art. 4.1.2. Rather, the Executive Committee is empowered only to “[f]orward proposed amendments to Constitutions 1 and 2 and other dominant legislation to the entire membership for a vote” or “[c]all 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

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<sup>5</sup> Articles 4.2, 4.3, and 4.4 authorize the Presidents Councils and Board of Directors to adopt “noncontroversial and intent-based amendments, administrative bylaws and regulations to govern Division II.” “Noncontroversial” amendments are legislation “clearly necessary to promote the normal and orderly administration of the division’s legislation.” Noncontroversial amendments adopted by the Division II Presidents Council are temporary in nature, and the Division II Management Council is required to “sponsor legislation at the next annual Convention to confirm the adoption of such amendments.” Ex. A, Contract, Art. 5.3.1.1.1.

*principles set forth in the Association's constitution*" (emphasis added). Ex. A, Contract, Art. 4.1.2(i), (j).

### **Exercise of Legislative Authority**

42. Pursuant to the mandate of the Constitution, the NCAA membership has promulgated over 300 pages of legislation that governs virtually every aspect of intercollegiate competition and implements rules, policies, and procedures for carrying out the principles set forth in the Constitution. *See generally* Ex. A, Contract.

43. For example, Article 12 of the Operating Bylaws titled "Amateurism" contains detailed and exhaustive legislation addressing virtually every aspect of the constitutional principle of "amateurism." This legislation addresses both broad issues such as the definition of amateurism and very minor issues such as the types of expenses that can be paid for a student-athlete, the timing of the payment of such expenses, and exceptions to these rules. It further details the types of competition a student-athlete can engage in without losing amateur status, and the types of promotional activities that are permissible. *See* Ex. A, Contract, Art. 12.

44. Other Articles are equally detailed. The constitutional principle of "recruiting" is addressed in Article 13, covering some 30 pages and including such details as the amount that can be spent on meals for a recruit, the persons who can perform recruiting activities, whether transportation costs can be paid for a recruit, when and how the recruit can be contacted for recruiting purposes, the permissible number of recruiting contacts, recruiting materials that can be used, and all permissible exceptions to these rules. *See e.g.*, Ex. A, Contract, Art. 13.

45. Other constitutional principles such as academic standards; student-athlete eligibility; financial aid; awards, benefits and expenses for enrolled student athletes; playing and practice seasons; and enforcement are also exhaustively covered by the Operating Bylaws and Administrative Bylaws. *See* Ex. A, Contract, at iii-vi.

46. In addition, pursuant to the mandate of the Constitution and Bylaws, the NCAA Common and Federated Committees have produced dozens of separate administrative handbooks setting forth additional detailed policies and regulations for the conduct of NCAA

championships. True and correct copies of a representative sample of these documents are attached hereto as Appendix “1”.

47. The NCAA membership has continued to remain active legislatively, proposing new legislation and amendments at each of the annual conventions. For example, in 2006 the membership proposed and voted on hundreds of proposed amendments to the bylaws among the three divisions. *See* 2006 NCAA Convention Proceedings, a true and correct copy of which is attached hereto as Appendix “2”.

48. These proposed amendments covered numerous aspects of NCAA affairs, including: amateurism; institutional, charitable, educational or nonprofit promotions; sale of items bearing names, likenesses, or pictures of student athletes; awards and benefits; medical expenses; eligibility; progress toward degree; seasons of competition; coaching limitations; financial aid; recruiting; ethical conduct; playing and practice seasons; executive regulations on the selection of teams and individuals for championships participation; active membership and sport sponsorship; and amendments to philosophy statements. *See* App. 2, 2006 NCAA Convention Proceedings.

### **Governance of NCAA Championships**

49. In addition to the legislation set forth above, the NCAA membership has followed the mandate of Article 5.2 of the Constitution and passed extensive legislation governing the establishment, operation, and administration of NCAA championships.

50. The NCAA membership has established a total of 88 national championships: 10 National Championships (in which all Divisions may compete), 26 Division I championships, 25 Division II championships, and 27 Division III championships. A breakdown of these championships is attached hereto as Exhibit “C”.

51. Article 18 of the Operating Bylaws is titled “Championships and Postseason Football.” This Article expressly provides:

All NCAA championships shall be conducted in accordance with this bylaw and the policies and procedures established by the Championships Committee, which shall establish and revise the policies and procedures governing the administration of NCAA

championships, including selection processes, formats and distribution of revenues to participating institutions. NCAA championships shall be under the control, direction and supervision of the appropriate sports committees, subject to the requirements, standards and conditions prescribed in Bylaw 31.<sup>6</sup>

Ex. A, Contract, Art. 18.1.<sup>7</sup>

52. The membership has additionally promulgated Administrative Bylaws governing administration of NCAA championships. Contract, Art, 31.1 “Administration of NCAA Championships” provides:

As specified in Bylaw 18.1, all NCAA championships shall be conducted in accordance with the general policies established by the Championships Committee and shall be under the control, direction and supervision of the appropriate sports committees, subject to the standards and conditions set forth in these executive regulations. Additional policies of an administrative nature are set forth in the respective championships handbooks and are to be followed in the administration of NCAA championships.

Ex. A, Contract, Art. 31.1.

53. Pursuant to Articles 18 and 31, all authority for administration of NCAA championships, including all “policies and procedures” incident thereto, is lodged in the divisional bodies and the divisional “Championships Committee.” The Executive Committee is not vested with any such authority. *See* Ex. A, Contract, Arts. 18 & 31.

54. The NCAA membership has expressly addressed the issue of eligibility to compete in NCAA championships. Article 18.4.2 titled “Institutional Eligibility” provides that in order to be eligible to enter a team in NCAA championship competition, an institution need only 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 certify that it is in compliance with NCAA *legislation*.<sup>8</sup> Ex. A, Contract, Art. 18.4.2 (emphasis added).

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<sup>6</sup> Bylaw 31 is an Administrative Bylaw titled “Executive Regulations,” which contains further legislation regarding, *inter alia*, administration of NCAA championships. *See* Ex. A, Contract, Art. 31.1.

<sup>7</sup> Although this Bylaw is also contained in the Division I Manual as Article 18.1, that document substitutes “Championships/Competition Cabinet” for “Championships Committee.”

<sup>8</sup> The specific elements of the certification of compliance are found in Article 30.3 of the Contract.

55. The method of selection of sites for championship contests is also expressly addressed in Article 31.1.3. This Article provides that “[t]he governing sports committees shall evaluate prospective sites for NCAA championships in terms of the specific criteria approved by the Championships Committee.” These criteria “shall be specified in the appropriate championships handbooks.” Ex. A, Contract, Art. 31.1.3.2.

56. Article 31.1.3.2, further identifies specific criteria which must be considered by the Championships Committee and sports committees in selecting hosting sites for NCAA regional and national championships. These criteria are:

- a. Quality and availability of the facility and other necessary accommodations;
- b. Revenue potential (*e.g.*, financial guarantee or guideline that ensures fiscal responsibility and is appropriate for the particular event, as recommended by the governing sports committee and approved by the Championships Committee);
- c. Attendance history and potential; and
- d. Geographical location (*e.g.*, a site that minimizes travel expenses).<sup>9</sup>

Ex. A, Contract, Art. 31.1.3.2.

57. Article 31.1.3.2 makes no mention of the use of Native American imagery by NCAA members. Ex. A, Contract, Art. 31.1.3.2.

58. Article 31.1.3.2.1 further provides that “[t]he top-seeded team ... shall be provided the opportunity to host the regional competition” provided that the criteria established by the “governing sports committee have been met.” Ex. A, Contract, Art. 31.1.3.2.1.

59. In addition to the criteria found in Article 31.1.3.2 of the Administrative Bylaws, pursuant to the mandate of Article 31.1.3, the Division II Championships Committee has approved limited additional site selection criteria. These criteria are found in the “Division II Championships Committee Policy and Operating Procedures” handbook and the Championship Handbooks. The analogous committees in Divisions II and III have promulgated similar

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<sup>9</sup> “Geographical Location” is not a criterion for regional site determination.

manuals and handbooks. A true and correct copy of the Division II Championships Committee Policy and Operating Procedures handbook is attached hereto as Appendix “3”.

60. In addition to setting forth additional championship site selection criteria, the Championship Handbooks contain detailed administrative policies and regulations governing, *inter alia*, uniforms, use of mascots, and selection of championship participants. *See generally* Ex. A, Contract *and* App. 1, Championship Handbooks.

61. Neither the Contract nor the Championship Handbooks contain any policies or regulations prohibiting institutions that use Native American imagery, logos, or mascots from hosting championship competitions. *See generally* Ex. A, Contract *and* App. 1, Championship Handbooks.

62. Neither the Contract nor the Championship Handbooks contain any policies or regulations prohibiting institutions from using Native American names or logos on their uniforms or from competing in championship competition unless such names and images are shrouded. *See generally* Ex. A, Contract *and* App. 1, Championship Handbooks.

63. Neither the Contract nor the Championship Handbooks contain any policies or regulations prohibiting championship participants from using Native American mascots or displaying Native American names or imagery on band uniforms, cheerleader uniforms, or other paraphernalia at championship competitions. *See generally* Ex. A, Contract *and* App. 1, Championship Handbooks.

### **Enforcement**

64. Article 1.3.2 of the Constitution, “Obligations of Member Institutions,” provides that “[m]ember institutions shall be obligated to apply and enforce [NCAA] legislation.” Ex. A, Contract, Art. 1.3.2.

65. Article 1.3.2 of the Constitution does not obligate member institutions to enforce NCAA Executive Committee policies. Ex. A, Contract, Art. 1.3.2.

66. Article 2.8.2, “Responsibility of the Association,” provides that “[t]he Association shall assist the institution in its efforts to achieve full compliance with all rules and regulations

and shall afford the institution, its staff and student-athletes fair procedures in the consideration of an identified or alleged failure in compliance.” Ex. A, Contract, Art. 2.8.2.

67. Pursuant to Article 2.8, the Association membership adopted Article 19 of the Contract, which sets forth penalties for violation of the Bylaws and enforcement procedures. *See* Ex. A, Contract, Art. 2.8.

68. Article 19.1 provides that the Division II Management Council “shall appoint a Committee on Infractions, which shall be responsible for administration of the NCAA enforcement program.” This Committee on Infractions has authority to impose “[d]isciplinary or corrective actions other than suspension or termination of membership.” Ex. A, Contract, Art. 19.1.2.

69. Article 19.1.3 further enumerates the duties of the Committee on Infractions:

- a. Consider complaints that may be filed with the Association charging the failure of any Division II member to maintain the academic or athletics standards required for membership or the failure of any Division II member to meet the conditions and obligations of membership in the Association;
- b. Formulate and revise in accordance with the requirements of Bylaw 19.3, a statement of its established operating policies and procedures, including investigative guidelines (see Bylaw 32);
- c. Determine facts related to alleged violations and find violations of NCAA rules and requirements;
- d. Impose an appropriate penalty or ‘show cause’ requirement on a Division II member found to be involved in a major violation (or on appeal of a Division II member found to be involved in a secondary violation ) or recommend to the Division II Presidents Council suspension or termination of membership; and
- e. Carry out other duties directly related to the administration of the Division II enforcement program.

Ex. A, Contract, Art. 19.1.3.

70. UND has not been referred to the Committee on Infractions for its use of Native American imagery. (Kupchella Aff., ¶ 26).

71. The Contract also provides for an appeals process for “major violations,” with such appeals being heard by the “Infractions Appeals Committee,” which, pursuant to Article

19.2, is comprised of members of the Division II Management Council. Ex. A, Contract, Art. 19.2.

72. Under the foregoing provisions, all power and authority to investigate and adjudicate violations of the obligations imposed on NCAA members by the Contract and to impose penalties for such violations is lodged at the divisional level. The NCAA Executive Committee has no such authority or power. *See generally* Ex A, Contract.

73. The only disciplinary power lodged with the Executive Committee extends to the power to suspend or terminate the membership of *non-divisional* members such as “Affiliated” and “Corresponding” members. Ex. A, Contract, Art. 19.5.3.1. UND is not an “Affiliated” or “Corresponding” member.

#### **The Executive Committee Attempts to Seize Control of NCAA Championships**

74. On April 27, 2001, the NCAA Executive Committee voted to “refer the review of the issue of eliminating the use of American Indian mascot nicknames and logos by members of the NCAA to the Minority Opportunities and Interests Committee and the Executive Committee Subcommittee on Gender and Diversity Issues.” A true and correct copy of the Executive Committee Minutes dated Apr. 27, 2001, is attached hereto as Exhibit “D”.

75. The Minority Opportunities and Interests Committee (“MOIC”) is an Association-Wide General Committee without any legislative or administrative authority.

76. In response to the Executive Committee’s mandate, the MOIC adopted a “strategic plan” for reviewing the use of Native American imagery by NCAA member institutions, which included a “research” phase and a “recommendations” phase. *See* MOIC Oct. 2002 Report, a true and correct copy of which is attached hereto as Exhibit “E”.

77. The “research” phase of the MOIC’s review consisted of reading and summarizing “articles and pieces of research,” virtually all of which were apparently authored by those opposing the continued use of Native American Imagery in sports and which advocated the discontinuation of such use. Ex. E, MOIC Oct. 2002 Rep.; NCAA Letter dated May 15, 2006, a true and correct copy of which is attached hereto as Exhibit “F”.

78. The MOIC also solicited “comments and testimonials from Indian tribal groups and members, student athletes, the NCAA membership, the general public, and various entities within the NCAA.” Ex. E, MOIC Oct. 2002 Rep.

79. While the majority of the third parties who bothered to respond to the MOIC’s comment requests were opposed to the use of Native American imagery in sports, the comments provided by the actual divisional governance structures within the NCAA (that are vested with authority by the Contract to administer NCAA championships and select championship sites and participants) *opposed* penalizing institutions using Native American imagery by restricting access to competing in and hosting championship competition:

- a. The Division I Championships/Competition Cabinet stated: “it is the position of the cabinet that access to or the location of NCAA championship events should *not* be restricted because of issues related to the use by institutions of American Indian mascots or images;”
- b. The Division II Championships Committee stated: “[t]he committee would *not* advocate a policy that would prevent or eliminate championship opportunities for those institutions continuing the practice of using mascots, nicknames, and logos as long as the activities and graphics are not disrespectful to any group; and
- c. The Division III Championships Committee stated that it “believes that the selection or use of Native American mascots *falls within the realm of institutional autonomy* and may not be an issue within the purview of the Association.”
- d. The Committee on Sportsmanship and Ethical Conduct stated that it believed mascot issues “*may be addressed most effectively by the individual institution*, its community, and its conference, rather than at the national level.”

Ex. E, MOIC Oct. 2002 Rep. & Ex. G thereto (emphasis added).

80. The MOIC presented its conclusions and recommendations regarding the use of Native American imagery by member institutions to the Executive Committee in October 2002. *See* Ex. E, MOIC Oct. 2002 Rep.

81. In its October 2002 Report, the MOIC concluded that “current uses of American Indian mascots by NCAA member institutions range from being respectful to offensive” and that

“institutions using American Indian mascots, nicknames and logos should review the depiction of and behavior associated with the use by athletic teams, cheerleaders, band members, other auxiliary groups, and fans” and eliminate “those aspects that are offensive.” Ex. E, MOIC Oct. 2002 Rep.

82. The MOIC further considered the methods that could be employed to preclude further use of Native American imagery by NCAA members. The MOIC stated that the NCAA could:

- a. Do nothing;
- b. Pass legislation barring members from using Native American mascots;
- c. “*Penalize*” institutions who used Native American imagery “through championships policy” which would prohibit affected institutions from “bringing their mascots, cheerleaders, or band to the competition site” and placing a “restriction on logos” which “may result in certain articles of clothing and various banners being prohibited from the competition site;” or
- d. “*Penalize*” institutions using Native American imagery by prohibiting them from hosting championship competition.

Ex. E, MOIC Oct. 2002 Rep. (emphasis added).

83. Despite the express opposition of the divisional championships committees to any policy which would restrict access to or the location of NCAA championships based on issues related to an institution’s use of Native American imagery, the MOIC recommended that the Association impose precisely such “penalties” on members using Native American imagery. Ex. E, MOIC Oct. 2002 Rep.

84. Notwithstanding the express opposition of the divisional governance structures vested by the Contract with authority to administer NCAA championships and establish selection criteria for championship participants and sites, on August 5, 2005, at the urging of the MOIC, 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” (the “**Policy**”). See

“NCAA Executive Committee Issues Guidelines for Use of Native American Mascots at Championship Events,” press release dated Aug. 5, 2005 (the “**Aug. 5 Executive Committee Guidelines**”) (emphasis added), a true and correct copy of which is attached hereto as Exhibit “G”.

85. As interpreted and applied 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. Ex. G, Aug. 5 Executive Committee Guidelines;
- b. Hosting any NCAA championship competitions, effective February 1, 2006. Ex. G, Aug. 5 Executive Committee Guidelines;
- 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. Ex. G, Aug. 5 Executive Committee Guidelines; and
- d. Selling Native American mascot, nickname, and imagery “related merchandise” at championship venues. Gary T. Brown, “Policy Applies Core Principles to Mascot Issue,” *NCAA News Online Article*, Aug. 15, 2005 (“**Aug. 15, 2005 NCAA News Article**”). a true and correct copy of which is attached hereto as Exhibit “H”.

86. The Aug. 5 NCAA Guidelines listed eighteen colleges and universities that are subject to the Policy based upon their “use of Native American imagery or references,” including UND. Ex. G, Aug. 5 Executive Committee Guidelines.

87. UND does not have a mascot. (Kupchella Aff., ¶ 14).

88. UND’s nickname is the “Fighting Sioux,” and such name references the people and culture who prior to the westward expansion of the United States in the nineteenth century populated the territory now comprising the state of North Dakota. (Kupchella Aff., ¶ 15).

89. UND adopted the name “Fighting Sioux” more than 70 years ago in order to associate itself with the courage, loyalty to cause, honor, and commitment exhibited by the Sioux people who inhabited the Northern Plains. (Kupchella Aff., ¶ 16).

90. UND has more than 32 separate programs designed to support Native American students pursuing university educations, including the “Native Americans into Medicine” program that has been in existence for over 30 years and has generated approximately twenty percent (20%) of all Native American physicians in the United States. (Kupchella Aff., ¶ 21).

91. More than 400 Native American students are enrolled at UND.

92. 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. (Kupchella Aff., ¶ 22).

93. On December 21, 2000, the North Dakota State Board of Higher Education voted unanimously that UND should retain the “Fighting Sioux” name and logo.

94. 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. Ex. G, Aug. 5 Executive Committee Guidelines. The proffered reason for not enforcing the Policy beyond one historical group was that “no one had complained,” which is clearly not true.

95. Members of the Executive Committee stated that the “hostile and abusive” standard to be applied was adopted “in part from case law,” in particular “civil cases in which decisions were reached on the basis of what a ‘reasonable person’ would find to be hostile or abusive.” See Ex. H, Aug. 15, 2005 News Article. Executive Committee members further clarified that the “hostile and abusive” standard is “stronger than simply ‘offensive.’” *Id.*

**The NCAA Acts Arbitrarily, Inconsistently, and in Bad Faith in Applying the Policy**

96. Following the announcement of the Policy, there was an understandable outcry from the affected institutions, and many of those colleges and universities immediately asked to be exempted from the Policy. See “Other Schools Set to Appeal Indian names,” *USA Today*, Aug. 23, 2005, a true and correct copy of which is attached hereto as Exhibit “I”.

97. Because there is no authority, process, or procedure in the Contract for the Executive Committee to promulgate legislation and regulations governing championship competition, much less a process or procedure for appeals of such Executive Committee legislation, the NCAA Executive Committee arbitrarily established an ad hoc “appeals process.”

98. In an August 9, 2005 letter from Myles Brand, President of the NCAA to UND President Charles Kupchella, Mr. Brand (the “**Aug. 9, 2005 Executive Committee Letter**”) indicated that an institution could challenge the Policy and the application of the Policy to its institution. A true and correct copy of the Aug. 9, 2005 Executive Committee Letter is attached hereto as Exhibit “J”.

99. The Aug. 9, 2005 Executive Committee Letter further stated that an institution could “seek to amend or change the policy itself” by submitting a request “through the respective divisional presidential governing body,” who could “develop a recommendation for the Executive Committee’s consideration.” Ex. J, Aug. 9, 2005 Executive Committee Letter.

100. Neither of the avenues of relief set forth in the Aug. 9, 2005 Executive Committee Letter is found in the Contract. Instead, both options were creations of the Executive Committee. Accordingly, it was entirely unclear from the Aug. 9, 2005 Executive Committee Letter what procedures would be observed in the appeal, what evidentiary standards and burdens would apply, what the basis was for concluding that UND’s use of Native American imagery was “hostile and abusive,” and what the scope of the appeal would be.

101. In an August 12, 2005 letter (the “**Aug. 12, 2005 UND 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. A true and correct copy of the Aug. 12, 2005 UND Letter is attached hereto as Exhibit “K”.

102. In a separate letter also dated August 12, 2005, from the President of FSU, T.K. Wetherell, to NCAA President Myles Brand, FSU lodged its objections to the Policy and inclusion on the list of schools subject to the Policy. FSU further suggested that the Policy “be

amended to recognize and respect tribal sovereignty and the rights of each tribe to determine whether their names are being used appropriately.” FSU requested the Executive Committee to “remove from its list all colleges and universities whose ‘namesake tribes’ have officially supported the use of their name and symbols.” A true and correct copy of the August 12, 2005 FSU Letter is attached hereto as Exhibit “L”.

103. In an August 19, 2005 press release (the “**Aug. 19, 2005 Executive Committee 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” comprised of members selected by the Executive Committee, who would consider “the unique aspects and circumstances as it relates to the specific use and practice at [each] college or university” to determine if a particular institution’s use of Native American imagery was hostile or abusive. A true and correct copy of the Aug. 19, 2005 Executive Committee Press Release is attached hereto as Exhibit “M”.

104. No further clarification was provided regarding the basis for the application of the Policy to any particular institution, the evidentiary burdens that would apply, or the actual procedures to be followed. However, the Aug. 19, 2005 Executive Committee Press Release did introduce new review criteria, obviously in response to the Aug. 12, 2005 FSU letter, asserting for the first time that “[o]ne primary factor that will be considered is if documentation exists that a ‘namesake’ tribe has formally approved of the use of the mascot, name, and imagery by the institution” (the “**Namesake Exception**”). Ex. M, Aug. 19, 2005 Executive Committee Press Release.

105. Neither the Contract nor the initial version of the “Policy” vests the Executive Committee with any authority to create a Namesake Exception or to allow an outside nonmember entity to control the actions of the NCAA and its members. *See generally* Ex. A, Contract.

106. Under this appeals procedure created by the Executive Committee, 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. Ex. M, Aug. 19, 2005 Executive Committee Press Release.

107. Within days, on August 23, 2005, the Executive Committee applied the newly-created Namesake Exception to exempt FSU, which is 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.” See “Statement by NCAA Senior Vice-President for Governance and Membership Bernard Franklin on Florida State University Review,” dated Aug. 23, 2005 (the “**Aug. 23, 2005 Executive Committee Press Release**”), a true and correct copy of which is attached hereto as Exhibit “N.”

#### **The UND Appeals Process**

108. 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 (the “**Aug. 30, 2005 UND Memo**”). By this letter, UND challenged the Policy and its application to UND. UND explained that its logo clearly was not “hostile or abusive” to Native Americans, and further specified:

- a. UND has received permission to use the “Fighting Sioux” name from the Sioux Tribe geographically closest to UND, the Spirit Lake Nation, qualifying UND for the “Namesake Exception;”
- b. UND uses Native American imagery with “consummate respect,” and its logo is based upon “a classic depiction of an authentic American Indian Sioux Warrior, rendered by a widely respected American Indian artist, Bennett Brien;”
- 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. *See* Aug. 30, 2005 UND Memo at 1, 3, 6, a true and correct copy of which is attached hereto as Exhibit "O"; (Kupchella Aff., ¶¶ 14-18).

109. A response dated September 28, 2005, stated that the NCAA Staff Committee (the "**Sept. 28, 2005 Staff Committee Memo**") had reviewed the "Executive Committee's determination that the university's use of the 'Fighting Sioux' nickname and logo is hostile or abusive" and concluded that UND "should be retained on the list of colleges and universities subject to restrictions on the use of Native American mascots, names and imagery at NCAA championships." *See* Sept. 28, 2005 Staff Comm. Memo, a true and correct copy of which is attached hereto as Exhibit "P".

110. The Staff Committee's decision was based upon "opposition from Native Americans" to UND's nickname and logo and upon the assertion that the Spirit Lake Nation's formal resolution permitting UND to use the "Fighting Sioux" name was "ambiguous." Ex. P, Sept. 28, 2005 Staff Comm. Memo.

111. The Staff Committee further stated that there was a "process" for appealing its decision to the Executive Committee, but did not provide any detail as to the scope of the appeal or the evidentiary standards and/or burdens that would apply. Ex. P, Sept. 28, 2005 Staff Comm. Memo.

112. UND responded to the September 28, 2005 Staff Committee Memo on November 4, 2005, with a letter to the Executive Committee (the “**Nov. 4, 2005 UND Memo**”). By this memo:

- a. UND pointed out the inconsistency in the NCAA’s application of the namesake tribe exception, noting that exemptions from the Policy had been granted to FSU and Central Michigan University based on the approval of only one Native American tribe (while other namesake tribes opposed use of the name), but UND had been denied an exemption even though it had the approval of the geographically closest North Dakota Sioux tribe, the Spirit Lake Nation, to use the “Fighting Sioux” name and logo;
- b. UND noted that while neither the Executive Committee nor the Staff Committee had offered a definition of the term “hostile and abusive,” UND’s use of Native American imagery is not “hostile or abusive,” either under the meaning given those terms by federal courts (which is the standard the Executive Committee members had publicly asserted was applicable), or under a non-legal definition, as UND uses Native American imagery with respect and sensitivity, and without animus or hostility;
- c. UND asserted that the NCAA Executive Committee lacks the authority to “penalize” member institutions or promulgate legislation (whether or not it is disguised as “policy”) such as the Policy;
- d. UND raised concerns that the Policy violated federal anti-trust law; and
- e. UND asked for more information regarding the appeals process, the basis for the Executive Committee’s determination that UND’s use of Native American imagery is “hostile and abusive,” and clarification and explanation of the evidentiary standards employed in both the application of the Policy to UND, and the appeals process.

See Nov. 4, 2005 UND Memo at 1, a true and correct copy of which is attached hereto as Exhibit “Q”.

113. On December 9, 2005, the Staff Review Committee filed a “response” to the Nov. 4, 2005 UND Memo (the “**Dec. 9, 2005 Staff Committee Memo**”) and made the following assertions therein:

- a. Despite its earlier proclamation that it would consider the “unique circumstances” surrounding UND’s actual use of Native American imagery in determining whether UND’s use was “hostile or abusive,” the Executive Committee had since adopted a *new*

“presumption” that *all* use of Native American names, logos, or imagery was “hostile and abusive,” regardless of the actual use by any member institution;

- b. This presumption could only be rebutted by “evidence that demonstrates clearly” a negative: that UND’s use “does not create or lead to a hostile or abusive environment;”
- c. The “rebuttable presumption” was supported by the (unpublished) research of Stephanie Fryberg, Ph.D., of the University of Arizona (the “**Fryberg Study**”); and
- d. UND did not qualify for a namesake exemption, because the Spirit Lake Nation’s approval was allegedly “ambiguous.”

Dec. 9, 2005 Staff Committee Memo, a true and correct copy of which is attached hereto as Exhibit “R.”

114. The Dec. 9, 2005 Staff Committee Memo announced new evidentiary standards under which the NCAA would review the application of the Policy to UND:

- a. To secure an exemption from the Policy, UND must “demonstrate[] that the ruling clearly was contrary to the evidence considered;”<sup>10</sup>
- b. The Staff Committee would now use the Webster’s New World Dictionary Third College Edition definition of both “hostile” and “abusive.” In order to avoid contradicting its earlier statements that the terms “hostile or abusive” would be given the same meaning given those terms by courts in civil rights cases, the Staff Committee asserted that the dictionary definition was the same as the legal definition, and ignored altogether federal cases establishing objective criteria for determining whether particular conduct met the definition of “hostile” or “abusive.”

Ex. R, Dec. 9, 2005 Staff Comm. Memo.

115. Despite the fact that UND was being informed for the first time that its use of Native American imagery was “presumed” to be “hostile and abusive” unless UND could demonstrate that the presumption was “clearly contrary to the evidence considered” by the Staff

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<sup>10</sup> The Staff Committee cited the following “evidence:” the Fryberg Study, an October 2005 American Psychological Association resolution recommending the retirement of Native American imagery by institutions, the alleged indication by Native American leaders and organizations that such usage is “stereotypical, psychologically harmful, and generally has the opposite effect to honoring or respecting Native American history and culture,” and the alleged opposition to UND’s use of the “Fighting Sioux” nickname and logo by local Sioux tribes. Ex. R, Dec. 9, 2005 Staff Comm. Memo at 2-5.

Committee, and despite the fact that the Executive Committee had had over four years to compile its “evidence,” UND was given *ten days* to produce evidence that “demonstrates clearly its use of Native American mascots, names, and/or imagery does not create or lead to a hostile or abusive environment.” Ex. R, Dec. 9, 2005 Staff Comm. Memo at 5.

116. UND replied to the Dec. 9, 2005 Staff Committee Memo in a December 23, 2005 memorandum (the “**Dec. 23, 2005 UND Memo**”), as follows:

- a. UND clearly and unequivocally objected to the Staff Committee’s appeals process and its ever-changing approach to justifying its decision to apply the Policy to UND;
- b. UND explained, again and in detail, that the Executive Committee plainly lacked the authority under the Contract to promulgate the Policy;
- c. UND demonstrated that its use of Native American imagery was neither “hostile” nor “abusive” whether considered under federal court interpretations of those terms or from an objective standpoint, and noted that there was no evidence, anywhere, indicating that UND’s actual use was “hostile or abusive” or that such an environment existed on its campus. UND specifically demonstrated that:
  - (1) There was no evidence whatsoever that individuals on UND’s campus are exposed to “discriminatory intimidation, ridicule or insult” which was “sufficiently severe or pervasive” to create a “hostile” environment as federal courts construe that term.
  - (2) There was no evidence whatsoever of any conduct which was “frequent” or “severe” which was “physically threatening or humiliating” or rose above a “mere offensive utterance.”
  - (3) In apparently the only reported case dealing with an educational institution’s use of Native American imagery and logos, *Munson v. State Superintendent of Public Instruction*, 577 N.W.2d 387, 1998 WL 61018 (Wis. Ct. App. 1998) (unpublished), the court held that a “reasonable person” would not find such use discriminatory, notwithstanding the fact that some individuals may find it “offensive;”
  - (4) The United States Office for Civil Rights visited UND in 2001 and conducted an investigation based on a complaint arising out of the use of the logo and nickname, and did not conclude that UND’s use of Native American imagery created a “hostile or abusive” environment; and

- (5) UND's intent in using Native American imagery is to honor the Sioux and their culture.
- d. UND demonstrated that 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;
- e. UND demonstrated that it was entitled to exemption from the Policy under the Namesake Exception based upon the formal Resolution from the Spirit Lake Nation, and pointed out the internal inconsistencies of the Staff Committee's application of that exception to other institutions;
- f. UND challenged the shifting and poorly defined evidentiary standards applied and requested more time to produce professional or expert studies to rebut the presumption and the evidence adduced by the Staff Committee; and
- g. UND again raised concerns that the Policy violates federal anti-trust law.

See Dec. 23, 2005 UND Memo, a true and correct copy of which is attached hereto as Exhibit "S".

117. On January 18, 2005, the Staff Committee issued its response to the Dec. 23, 2005 UND Memo (the "**Jan. 18, 2006 Staff Committee Memo**"), and for the first time informed UND that the appeals process could not be used to challenge the Policy itself, but only the application of the Policy to UND—all the while asserting that it had been indulgent in considering UND's objections to date because of a purported "misunderstanding" on UND's part. See Jan. 18, 2006 Staff Committee Memo at 2 & 12, a true and correct copy of which is attached hereto as Exhibit "T".

118. The Jan. 18, 2006 Staff Committee Memo articulated yet another new evidentiary standard, that "UND must demonstrate that the staff committee decision was against the weight of evidence." Ex. T, Jan. 18, 2006 Staff Comm. Memo at 3.

119. The Staff Committee further set forth its conclusory finding that the "clear weight of evidence ... supports a finding that the imagery is perceived as hostile or abusive" without any demonstration that UND's actual use of Native American imagery on its campus is in fact hostile

or abusive or that it creates a hostile or abusive environment. Ex. T, Jan. 18, 2006 Staff Comm.

Memo at 4. The Staff Committee additionally claimed that:

- a. The Executive Committee had the authority to promulgate the Policy based upon its duty under the Contract to “identify core issues” and “act” to resolve them;
- b. Despite its extensive discussion of the Fryberg Study and its repeated reference to the Fryberg Study as the evidence supporting the presumption that all use of Native American imagery is “hostile or abusive,” the Staff Committee did not actually rely on the Fryberg Study in reaching its conclusion that UND’s use of Native American imagery was “hostile and abusive,” but instead relied upon the MOIC reports, the Executive Committee’s own (undisclosed) solicitation of comments and review of (undisclosed) materials, and a resolution (which was dated October 18, 2005—almost two months after the Policy was announced) from a political organization—the American Psychological Association; and
- c. The Staff Committee did not believe that the “legal” interpretations of “hostile or abusive” were binding upon them, but that under either its “dictionary” definition of the terms “hostile or abusive” or the meaning given those terms in civil rights cases, UND’s use of Native American imagery is “hostile or abusive.” This conclusion was not accompanied by an examination or discussion of any of the legal authority cited by UND in its prior correspondence or a discussion of the actual circumstances of UND’s use of the name and logo.

120. UND filed a response to the January 18, 2006 Staff Committee Memorandum on January 30, 2006 (the “**Jan. 30, 2006 UND Memo**”). By this memorandum, UND pointed out that:

- a. The appeals process was fundamentally flawed, as the Staff Committee had repeatedly altered or augmented the evidentiary standards to be applied, the rationales for rejecting UND’s appeal, and the evidence it claimed to rely upon in reaching its decision;
- b. The Executive Committee had vastly exceeded its authority in asserting that its duty to identify and act to resolve “core issues” gave it the power to legislate on eligibility to host and compete in championship competitions;
- c. The Policy violated federal anti-trust law;
- d. The Policy was flawed from a sociological and policy perspective;

- e. The Executive Committee's application of the Namesake Exception to powerful schools such as FSU and Central Michigan University ("CMU") is inconsistent and indicative of bad faith;
- f. There is no objective support for the allegation that UND's actual use of Native American imagery is "hostile or abusive," whether considered under the analysis developed by federal courts or under a "dictionary definition" of those terms, and in fact the evidence suggests otherwise, citing the following:
  - i. Unlike other universities using Native American imagery, UND does not have a Native American "mascot" at all.
  - ii. UND's logo is an accurate portrayal of an American Indian of the past, created by a Native American artist.
  - iii. No disrespectful actions such as "tomahawk chops" or other stereotypical behaviors are encouraged or permitted at UND events.
  - iv. The Sioux Spirit Lake Nation gave UND its approval to continue using the "Fighting Sioux" nickname and logo in 2000.
  - v. UND has acted quickly and proactively to respond to any perceived or actual inappropriate behavior by students or others directed towards Native Americans. *See* Ex. S, December 23, 2005 UND Memo at 11.
  - vi. UND has numerous programs for Native Americans as discussed in each of its prior memoranda.
  - vii. The Office for Civil Rights conducted an investigation on UND's campus and did not find that UND's use of Native American imagery created a "hostile or abusive" environment.

*See* Jan. 30, 2006 UND Memo, a true and correct copy of which is attached hereto as Exhibit "U"; (Kupchella Aff., ¶¶ 13, 15, 17-21).

121. On or about April 27, 2006, in response to UND's Jan. 30, 2006 Memo, the Executive Committee held what was supposed to be a paper-only review of UND's appeal submissions. During this meeting, UND's appeal was finally rejected and thereafter announced in yet another press conference held by the NCAA. On May 15, 2006, the Executive Committee sent UND a letter "explaining" its decision.

122. 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. *See* Ex. F, May 15, 2006 Executive Comm. Letter.

### **The Effects on UND**

123. 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. (Affidavit of Thomas Buning dated Oct. 3, 2006, ¶ 3).

124. There are two types of NCAA championship events: (a) those events which are established long in advance by a competitive bidding process, in which the NCAA selects a location to hold a championship event and contracts with a member institution to host the event, and (b) those events whose location is generally established by the results of regular-season play, in which the event location is awarded to one team because of its better performance in the regular season, often referred to as a home-field advantage play-off game. *See* App. 3, Division II Championships Committee Policy and Operating Procedures at 25.

125. 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 compete in an NCAA championship event, (c) fans, alumni, and donors are less likely to support an athletic program that has been labeled hostile or abusive, and (d) fan and donor support will likely decrease if the Policy causes UND's programs to become less competitive. (Buning Aff., ¶ 5.)

126. UND will lose significant revenue if it is not allowed to host NCAA championship events because of (a) lost ticket sales at NCAA championship events, (b) lost

concession sales at NCAA championship events, (c) lost merchandise sales at NCAA championship events, and (d) lost royalty payments from UND trademarked goods sold as a result of NCAA championship events. (Buning Aff., ¶ 6-9.)

127. 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, if earned, (d) prospective athletes do not want to live and compete in an environment that has been labeled as hostile or abusive, (e) prospective athletes want to be associated with a successful program, and (f) prospective athletes want to play for the "Fighting Sioux" and be part of its long history of success. (Buning Aff., ¶ 11.)

128. 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 to play on a fair and balanced playing field. 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 excellent 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 to 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. (Buning Aff., ¶ 14.)

129. The NCAA itself touts the benefits of hosting NCAA championship events. It has pointed to the "impact and prestige that comes from hosting national sporting events" and to "economic benefits" which "are real and documented" in its publication inviting and

encouraging member institutions to bid for contracts to host NCAA championship events (“**NCAA Bid Invitation**”). A true and correct copy of the NCAA Bid Invitation is attached hereto as Exhibit “V”.

130. Compliance with the portion of the Policy that would allow UND to compete in championship competition (although never at home regardless of win-loss record) 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” name or logo for its athletes, cheerleaders, and band members. The cost of these measures is difficult to ascertain with precision because of the sheer volume of affected items. The estimated cost is approximately \$178,140. (Buning Aff., ¶ 16.)

131. Most of UND’s revenue-producing athletic events are held in the Ralph Engelstad Arena and the Betty Engelstad Sioux Center (“**Engelstad Arena**”) and the Alerus Center (“**Alerus**”). The Engelstad Arena, which is managed for the benefit of UND with net revenue dedicated to the UND athletic department, features men’s and women’s hockey, women’s volleyball, men’s and women’s basketball, and women’s soccer. The Alerus, a 12,283-seat football stadium with an additional 256 suite seats and 893 standing-room only admissions, benefiting UND, is owned by the City of Grand Forks and managed by Compass Facility Management, Inc. (Buning Aff., ¶ 4.)

132. From October 2003 to March 2006, revenue derived by the Englestad Arena from hosting NCAA championship events, both those established by contract and those established by home-field advantage, is approximately \$471,269. (Affidavit of Jody J. Hodgson dated Oct. 4, 2006, ¶ 4.)

133. Revenue derived from the sales of tickets, managed by the UND athletic department, related to the hosting of any NCAA championship events, both those established by

contract and those established by home-field advantage, is approximately \$1,318,683. (Buning Aff., ¶ 7.)

134. Total net revenue derived by UND in the form of (a) ticket sales managed by the UND athletic Department and (b) profits donated by supporting organizations attributable to hosting any NCAA championship events, both those established by contract and those established by home-field advantage, is approximately \$96,533. (Buning Aff., ¶ 8.)

135. If the Engelstad Arena is foreclosed from bidding to host an NCAA contract event, the fans and participants of Division I hockey, and Division II basketball and volleyball will suffer harm. Athletes and fans will be denied the opportunity to participate and witness championship hockey at one of the country's leading hockey venues. Moreover, hockey fans residing near the Engelstad Arena are likely to be denied the opportunity to attend an NCAA championship event. Basketball and volleyball fans will suffer the same consequences.

136. If the Engelstad Arena is foreclosed from bidding to host an NCAA contract event, the collegiate athletic community will suffer long-term harm. A venue like the Engelstad Arena requires a monumental input of initial capital--in this case, over \$100 million dollars. Institutions will be less likely to invest in such infrastructure if contractual rights to bid on NCAA events can whimsically be denied by the Executive Committee of the NCAA. Long-term, this hesitation will result in less high-quality athletic venues at colleges and universities across the country.

137. The Engelstad Arena is one of the premier college hockey arenas in the nation, with construction costs exceeding \$100 million dollars. It is over 400,000 square feet in size and seats up to 11,406 fans. Amenities of the Arena include an eight-screen video scoreboard, an adjacent Olympic-sized practice rink, a 10,000-square-foot weight room, and a padded leather seat for every spectator. (Hodgson Aff., ¶ 5-8.)

138. Because the Engelstad Arena is the "Home of the Fighting Sioux," the "Fighting Sioux" nickname and logo are permanently embedded into the architecture of the Arena, including the concrete, masonry, glass, seats, and floor. There are over 2,400 images of UND's

“Fighting Sioux” logo embedded and prominently featured in nearly every aspect of the architecture and design of the Engelstad Arena. A great number of these images are permanently embedded in stone relief, concrete work, wood engravings, and three-dimensional sculpture. (Hodgson Aff., ¶ 9-10.)

139. Removal of the thousands of “Fighting Sioux” logos in the Engelstad Arena would be impractical, and replacing all such logos with a new university logo would be extremely expensive. An initial estimate for replacing the “Fighting Sioux” logo with a new logo is in excess of \$2.6 million dollars. (Hodgson Aff., ¶ 11.)

140. 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 would, in turn, force budget cuts and other cutbacks in the services and opportunities UND has to offer its student body as a whole. (Kupchella Aff., ¶ 25; Hodgson Aff., ¶ 15.)

141. 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 impact UND athletes and fans during the present athletic season, which can never be replayed.

142. The application of the Policy to UND, which labels UND as a hostile and 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.

143. If the Policy is not declared invalid and/or UND is not immediately released from its prohibitions, UND will likely suffer irreparable harm and substantial injury in the absence of preliminary and permanent injunctive relief. (Kupchella Aff., ¶¶ 25-32.)

## ARGUMENT

UND seeks a preliminary injunction precluding the NCAA from applying the Policy to UND pending a determination of the merits of UND's claims against the NCAA. The North Dakota Supreme Court has held that whether preliminary injunctive relief should issue involves consideration of the following four factors: (1) the threat of irreparable harm to the movant; (2) the balance between the harm to the movant and the injury that granting the injunction will inflict on other parties; (3) the probability that the movant will succeed on the merits; and (4) the public interest. *Eberts v. Billings County Bd. of Comm'rs*, 2005 ND 85 ¶ 8, 695 N.W.2d 691. *See also Dataphase Sys., Inc. v. C L Sys., Inc.*, 640 F.2d 109, 114 (8th Cir. 1981).<sup>11</sup> UND can establish each of these factors and is therefore entitled to preliminary injunctive relief against the NCAA.

### **I. UND IS ENTITLED TO AN INJUNCTION BECAUSE APPLICATION OF THE POLICY TO UND WILL CAUSE IRREPARABLE INJURY THAT CANNOT BE FULLY COMPENSATED IN DAMAGES.**

A preliminary injunction is proper when it is necessary to “prevent such a change in the relations and conditions of persons and property as may result in irreparable injury to some of the parties before their claims can be investigated and adjudicated.” *Dataphase*, 640 F.2d at 113 n.5. An injury is irreparable “when it cannot be adequately compensated in damages, and it is not necessary that the pecuniary damage be shown to be great ... . Acts which result in a serious change of, or are destructive to, the property affected either physically or in the character in which it has been held or enjoyed, do an irreparable injury.” *Vorachek v. Citizens State Bank*, 461 N.W.2d 580, 585 (N.D. 1990) (quoting *Viestenz v. Arthur Twp.*, 54 N.W.2d 572, 578 (N.D. 1952) (internal citations omitted)).

In subjecting UND to its Policy, the NCAA Executive Committee has declared that UND is a presumptively hostile institution solely due to UND's use of the “Fighting Sioux” nickname and imagery, without any consideration of whether a hostile or abusive environment actually

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<sup>11</sup> The North Dakota Supreme Court has indicated that the *Dataphase* factors are consistent with North Dakota law and therefore corresponding federal law addressing the granting of preliminary injunctive relief is an important source of persuasive authority. *See F-M Asphalt, Inc. v. North Dakota State Hwy. Dept.*, 384 N.W.2d 663, 665 n.1 (N.D.1986).

exists in the championship venues over which the NCAA has control. As a member institution of the NCAA, UND is held captive by the Executive Committee's unilateral and unauthorized declaration. Even worse, the Executive Committee has effectively forbidden UND to host or participate in NCAA playoff and championship events unless UND completely changes its nickname and imagery, thus causing irreparable injury to UND's reputation, to its ability to recruit top students and athletes, and ultimately to its academic and athletic programs.<sup>12</sup>

None of these harms can be remedied by monetary damages alone. UND's only recourse is to capitulate and discontinue the use of its beloved and valuable "Fighting Sioux" nickname and logo regardless of whether it has any negative impact, or to challenge the Executive Committee's ill-conceived, unauthorized and unlawful Policy in court. UND has chosen to do the latter, and until a decision on the merits can be rendered, this Court should issue an injunction prohibiting the NCAA from applying the Policy to UND, thereby preserving the status quo, preventing the harm from occurring, and protecting UND's rights until a decision on the merits can be rendered. The time to prevent irreparable harm is now.

**A. The Court Should Grant an Injunction Because Application of the Policy to UND will Cause Irreparable Injury to UND's Reputation.**

It is well established that injunctions are appropriate where the threat of injury is to a plaintiff's reputation and goodwill because these types of injuries are generally considered irreparable and not compensable with damages. *See United Healthcare Ins. Co. v. Advance PCS*, 316 F.3d 737 (8th Cir. 2002) (affirming preliminary injunction without evidentiary hearing

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<sup>12</sup> The NCAA will no doubt argue that its Policy does not actually prohibit UND from participating in or hosting championship events; it will claim that UND can participate as long as UND complies with the Policy. But the practical effect of the Policy is that UND must abandon the use and display of its "Fighting Sioux" nickname and imagery as a condition of participating or be prohibited from attending and bidding to host post-season championship events. Another practical effect of such "compliance" is an admission that UND is a hostile institution. Properly construed, therefore, the Policy does in fact prohibit UND and UND teams from even participating in championship events. *See Gilder v. PGA Tour, Inc.*, 936 F.2d 417, 423 (9<sup>th</sup> Cir. 1991) (assertion that pro golfer could have simply earlier complied with association rule could not negate the irreparable harm flowing from the immediate application of the rule). Therefore, UND will use the terminology throughout this Memorandum that the Policy effectively prohibits UND from participating in and bidding to host NCAA championship events.

and holding that potential loss of intangible assets such as reputation and goodwill constitute irreparable injury) (*citing General Mills, Inc. v. Kellogg Co.*, 824 F.2d 622, 625 (8th Cir. 1987)); *Medicine Shoppe Int'l, Inc., v. S.B.S. Pill Dr., Inc.*, 336 F.3d 801, 805 (8th Cir. 2003) (affirming preliminary injunction where district court found that petitioner established harm to business reputation and goodwill, and observing that harm to reputation and goodwill is difficult, if not impossible to quantify in dollar amount).<sup>13</sup> UND's reputation and goodwill will suffer irreparable harm if UND is prohibited from hosting or participating in NCAA championship events due to the Executive Committee's Policy, and a preliminary injunction is thus appropriate.

It is obvious that the Executive Committee's highly-publicized unilateral declaration that UND is a hostile institution and its use of the "Fighting Sioux" nickname and image presumptively creates a hostile or abusive environment will cause serious injury to UND's reputation in a variety of contexts. UND's reputation will be impugned in the NCAA forum with respect to peer member institutions, within the community at large, and among current and prospective students and academics. Its reputation as an institution of higher learning with a strong and demonstrated commitment to diversity, which UND has worked years to cultivate as evidenced by its substantial and successful Native American programs among others, will be irreparably damaged. This is exactly the type of harm to a plaintiff's reputation that a preliminary injunction is designed to avert. *See e.g., Coca-Cola Co. v. Gemini Rising, Inc.*, 346 F. Supp. 1183, 1189 (D.C.N.Y. 1972) ("[t]o associate such a noxious substance as cocaine with plaintiff's wholesome beverage as symbolized by its 'Coca-Cola' trademark and format would clearly have a tendency to impugn that product and injure plaintiff's business reputation, as

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<sup>13</sup> *See also Dominion Video Satellite, Inc., v. Echostar Satellite Corp.*, 269 F.3d 1149, 1157 (10th Cir. 2001) (noting that no remedy could repair damage to petitioners' reputation, goodwill, marketing potential and credibility); *Keystone Consolidated Indus., Inc. v. Mid-States Distrib. Co.*, 235 F. Supp. 2d. 901, 914-915 (C.D. Ill. 2002) (harm to business reputation in trademark infringement is sufficient to establish irreparable injury); *Health o Meter, Inc. v. Terraillon Corp.*, 873 F. Supp. 1160, 1175 (N.D. Ill. 1995) (damage to business reputation and goodwill is considered irreparable harm); *Cutler-Hammer, Inc. v. Universal Relay Corp.*, 285 F. Supp 636, 639 (D.C.N.Y. 1968) (granting preliminary injunction in trademark infringement and unfair competition claim since "injuries to reputation are not readily recompensed by money damages and harm caused may well be irreparable.").

plaintiff contends.”). The reputation that UND provides a high quality education for all of its students, including Native American students, is simply incompatible with the Executive Committee’s assertion that it is hostile and creates a hostile and abusive environment.

Both the current and future injuries to UND’s reputation support granting a preliminary injunction. In *United Healthcare*, the Court of Appeals for the Eighth Circuit upheld a district court’s ruling that the petitioners’ potential loss of reputation among both its customers and among other pharmacists constituted irreparable harm and rejected respondent’s claims that any potential harm to petitioners’ reputation was too speculative. 316 F.3d at 741-42. The court stated: “Like the district court, we do not find the lack of complaints to be dispositive of the issue, as it might take months for a loss of goodwill to become manifest.” *Id.*

In addition to the obvious immediate injury to UND’s reputation by the Executive Committee’s branding of UND as a hostile institution through the application of the Policy, UND’s reputation as a provider of superior athletic programs and facilities will also be injured by the ongoing prohibitions that the Executive Committee has placed on UND’s participation in championship events. The Policy prohibits UND from bidding to host lucrative predetermined championship events that are often bid and awarded years in advance. The Policy further prohibits UND from hosting events which UND is entitled to host under the Contract, unless it discontinues using the “Fighting Sioux” nickname and imagery. Practically speaking, this would require UND, at enormous expense, to remove approximately 2400 “Fighting Sioux” images embedded throughout the recently built Engelstad Arena, including within its very architecture, and from every UND athletic, cheerleading, and band uniform and related paraphernalia. Removing the thousands of Native American images from the Engelstad Arena and other venues and purchasing additional sets of uniforms for all UND athletes and cheerleading and band members simply to comply with the unauthorized and unlawful Policy would be extremely costly and burdensome. UND’s reputation as an institution qualified to participate in and host NCAA championship events will suffer if it must quickly undertake such extreme and unfair

measures to comply with the Policy or else be faced with not being able to participate evenly in the NCAA forum.

Application of the Policy to UND will undoubtedly injure UND's reputation. Such damage is particularly egregious given that the NCAA has failed to offer any kind of evidentiary showing or factual basis for the Executive Committee's conclusions and UND's concomitant punishment. The championship events and venues have not been hostile or abusive. Only praise has been given by the NCAA to the Engelstad Arena and UND on its recent hosting of the Western Regional Division I Men's Hockey Tournament. (Buning Aff., ¶ 10; Hodgson Aff., ¶ 14.) On this basis alone, the Court could and should grant UND's Motion for Preliminary Injunction.

**B. The Court Should Grant an Injunction Because the Policy Will Cause Irreparable Injury to UND's Ability to Recruit Top Students and Athletes and to Its Academic and Athletic Programs.**

Universities compete for their student, athlete, and even fan populations. Among the factors that students consider when applying to a university include its reputation and ability to provide both academic and athletic programs and opportunities for their multi-dimensional educational, athletic, and recreational needs. Not only will UND's *reputation* as a provider of superior athletic programs be injured, it will *in fact* be less able to provide the athletic experiences that students desire—participation in competition in championship-level NCAA events, both locally and at away games. Not only will UND's *reputation* as a host with superior and outstanding athletic facilities—*e.g.*, the Engelstad Arena—be injured, it will *in fact* be prohibited from hosting NCAA championship events. UND's recruitment of top students, athletes, and fans will suffer, and consequently its overall enrollments will likely suffer as well.

The NCAA has a monopoly on intercollegiate athletic competition; there is no other game in town besides the NCAA. UND cannot participate at championship competitions and events in any other comparable forum, and neither can its students. Its ability to participate in and host championship events is crucial to the ongoing success of UND's athletic programs, which are an integral part of UND's offerings. Prospective students consider the strength of

UND's athletic programs when evaluating UND, even if they are not athletes themselves. The NCAA's pronouncement that UND can no longer evenly participate in championship events, even if its teams and athletes qualify, and cannot bid to host NCAA championship events even though it is a member institution, constitutes severe and irreparable harm. Further, these are not the type of injuries for which money damages can fully compensate and are thus the type of injuries for which a preliminary injunction is appropriate. *See Glenwood Bridge, Inc. v. City of Minneapolis*, 940 F.2d 367, 371-72 (8th Cir. 1991) (contractor was entitled to preliminary injunction where its right to bid on a legal contract could not be fully compensated with money damages).

The NCAA prohibitions will have the effect of not only depriving UND, the institution, from participating in the championship events on an even basis with other member institutions, but will also have the effect of preventing current and prospective UND students from participating in championship events, either at home or at away games. Additionally, other member institutions and their students will be prevented from competing at championship events that might have been held at UND but for the Policy. Moreover, the Policy prevents UND from being able to provide NCAA championship events for fans and the community at large.

The injuries to UND caused by the Policy's application will be continuous and ongoing, sport after sport, season after season. Since a recurrent suit for damages is not an adequate remedy under these circumstances, an injunction is especially warranted. "[W]here an injury, committed by one against another is continuous or is being constantly repeated, so that the complainant's remedy at law requires the bringing of successive actions, that remedy is inadequate and the injury will be prevented by injunction." *Viestenz v. Arthur Tp.*, 54 N.W.2d 572, 573, 578-79 (N.D. 1952) (plaintiffs whose property was subject to annual flooding were entitled to mandatory injunction because recurrent suit for damages was not adequate remedy). The standard applies in this case because UND will be effectively prohibited from evenly participating in and hosting NCAA championship events season after season unless it covers or removes the "Fighting Sioux" name and imagery from its venues such as the Engelstad Arena

and from its uniforms and related paraphernalia. Similarly, the damage to its reputation will be continuous and ongoing as it will be repeatedly prohibited from bidding to host or fully participating in NCAA championship events.

Because the Policy will cause irreparable injury to UND's reputation, to its ability to host and participate in championship events, and consequently to its academic and athletic programs, this Court should grant an injunction prohibiting the NCAA from applying the Policy to UND, thereby preserving the status quo, pending a resolution on the merits of this case.

## **II. UND IS ENTITLED TO AN INJUNCTION BECAUSE IT HAS A SUBSTANTIAL PROBABILITY OF SUCCEEDING ON THE MERITS.**

UND need not demonstrate a "greater than fifty percent likelihood" that it will prevail in order to warrant injunctive relief. *Dataphase*, 640 F.2d at 113. Rather, "[t]he very nature of the inquiry on petition for preliminary relief militates against a wooden application of the probability test" and that where "the movant has raised a substantial question [on the merits] and the equities are otherwise strongly in his favor, the showing of success on the merits can be less." *Id.*; see also *F-M Asphalt v. North Dakota State Hwy. Dept.*, 384 N.W.2d 663, 665 n.1 (N.D. 1986) ("[t]he *Dataphase* factors are consistent with our law delineating the proper factors to be considered in determining whether to grant an injunction").

Given the substantial and demonstrated irreparable harm that UND will suffer if an injunction is not granted, and the absence of any meaningful injury to the NCAA if an injunction is issued, UND clearly has a lowered burden of demonstrating at this stage that it will succeed on the merits of its claims. Moreover, even if the equities did not weigh so heavily in UND's favor, an injunction would still be appropriate because, as discussed more fully below, the evidence demonstrates that there is a probability, not a mere "substantial question," that UND will prevail on the merits of its claims.

### **A. The NCAA Has Breached Its Contract With Its Member Institution.**

While the NCAA is a voluntary organization, its relationship with its members is a contractual one. *Trustees of the Cal. State Univ. & Coll. v. Nat'l Collegiate Athletic Ass'n*, 147

Cal. Rptr. 187, 192 (Ct. App. 1978) (“[T]he relationship between the parties was one of contract, between the NCAA as a voluntary association and CSUH as a member, evidenced by the constitution and bylaws.”).<sup>14</sup> Accordingly, the rights and powers of the NCAA and its constituent members are controlled by the Contract between the parties, which is the Constitution and Bylaws adopted by each respective division of the NCAA. As discussed more fully below, the NCAA Executive Committee has not only breached its contractual obligations to UND by willfully exceeding its authority in promulgating the Policy, it has also breached the implied covenant of good faith and fair dealing in its arbitrary, self-serving, and inconsistent application of the Policy to UND.

**1. The Executive Committee Exceeded Its Authority in Promulgating the Policy.**

There was a right way under the Contract for the Executive Committee to attempt to ban the use of Native American imagery by the NCAA’s member institutions, but the Executive Committee did an end run around it. Instead of proposing legislation to the entire membership for a vote as it is authorized to do by Article 4.1.2 of the Constitution, the Executive Committee instead asserted that it has the power to promulgate the Policy based upon Article 4.1.2 of the Constitution, which charges the Executive Committee with the duty to “[i]dentify core issues that affect the Association as a whole” and to “[a]ct on behalf of the Association to resolve” these issues. Even a cursory examination of the Contract reveals that this limited grant of authority

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<sup>14</sup> See also *Bloom v. Nat’l Collegiate Athletic Ass’n*, 93 P.3d 621, 623-24 (Colo. Ct. App. 2004)(finding that student-athlete did have standing to assert breach of contract claims as a third-party beneficiary to contract). Moreover, the relationship between a voluntary association and its members is ordinarily construed in contract. *Austin v. American Ass’n of Neurological Surgeons*, 253 F.3d 967, 968 (7th Cir. 2001) (“Ordinarily, a dispute between a voluntary association and one of its members is governed by the law of contracts, the parties’ contractual obligations being defined by the charter, bylaws, and any other rules or regulations of the association that are intended to create legally enforceable obligations.”); *Employee’s Benefit Ass’n v. Grisset*, 732 So.2d 968, 975 (Ala. 1998)(“The constitution, bylaws, and regulations of a voluntary association constitute a contract between the association’s members which is binding upon each member.”)(quoting *Scott v. East Alabama Educ. Foundation, Inc.*, 417 So.2d 572, 573 (Ala. 1982)); *Van Valkenburg v. Liberty Lodge No. 300 A.F. & A.M.*, 619 N.W.2d 604, 610 (Neb Ct. App. 2000)(“The constitution and bylaws of a voluntary association constitute a contract between the members of that association.”).

does not empower the Executive Committee to single-handedly promulgate and enforce the Policy.

Under the Contract, all legislative power is expressly vested in the NCAA membership and associated governance structures, not the Executive Committee. The Contract provides that whereas the Constitution “sets forth basic purposes, fundamental policies and general principles that generally serve as the basis on which the legislation of the Association shall be derived,” Contract, Art. 5.2.1, “[a]ll regulations governing the administration of intercollegiate athletics appear in the bylaws.” Contract, at ix (emphasis added). The Contract further provides that “[a]ll legislation of the Association that governs the conduct of the intercollegiate athletics programs of its member institutions shall be adopted by the membership in Convention assembled.” Contract, Art. 5.01 (emphasis added).

The Contract further clarifies that the Operating Bylaws “consist of legislation adopted by the membership to promote the principles enunciated in the constitution and to achieve the Association’s purposes.” Contract, at ix. The Contract likewise specifies that the Administrative Bylaws “set forth policies and procedures for the implementation of (a) the general *legislative* actions of the Association, (b) the *NCAA championships* and the business of the Association, (c) the Association’s *enforcement* program, and (d) the Association’s Athletics certification program.” Contract, at ix (emphasis added). By contrast, under Article 4.1.2, Subsections (i) and (j), the Executive Committee is empowered only to “forward proposed amendments to [the Constitution] and other dominant legislation to the entire membership for a vote,” or “[c]all 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 Association’s constitution.”

If the Executive Committee had the power to enact legislation such as the Policy itself, the foregoing sections of the Contract would make no sense. Based on the Contract’s plain and unequivocal language, it is clear that whereas the Constitution sets forth general “principles” for the conduct of intercollegiate athletics, the mechanism by which these “principles” are promoted

and by which the purposes of the NCAA are achieved is through “legislation adopted by the membership.” Contract, at ix. It is also clear that “policies and procedures” for implementing the legislation adopted by the membership are intended to be established through adoption by the membership of Administrative Bylaws. *Id.*

Notwithstanding the clear command of the Contract, the Executive Committee has made the incredible and unsupported assertion that the provisions of the Constitution permitting the Executive Committee to “[a]ct on behalf of the Association” to resolve “core issues” empower the Executive Committee to implement, by majority vote of the Executive Committee, policies which would otherwise require a two-thirds majority vote of the entire NCAA membership to enact. Moreover, the Executive Committee has asserted that it has this power regardless of whether such “action” usurps authority expressly delegated to another NCAA entity by the Bylaws. (*See* Ex. T, Jan.18, 2006 Staff Committee Memo at 5). This argument is contradicted by both the plain language and the structure of the Constitution and Bylaws.

(a) ***The Constitution and Bylaws Expressly Vest Authority to Legislate in the Membership, Not in the Executive Committee.***

While the Policy at issue in this action purports to regulate the eligibility of member institutions to host and participate in championship competitions, nowhere does the Constitution or Bylaws expressly authorize the Executive Committee to adopt policies, regulations, or bylaws governing administration of championship competitions. Indeed, there is no provision in the Constitution or Bylaws which expressly vests the Executive Committee with authority to legislate or establish *any* policies or regulations governing championships.

In contrast, other NCAA entities are expressly granted such authority. Article 4.3.2 expressly charges the Presidents Council with the duty to “[a]dopt noncontroversial and intent-based amendments, administrative bylaws and regulations to govern Division II,” to “[s]ponsor Division II legislation” and to “[a]pprove regulations providing for the administration of Division II championships.” Contract, Art. 4.3.2(e), (f) & (o). The Presidents Council is further

vested with the authority to “[e]stablish and direct the general policy of Division II.” Contract, Art. 4.3.2(b).

Had the parties to the Contract intended for the Executive Committee to have similar powers, they easily could have included similar language in Article 4.3 of the Constitution in describing the duties and responsibilities of the Executive Committee. But Article 4.3 does not vest the Executive Committee with any such authority. This silence in light of the express grant of authority to the Presidents Council indicates that the parties did not intend that the Executive Committee share the limited power to legislate or control the conduct of championship competitions. *See* Contract, Art. 4.3.

**(b) *Extensive Legislation Regarding Championship Events Demonstrates the Proper Role of Legislation in Regulation.***

The Contract provides that “[a]ll legislation of the Association that governs the conduct of the intercollegiate athletics programs of its member institutions shall be adopted by the membership in Convention assembled.” Contract, Art. 5.01. This requirement includes “legislation to be included in the constitution of the Association.” Contract, Art. 5.2.1. Such legislation also includes the “establishment and control of NCAA championships (games, matches, meets and tournaments) and other athletics events sponsored or sanctioned by the Association,” as well as “[t]he procedures for administering and enforcing the provisions of the constitution and bylaws.” Contract, Art. 5.2.2. The NCAA membership is further authorized to pass Administrative Bylaws, defined as “administrative regulations, executive regulations,” and “enforcement policies and procedures” for the purpose of providing “policies and regulations for the implementation of policy adopted by the membership as set forth in the constitution and operating bylaws.” *Id.*, Art. 5.2.3.<sup>15</sup>

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<sup>15</sup> A diagram detailing the legislative process is included as Figure 5-1 of the Constitution and Bylaws.

Pursuant to this express grant of authority, the membership has legislated extensively on the criteria for eligibility to participate in championship competition. Such legislation is exhibited, among other places, in Article 18 of the Bylaws. Article 18.1 of the Bylaws provides:

All NCAA championships shall be conducted in accordance with this bylaw and the policies and procedures *established by the Championships Committee*, which shall establish and revise the policies and procedures governing the administration of NCAA championships, including the selection processes, formats and distribution of revenues to participating institutions. Championships shall be under the control, direction, and supervision of the appropriate sports committees, subject to the requirements, standards and conditions prescribed in [the Executive Regulations].

Contract, Art. 18.1 (emphasis added). Further, Article 18.4.2 of the Bylaws, titled “Institutional Eligibility,” sets forth a number of requirements for an institution to be “eligible to enter a team or an individual in NCAA championship competition.”

Nowhere in these exhaustive regulations has the Division II membership, of which UND is a member, or the Presidents Council seen fit to disqualify from post-season competition members who use Native American names or imagery.<sup>16</sup> Moreover, after considering the issue, the Division II Championships Committee informed MOIC, the very committee charged by the Executive Committee with developing the Policy, that the Division II Championships Committee “would not advocate a policy that would prevent or eliminate championship opportunities for those institutions continuing the practice of using mascots, nicknames and logos as long as the activities and graphics are not disrespectful to any group.”

Similar responses were received from other championships committees. The Committee on Sportsmanship and Ethical Conduct stated that it believed mascot issues “may be addressed most effectively by the individual institution, its community, and its conference, rather than at the national level.” Likewise, the Division I Championships/Competition Cabinet stated that it believed “access to or the location of NCAA championship events should not be restricted because of issues related to the use by institutions of American Indian mascots or images.”

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<sup>16</sup> Indeed, Article 4 of the Constitution explicitly guarantees members access to national championships. Contract, Art. 4.01.2

Finally, the Division III Championships Committee stated that it believed “that the selection or use of Native American mascots falls within the realm of institutional autonomy and may not be an issue within the purview of the Association.” *Id.*

The membership has further adopted Administrative Bylaws which provide even more extensive regulations regarding the administration of NCAA championships, site selection, and eligibility requirements for member institutions to participate in championships. For example, Article 31.1.3 provides that “sites” of championship competitions are to be determined by the governing sports committees and the Championships Committee pursuant to criteria established by the Championships Committee. Among the criteria listed for selection of national championship sites are the “[q]uality and availability of the facility . . . [r]evenue potential . . . [a]ttendance history . . . and [g]eographical location.” Contract, Art. 31.1.3.2.2. In addition, site preference for regional championships is given to the “top-seeded team.” Contract, Art. 31.1.3.2.1. Article 31.2 sets forth the “institutional eligibility” requirements for participation in NCAA championships, and Article 31.3 enumerates the criteria for selection of teams participating in championship competition. Nowhere in these Bylaws is there even a mention of Native American imagery, let alone a prohibition on its use by member institutions.

Given the Constitution’s charge that “[a]ll legislation of the Association that governs the conduct of the intercollegiate athletics programs of its member institutions shall be adopted by the membership in Convention assembled,” the detailed requirements set forth for passing legislation, and the detailed and lengthy legislation adopted by the membership regarding eligibility to host and participate in championship competitions, there is simply no support for the Executive Committee’s assertion that the “action” authorized by Article 4.1.2 of the Constitution extends to the promulgation of “policies” regarding championship competition which are the equivalent of legislation.

(c) ***The Process for Enforcement and Appeals of Violations Further Reinforces the Conclusion that the Executive Committee Does Not Have Authority to Legislate.***

The Executive Committee's assertion of legislative power is further undermined by the fact that enforcement of NCAA Policies, including penalties for violations, is extensively addressed by the Constitution and Bylaws. For example, Article 19 of the Bylaws provides that the Committee on Infractions is "responsible for administration of the NCAA enforcement programs." Contract, Art. 19.1. Article 32 of the Administrative Bylaws sets forth further regulations. The Executive Committee has no role in enforcement or imposition of penalties.

Further, while the Bylaws contain detailed provisions setting forth a process for challenging decisions of relevant committees regarding eligibility for competition and enforcement penalties, there is no mechanism set forth in the Constitution or Bylaws to challenge legislative "policies" implemented by the Executive Committee. Characteristically, the Executive Committee has asserted that this means that the only manner in which such legislative policy can be overturned is for an institution to undertake to "change the NCAA governance structure" or pass legislation requiring "that all Association-wide decisions be approved by a vote of all member institutions." Ex. T, Jan. 18, 2006, Staff Comm. Memo at 5.

The Executive Committee has it backwards. What the Constitution and Bylaws specify is that the Executive Committee does not have the authority to promulgate such legislative "policy." Accordingly, it is not the obligation of member institutions to propose and pass legislation to "undo" by a super-majority vote what the Executive Committee has done. Rather, the onus is on the Executive Committee to propose to the NCAA membership legislation regarding the use of Native American imagery if it believes such legislation is in order.

(d) ***The Executive Committee Has Asserted Virtually Limitless Authority***

Were the Court to adopt the interpretation of the Contract urged by the Executive Committee, there would be virtually no policy or regulation that the Executive Committee could not promulgate under the auspices of "acting" to resolve "core issues." Rather than forward proposed amendments to the Constitution and other legislation "to the entire membership for a

vote” as directed by Article 4.1.2 of the Constitution, the Executive Committee could simply “act” to “resolve” the issue addressed by the legislation by promulgating a new “policy” all by itself. In light of the detailed and demanding requirements set forth in the Bylaws for the adoption of legislation, the Executive Committee’s argument that it can bypass such procedures through the promulgation of “policy” does not pass muster.

Far from permitting the Executive Committee to take unilateral action to pass legislation disguised as a “policy” if it disapproves of the rules and regulations of the Division II Presidents Council or the bylaws and regulations adopted by the NCAA membership, the Contract instead authorizes the Executive Committee to “[c]all 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 Association’s constitution.” Contract, Art. 4.1.2(j). Even then, such action may be overridden only by “a two-thirds majority vote” of the entire NCAA membership. Contract, Art. 4.1.2(j). Such a provision would be unnecessary if the Executive Committee possessed the power to act unilaterally to impose legislative policies aimed at bringing a division of NCAA membership into perceived compliance with the principles set forth in the Constitution.

The forgoing makes it plain that under the express terms of Contract, the power to promulgate legislation establishing policies and regulations regarding eligibility for participation in championship competition and enforcement of such legislation is reserved to the NCAA membership. Accordingly, it is also clear that the Executive Committee exceeded its authority and breached its contractual obligations to UND in imposing the Policy and seeking to enforce it against UND.

**B. The NCAA Executive Committee Has Breached the Implied Covenant of Good Faith and Fair Dealing and Acted Arbitrarily and in Bad Faith.**

In addition to breaching multiple express provisions of the Contract, the Executive Committee has also breached the Contract by failing to adhere to the implied covenant of good faith and fair dealing. It is well-established that “[e]very contract contains an implied covenant

of good faith and fair dealing.” *Hall v. Nat’l Collegiate Athletic Ass’n*, 985 F. Supp. 782, 794 (N.D. Ill. 1997); *see also* Restatement (Second) of Contracts § 205 (2005) (“Every contract imposes upon each party a duty of good faith and fair dealing in its performance and enforcement.”). North Dakota has not disturbed this general contract principle, except in the limited context of at will employment. In fact, North Dakota has, like many other states, codified this general contract doctrine, as it is applied to contracts covered by the Uniform Commercial Code. N.D.C.C. § 41-01-13 (“Every contract or duty within this title imposes an obligation of good faith in its performance or enforcement.”); *see also* *Union State Bank v. Woell*, 434 N.W.2d 712, 716 (N.D. 1989) (“The obligation to exercise good faith extends to [e]very contract or duty’ within the Uniform Commercial Code.”).<sup>17</sup>

In discussing a good faith contract claim against the NCAA, the *Hall* court indicated that “[t]he covenant of good faith requires that a party vested with contractual discretion exercise that discretion reasonably, not arbitrarily or capriciously.” *Hall*, 985 F. Supp. at 794. In addition, the North Dakota Supreme Court has held that while voluntary member associations may adopt reasonable bylaws, the court will strike down regulations which are “clearly arbitrary and unreasonable.” *Crandall v. North Dakota High Sch. Activities Ass’n*, 261 N.W.2d 921, 926 (1978) (quoting *Brown v. Wells*, 181 N.W.2d 708, 711 (Minn. 1970)).

The evidence in this case demonstrates that the NCAA Executive Committee has not acted in good faith (1) in promulgating the Policy despite its plain lack of authority, (2) in arbitrarily changing, throughout UND’s appeal, the purported standard used to apply the Policy, (3) in developing an exception to the Policy, inconsistent with the stated goals of the Policy, for the benefit of a single member institution, and (4) in applying the Namesake Exception to UND

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<sup>17</sup> Whether the NCAA may also have a separate duty of good faith and fair dealing under tort principles is an open question in North Dakota. North Dakota does recognize this separate claim in the context of an insurance contract, *Fetch v. Quam*, 2001 ND 48, ¶ 12, 623 N.W.2d 357, but it does not in employment contracts. *Dalan v. Paracelsus Healthcare Corp. of N.D., Inc.*, 640 N.W.2d 726, 731 (N.D. 2002). UND’s action is solely in contract, however, and so this question need not be addressed by the Court. It is clear that an implied contractual duty of good faith and fair dealing applies where a North Dakota university becomes a member of a large association that is essentially voluntary in name only.

in a manner entirely inconsistent with its application to other member schools. Accordingly, the NCAA should be enjoined from applying the Policy to UND.

**1. The NCAA Executive Committee Willfully Exceeded Its Authority in Promulgating the Policy.**

As set forth at length above, any reasonable reading of the Contract reveals that the Executive Committee does not have the power to issue “policies” which are the equivalent of legislation. Accordingly, the Executive Committee cannot have had a good faith belief that it was acting within its contractual authority in promulgating the Policy, and the Policy should be enjoined on this ground alone.

**2. The NCAA Executive Committee has Arbitrarily and Unreasonably Changed the Standard Used to Apply the Policy on Multiple Occasions.**

Even if the Executive Committee had not willfully exceeded its authority in promulgating the Policy in the first instance, which it did, application of the Policy to UND should nevertheless be enjoined because of the arbitrary and unreasonable manner in which the Executive Committee has applied the Policy to UND. By repeatedly altering the application of the Policy, and by transparently crafting and inconsistently applying outcome-oriented exceptions, the NCAA has not been faithful to the agreed common purpose of the NCAA Constitution and Bylaws and has failed to protect the justified expectations of UND.

First, the NCAA asserted that in determining whether an institution’s use of Native American imagery was “hostile and abusive,” it would consider the specific circumstances of individual situations. Then, when presented with evidence that UND’s actual use of Native American imagery was respectful and clearly not “hostile and abusive,” the NCAA arbitrarily created a “rebuttable presumption” that all use of Native American imagery was “hostile and abusive,” claiming this “presumption” was supported by scientific study and evidence. Then, when this “scientific evidence” was demonstrated to be unreliable and inherently contradictory, the NCAA retreated to claim that its presumption was based on nebulous input and consideration, factors impossible for an appealing member to rebut. Each of these actions demonstrates the NCAA’s bad faith.

(a) ***The NCAA Arbitrarily Refused to Abide by the “Hostile and Abusive” Standard It Adopted.***

The stated Policy applies only to those institutions whose use of Native American imagery is deemed “hostile” or “abusive.” Shortly after the NCAA promulgated the Policy, it issued a press release stating that the Executive Committee adopted the “hostile or abusive” standard “in part from case law,” and in particular “civil cases in which decisions were reached on the basis of what a ‘reasonable person’ would find to be hostile or abusive.” *See* Ex. H, Aug. 15, 2005 *NCAA News* Online Article. The press release clarified that the Executive Committee considered the “hostile or abusive” standard to be a stronger standard than simply “offensive,” which courts have held is protected expression. *Id.* The Executive Committee further assured members that it would consider “the unique aspects and circumstances as it relates to the specific use and practice at [each] college or university,” to determine if a particular institution’s use of Native American imagery was “hostile or abusive.” Ex. M, Aug. 19, 2005 Executive Comm. Press Release.

Based on these representations, UND diligently researched the application and interpretation of “hostile and abusive” in federal and state civil rights cases. In its initial appeals, UND demonstrated that under the standard set forth in these cases, UND’s use of Native American imagery was neither hostile nor abusive. *See* Ex. Q, Nov. 4, 2005 UND Memo at 7-9; *see also* Ex. S, Dec. 23, 2005 UND Memo at 25-29. In these memoranda, UND explained that in order to demonstrate a “hostile” or “abusive” environment, federal courts have held that it must be shown that individuals are exposed to “discriminatory intimidation, ridicule, and insult” which creates an abusive environment because it is “sufficiently severe or pervasive,” and that conduct which is “merely offensive” such as “mere utterance of an epithet which engenders offensive feelings” is not “hostile and abusive.” *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993).<sup>18</sup>

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<sup>18</sup> The *Harris* court further explained that factors to be considered in determining whether the standard has been met are the “frequency of the discriminatory conduct; its severity; [and]

UND explained that this standard was not met in its case because, *inter alia*, UND did not have a mascot, its logo was a historically accurate depiction of a Sioux warrior designed by a respected Native American artist, and that it did not allow such actions as the “tomahawk chop” and such actions did not occur at UND and therefore there simply was no evidence of any “discriminatory intimidation, ridicule, or insult” occurring on campus, let alone evidence of conduct that was “severe or pervasive.”

UND further cited the NCAA Executive Committee to what was, at the time,<sup>19</sup> apparently the only reported case on point, *Munson v. State Superintendent of Public Instruction*, 577 N.W.2d 387, 1998 WL 61018 (Wis. Ct. App. 1998) (unpublished) in support for the proposition that use of a Native American name and logo alone is not “objectively” discriminatory. UND explained that in *Munson*, a Native American student objected to her high school’s use of the name “Indians” and its associated Native American logo. *Id.* at \*\*\*2. Although the court noted that the logo was offensive to the plaintiff, it held that an objective standard had to be used “because any logo may be offensive to some.” *Id.* at \*\*\*3. The court further recognized that “some students and fans at the sporting events” engaged in “racially stereotypic behavior” and that “the Indian tribes in Wisconsin are in agreement in seeking to have Indian logos removed from schools.” *Id.* Nevertheless, the *Munson* court dismissed the plaintiff’s case because a reasonable person “similarly situated” would not have felt that the logo depicted a negative stereotype. *Id.* The court further found that neither the team name nor the logo created a hostile or abusive environment because there was no evidence of “persistent or pervasive racial harassment.” *Id.*

Rather than address this authority and evidence cited by UND, the NCAA refused to discuss or even recognize it. Further, the NCAA did not even attempt to offer any evidence, let

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whether it is physically threatening or humiliating, or a mere offensive utterance.” *Harris*, 510 U.S. at 23.

<sup>19</sup> The Illinois Court of Appeals recently addressed a similar challenge. *See Illinois Native American Bar Ass’n. v. University of Illinois*, \_\_\_ N.E.2d \_\_\_, 2006 WL 2684269 (Ill. App. Ct. Sept. 19, 2006). In that case, the plaintiffs sought to enjoin the University of Illinois from using its dancing mascot, Chief Illiniwek.

alone credible evidence, that UND created an objectively “hostile or abusive” environment for its Native American students with its “Fighting Sioux” nickname and logo. The NCAA failed to provide any evidence that Native American students and visitors are exposed to *any* intimidation, ridicule, or insult during championship events. The NCAA failed to provide any evidence that either UND’s “Fighting Sioux” nickname or its respectful and historically accurate imagery are actually “threatening or humiliating” to anyone. The NCAA failed to offer a single example of alleged hostile or abusive or even insulting conduct.

Indeed, rather than concede that UND’s use was not hostile or abusive under the legal standard it had adopted, the Executive Committee instead chose to dodge the issue. The Executive Committee continued to assert that the Policy was based on the legal definitions of “hostile” and “abusive,” but rather than address federal and state case law setting forth clear standards for applying those terms, and the facts and circumstances surrounding UND’s actual use of Native American imagery as it promised it would, the Executive Committee ignored this precedent and proclaimed that the “dictionary” definition<sup>20</sup> would apply, ultimately ignoring altogether the analysis used by federal courts to determine whether an environment is “hostile” or “abusive,” and instead adopting a “rebuttable presumption” that “the use of Native American mascots, names, and/or imagery by member institutions for their athletics teams and programs

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<sup>20</sup> According to the NCAA, Webster’s New World Dictionary Third College Edition defines “hostile” and “abusive” as follows:

“Hostile”: Of or characteristic of an enemy; warlike; having or showing ill will; unfriendly; antagonistic; not hospitable or compatible; adverse.

“Abusive”: Involving or characterized by abuse or misuse; abusing; mistreating; coarse and insulting in language; scurrilous; harshly scolding.

Ex. R, Dec. 9, 2005 Staff Comm. Memo at 6. While federal courts may not have “altered” this definition, they have undeniably established clear and specific criteria to be considered in determining whether particular conduct can properly be considered “hostile or abusive.” See *Harris*, 510 U.S. at 21. UND is not aware of *any* federal or state case holding that an educational institution’s use of Native American imagery is discriminatory or is hostile or abusive. Indeed, in *Munson*, 577 N.W.2d 387, 1998 WL 61018 (Wis. Ct. App. 1998), the court held that such use is not discriminatory. See also *Illinois Native American Bar Ass’n. v. University of Illinois*, \_\_\_ N.E.2d \_\_\_, 2006 WL 2684269 (Ill. App. Ct. Sept. 19, 2006) (Hoffman, J., Specially concurring) (finding that Chief Illiniwek’s performance during sporting events could not create objectively hostile environment for Native American students).

creates or leads to a hostile environment.” Ex. R, Dec. 9, 2005 Staff Comm. Memo at 5.<sup>21</sup> By changing the standard mid-stream in order to avoid exempting UND from application of the Policy, the NCAA Executive Committee acted in bad faith.

**(b) *The Executive Committee Arbitrarily Changed the Evidentiary Basis for Its “Presumption.”***

Having informed UND for the first time, months after the Policy was published and initial appeal denied, that it had adopted a new “rebuttable presumption” that UND’s use of Native American imagery was hostile and abusive, the NCAA further demonstrated its bad faith by first claiming that the presumption was supported by academic research, and then entirely abandoning that claimed foundation for the presumption when UND demonstrated that the research was critically flawed and had no application to UND.

In support of its “rebuttable presumption,” the NCAA Executive Committee claimed it relied on the findings and conclusions in one highly dubious study--the Fryberg Study. Despite the fact that it was unpublished and had not been peer reviewed, the Fryberg Study represented the only evidence cited by the NCAA in support of its presumption. UND responded by demonstrating that the Fryberg Study was critically flawed. For example, UND demonstrated that the Fryberg Study was of questionable credibility, suffered from a potential personal bias, failed to state significant information about methodology, stimuli, participant selection and analysis, and failed to use an appropriate control condition. *See* Ex. S, Dec. 23, 2005 UND Memo at 12-18. UND further demonstrated that, even if the conclusions of the Fryberg Study were accepted, they did not support application of the Policy to UND. *Id.*

Rather than confront or even address UND’s evidence, the NCAA Executive Committee again changed the rules and asserted that it had not relied upon the Fryberg Study even though the Fryberg Study had previously been offered as the sole objective rationale for the presumption and had been extensively discussed in the Dec. 9, 2005 Staff Committee Memo. Instead, the

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<sup>21</sup> The Executive Committee further held that in order to rebut the presumption UND “must present evidence that demonstrates clearly its use of Native American mascots, names, and/or imagery does not create or lead to a hostile or abusive environment.”

NCAA Executive Committee for the first time claimed that the presumption was actually based on “comments and input” from divisional representative bodies, the recommendation of the NCAA Minority Opportunities and Interests Committee, and a resolution from the American Psychological Association (adopted after the NCAA Policy had been announced). Ex. T, Jan. 18, 2006 Staff Comm. Memo. The NCAA Executive Committee concluded by asserting, again for the first time, that it did not have to defend the “rebuttable presumption” because “attacks on the Policy” were “outside the limited scope of th[e] appeal.” Ex. T, Jan. 18, 2006 Staff Comm. Memo at 10. In other words, UND had the burden of overcoming an evidentiary presumption, without ever being told the basis for the presumption, and therefore without any explanation of how the presumption could be overcome or even what evidence the Executive Committee might consider.

The NCAA has repeatedly abandoned its arguments and its scant evidence as soon as it became clear at each step of the way that it would not withstand scrutiny. The NCAA’s rationale for applying the Policy to UND has become increasingly vague, despite early assurances that it would apply a solid and ascertainable standard. The foregoing makes it plain that the NCAA has repeatedly acted arbitrarily and unreasonably, based on expedience in promoting its agenda by altering the standards for application of the Policy. The NCAA further acted arbitrarily and in bad faith by adopting a presumption that assumes UND’s use of Native American imagery is “hostile or abusive”—without ever making any objective finding that a “hostile or abusive” environment actually exists at venues at UND during post-season championship events or on the UND campus in general, and ignoring all evidence to the contrary.

**3. Creation of a Special Exception for a Single Influential Member is a Hallmark of Bad Faith.**

The NCAA has also acted in bad faith by crafting the Namesake Exception for the special benefit of FSU. The Namesake Exception exempts from the Policy institutions that have the approval of a “namesake” tribe to use the tribe’s name and imagery, regardless of the nature of that use. Creation of the Namesake Exception was an expedient way to avoid possible

confrontation with FSU and other large Division I schools. Notwithstanding the timely connection between FSU's appeal promoting a concept of a namesake exception and the announcement by the NCAA that it had created a Namesake Exception, other clues about motive exist in the Exception itself. The Namesake Exception is wrought with intellectual inconsistencies, including a misunderstanding of the supposed harm, an overly broad application, and a failure to consider the practical consequences of administering such an exception, which indicate that the true motivation for the Namesake Exception was to avoid a confrontation with FSU.

The Fryberg Study, relied on so heavily to justify the Policy and the presumption against schools using Native American imagery (*See* Ex. R, Dec. 9, 2005 Staff Committee Memo), clearly concluded that if harm was caused by the use of Native American imagery, the harm occurred regardless of whether Native Americans approved. In fact, the Fryberg Study concluded that it was Native Americans who actually approved of the use who were most likely to suffer harm. Creation and application of the Namesake Exception is entirely inconsistent with this conclusion and calls into question the true motivation for its creation.

In addition, the NCAA has not limited the Namesake Exception to only the use of the tribal name. If the NCAA were truly motivated by a respect for tribal sovereignty, it would have made some effort to craft the exception to reflect the unique or proprietary interests of a particular tribe. Instead, it has allowed a small tribe in Florida to approve a wide range of Native American imagery, including the stereotypical images often deemed offensive, even though these images have no particular tie, in reason or fact, to the historic Seminole. A blanket exception for FSU, based on the Namesake Exception, allows FSU to flood the national media with inaccurate and misleading representations of historical Native Americans. Its application allows FSU to allegedly harm, with its use of Native American imagery, millions of Native Americans across the country—none of whom (except the small band in Florida) have given their consent to FSU.

The NCAA has failed to articulate or consider the practical difficulties in applying the Namesake Exception. The NCAA has not decided how to treat tribal names that are associated with more than one tribal entity. For example, the NCAA failed to even approach the Seminole of Oklahoma to ascertain their position before issuing a full exemption to FSU. Nor has the NCAA even considered the possibility that tribal approval, once given, may some day be taken away. Inconsistencies in the Namesake Exception's application such as these undermine the NCAA's stated purpose for its own Policy.

Since adopting the Namesake Exception for the benefit of FSU, the NCAA has tried to paint it as one motivated by respect for tribal sovereignty. But the questionable rationale for the Namesake Exception in light of the NCAA's own purported evidence in the form of the Fryberg Study and the Exception's inconsistent application to member institutions indicate that the NCAA is not primarily concerned with tribal sovereignty. Rather, the NCAA is interested in appeasing one of its most influential members, FSU, and created the Namesake Exception to satisfy that aim. The NCAA's naked favoritism for influential member institutions such as FSU constitutes bad faith and is a breach of the contractual duty of good faith, owed by the NCAA to *all* of its members. The NCAA has successfully evaded a dispute with its most influential members, but it has done so at the cost of failing to maintain a balanced, fair, and consistent application of its Policy.

#### **4. Application of the Namesake Exception has been Arbitrary and Unreasonable.**

Having adopted, despite its inconsistencies, the Namesake Exception, there is no reason, in theory or in fact, to deny UND that exemption. The NCAA has been absolutely unreasonable and arbitrary in its refusal to apply the Namesake Exception to UND. UND is entitled to the benefit of the Namesake Exception because it has the approval of the nearest Sioux tribe. This is especially true considering the NCAA's exemption of CMU from the Policy. Further, a reasonable comparison of the application of the Namesake Exception granted to FSU and the

denial of the same to UND, a fact the NCAA desperately wants to avoid, demonstrates the remarkable lack of good faith that the NCAA has exhibited in consideration of UND's appeal.

**(a) *UND Should Have Been Exempted Because of Approval by the Spirit Lake Nation.***

UND has produced, at every opportunity in the appeals process, clear evidence demonstrating that it should be exempt from the Policy because it has the approval of the Sioux Spirit Lake Nation to use the "Fighting Sioux" name and associated logo. UND explained that on December 13, 2000, the Spirit Lake Nation adopted Resolution No. A05-01-041, which expressly specified that the tribe was "not opposed to keeping the 'Fighting Sioux' name and present Logo at UND." Ex. O, Aug. 30, 2005 UND Memo at 3-4.

The NCAA refused to accept this clear expression of support from a namesake tribe and refused to exempt UND from the Policy. Instead, the NCAA went to great lengths to introduce "ambiguity" into the Spirit Lake Nation's support of UND's use of the "Fighting Sioux" name and associated logo by arguing that the Resolution states that the tribe's approval is conditional on "something good com[ing] out of this controversy." The NCAA also cited as evidence a straw poll conducted in August 2005 by the Spirit Lake Nation "General Assembly," which has no governing authority and consists of only a segment of the tribe, to withdraw the tribe's support. In addition, the NCAA cited the passage of a resolution by the United Tribes of North Dakota, an organization unaffiliated with the Spirit Lake Nation, supporting the Policy. Ex. P, Sept. 28, 2005 Staff Comm. Memo at 2; Ex. R, Dec. 9, 2005 Staff Comm. Memo at 8-9.

In response, UND forcefully and conclusively disproved these contentions by showing that any and all conditions on the Spirit Lake Nation's approval had been met; the Spirit Lake Tribal Council, the governing body of the Spirit Lake Nation, has not rescinded its support of UND's use of the "Fighting Sioux" nickname and logo despite numerous telephone calls from the NCAA; and the board of directors of the United Tribes of North Dakota has no authority to and does not speak for the Spirit Lake Nation. *See* Ex. S, Dec. 23, 2005 UND Memo at 30-36.

In its January 18, 2006 response to UND, the NCAA Staff Committee did not even mention, let alone address, these facts. The Staff Committee nonetheless described the resolution of the Spirit Lake Tribal Council as one “of questionable continuing efficacy” and admitted that “NCAA efforts to speak with representatives of the Spirit Lake Nation have been unsuccessful.” Ex. T, Jan. 18, 2006 Staff Comm. Memo at 13. Apparently, the NCAA has tried, but failed, to persuade the Spirit Lake Tribal Council to formally rescind its prior approval of UND’s use of the “Fighting Sioux” nickname and logo. Unable to secure a formal withdrawal of the Spirit Lake Tribal Council’s approval, the NCAA has instead attempted to cast doubt on the viability of an unambiguous resolution of the legitimate governing body of the Spirit Lake Nation. In the same breath, the NCAA insists that the essence of the Namesake Exception is a respect for tribal sovereignty. Such duplicity is inherently arbitrary and indicative of bad faith.

**(b) *The NCAA’s Exemption to CMU under Similar Circumstances is Highly Indicative of Bad Faith Towards UND.***

The NCAA exemption of CMU further reflects the NCAA’s arbitrary application of the Namesake Exception and its consideration of the Spirit Lake Resolution. The salient facts are simple and straightforward: UND and CMU both have the approval of the respective tribe nearest them, but the NCAA has denied application of the Namesake Exception to UND and granted it in favor of CMU. At first, the NCAA justified its position by pointing to the fact that not all the Sioux tribes in North Dakota had given their approval. Ex. P, Sept. 28, 2006 Staff Comm. Memo at 2. When UND pointed out that all the Chippewa tribes in Michigan, except the Saginaw-Chippewa tribe, were opposed to CMU’s use of the Chippewa name, the best reply the Staff Committee could muster was that the NCAA was not aware that the other Chippewa tribes were opposed. Ex. R, Dec. 9, 2005 Staff Comm. Memo at 10.

The NCAA has claimed that it “considered numerous studies, and conducted its own independent work, during the four-year review process.” Ex. T, Jan. 18, 2006 Staff Comm. Memo at 11. After allegedly four years of reflection and consideration in weighing the Policy, the Staff Committee’s ignorance of the Chippewa position is inexplicable. Even a cursory

review of the academic literature would have enlightened the Staff Committee to their opposition. See Richard C. Eckert, *Wennebojo Meets the Mascot: A Trickster's View of the Central Michigan University Mascot/Logo*, in C. Richard King & Charles F. Springwood, *TEAM SPIRITS*, 64 (2001) (discussing the general Chippewa opposition to Central Michigan's use). Such ignorance is not attributable to laziness alone; it is a marker of the arbitrary and bad faith application of the Namesake Exception. There is no other rationale for treating member schools in virtually identical circumstances so differently.

(c) ***Granting an Exemption for FSU, While Applying the Policy to UND, Unequivocally Demonstrates the NCAA's Bad Faith.***

As discussed previously, the Namesake Exception was created for the benefit of the FSU Seminoles. The irony of this situation is that FSU is the collegiate embodiment of the alleged Native American Imagery "problem." Efforts to remove Native American imagery from sports are not driven by the benign and respectful uses characteristic at UND; they are motivated by the desire to remove the more questionable images used by professional teams, such as the Washington Redskins, the Atlanta Braves, and the Cleveland Indians. While creation of the exception for FSU was a clear marker of bad faith, actual application of the exception in the specific circumstances applicable to both schools, UND and FSU, presents unmistakable evidence of the NCAA's bad faith towards UND.

At the collegiate level, FSU is the icon of those uses that have stirred this controversy. FSU has the "tomahawk chop" and the notorious war chant, derived not from Seminole folk music, but from stylized Hollywood westerns. FSU has a supposed Seminole warrior in Plains Indian clothing atop a war horse more suited to the Great Plains than the Everglades.<sup>22</sup> If a serious debate about the propriety of the use of Native American imagery in the collegiate ranks were conducted, such debate would have to start at FSU. A result in which FSU is allowed to continue its questionable uses of Native American imagery and, at the same time, UND is

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<sup>22</sup> The only prominent, stereotypical symbol of Plains Indian culture not embraced by the FSU Seminole is the buffalo-hide teepee, but inspection of FSU "tail-gating" events might prove otherwise.

restricted from the benefit of full membership by being denied access to championship competition for its respectful use (which includes none of the stereotypical or inaccurate uses employed by FSU), is absurd. Sadly, since the exception was arbitrarily created to avoid a fight with FSU, foresight and a desire for well-reasoned application were apparently not large factors in its implementation. After realizing that its Policy would have little significance with the Division I schools mostly exempted, the NCAA looked to UND to make some kind of “statement.” This statement has evolved to produce the ironic and unjustifiable result discussed above. Such a result demands that the Policy’s present application to UND be summarily rejected as arbitrary and the product of bad faith.

### **C. The Policy Violates State Anti-Trust Laws**

Provisions of North Dakota antitrust law derive from the Uniform State Antitrust Act which is generally “interpreted in conformity with the federal [antitrust laws].” *Mothershed v. Justices of Supreme Court*, 410 F.3d 602, 609 (9<sup>th</sup> Cir. 2005) (quoting *Arizona v. Maricopa County Med. Soc’y*, 643 F.2d 553, 554 n.1 (9<sup>th</sup> Cir. 1980)). Accordingly, the same analysis undertaken under federal law should be applied to claims brought under N.D.C.C. ch. 51-08.1.<sup>23</sup>

Under North Dakota law, it is illegal to make “[a] contract, combination, or conspiracy between two or more persons in restraint of, or to monopolize, trade or commerce in a relevant market.” N.D.C.C. § 51-08.1-02. This provision parallels section 1 of the Sherman Act and therefore a similar analysis is called for under the North Dakota statute.<sup>24</sup>

The NCAA Executive Committee Policy at issue in this case is clearly subject to this analysis because it stems from a contractual relationship between the NCAA and its members via the NCAA Constitution and Bylaws.<sup>25</sup> Further, in applying federal anti-trust law to the NCAA,

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<sup>23</sup> See also Prefatory Note, Uniform State Antitrust Act, 7C U.L.A. at 352 (2000) (indicating that following federal antitrust precedent should be encouraged in most instances).

<sup>24</sup> Section 1 of the Sherman Act makes illegal “[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce.” 15 U.S.C.A. § 1 (2006).

<sup>25</sup> The contractual relationship between the member schools of the NCAA is not in contention. See, e.g., *Worldwide Basketball v. Nat’l Collegiate Athletic Ass’n*, 388 F.3d 955, 959 (6th Cir. 2004) (“The NCAA does not dispute the Promoters’ claim that the Two in Four Rule represents

the United States Supreme Court has recognized that the “NCAA and its member institutions are in fact organized to maximize revenues” which means that its non-profit character is not significant. *Nat’l Collegiate Athletic Ass’n v. Board of Regents of Univ. of Okla.*, 468 U.S. 85, 101 n.22 (1984). As discussed more fully below, the Policy is an unreasonable restraint on trade that imposes an unreasonable restraint on competition under North Dakota law.<sup>26</sup>

Federal courts have developed three modes of analysis to determine if a restraint on trade is unreasonable: (1) *per se*, (2) “quick-look” rule of reason analysis (the “Quick-Look”), and (3) full rule of reason market analysis (“Rule of Reason”). These analytical approaches have also often been applied to claims brought under state antitrust laws as well. The “*per se*” analysis has generally not been applied to challenges to traditional NCAA rules because intercollegiate athletics represent “an industry in which horizontal restraints on competition are essential if the product is to be available at all.” *Board of Regents*, 468 U.S. at 101.<sup>27</sup> Instead, a rule of reason analysis has been applied. Under both a Quick-Look and a full Rule of Reason market analysis, the Policy constitutes an unreasonable restraint on competition and violates North Dakota law.<sup>28</sup>

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an agreement in which the NCAA participated.”); *St. Louis Convention & Visitors Comm’n v. National Football League*, 154 F.3d 851, 861 (8th Cir. 1998) (observing that in the prior cited NCAA cases “there was no question that the [NCAA was] acting pursuant to an agreement in restraint of trade, and the issue was whether the agreement was unreasonable.”).

<sup>26</sup> While courts have recognized that “[e]very agreement concerning trade, every regulation of trade, restrains,” *Chicago Bd. of Trade v. United States*, 246 U.S. 231, 238 (1918), the United States Supreme Court has clarified that in determining whether a particular restraint on trade is illegal under the Sherman Act, the relevant inquiry is whether the challenged practice “imposes an unreasonable restraint on competition.” *Arizona v. Maricopa County Medical Soc’y*, 457 U.S. 332, 342-343 (1982).

<sup>27</sup> Under federal law, application of a *per se* analysis is proper when “experience with a particular kind of restraint enables the court to predict with confidence that the rule of reason will condemn it.” *Craftsmen Limousine, Inc. v. Ford Motor Co.*, 363 F.3d 761, 773 (8th Cir. 2004) (quoting *Maricopa County*, 457 U.S. at 344). When this is found to be the case, “a restraint is presumed unreasonable without inquiry into the particular market context in which it is found.” *Board of Regents*, 468 U.S. at 101.

<sup>28</sup> Commentators considering the issue have also concluded that the NCAA Policy violates federal antitrust law. See Kenneth B. Franklin, *A Brave Attempt: Can The National Collegiate Athletic Association Sanction Colleges and Universities with Native American Mascots?*, 13 J. Intell. Prop. L. 435 (Spring 2006) (reviewing the NCAA Native American imagery policy and concluding that NCAA’s actions are clearly in violation of federal antitrust laws.).

**1. The Policy Should be Analyzed Under a Quick-Look Rule of Reason In Accordance with United States Supreme Court Precedent.**

The Quick-Look rule of reason has been applied to challenges to NCAA bylaws. *Id.*<sup>29</sup> Although the Supreme Court decided not to apply a *per se* analysis to the NCAA in *Board of Regents*, it also did not require a complete market analysis as used in the full Rule of Reason. *Id.* at 110 (“This naked restraint on price and output requires some competitive justification even in the absence of a detailed market analysis.”).<sup>30</sup> The Supreme Court relieved the plaintiff of proving traditional antitrust elements because of the clearly anticompetitive nature of the NCAA governance structure. Similarly, a Quick-Look should be applied when “an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets.” *California Dental Ass’n v. Federal Trade Comm’n*, 526 U.S. 756, 770 (1999) (citing the NCAA’s action of limiting output of televised games in *Board of Regents* as an example of obvious anti-competitive effects).

Here, the Policy clearly has an anticompetitive effect. It is an outright ban that prohibits certain NCAA members from competing evenly in championship events and from bidding on contracts to host championship events. Even an observer with only a rudimentary understanding of economics could conclude that a ban on hosting and evenly competing in NCAA

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<sup>29</sup> The *Board of Regents* decision, responding to the unique position of the NCAA, is considered a landmark case in the development of the “quick-look” rule of reason analysis. *California Dental Ass’n v. Federal Trade Comm’n*, 526 U.S. 756, 770 (1999). As a relatively recent innovation in anti-trust law, the quick-look analysis continues to evolve, and distinctions between it and other modes of analysis are far from complete. The United States Supreme Court has admitted that “[t]he truth is that our categories of analysis of anticompetitive effect are less fixed than terms like ‘*per se*,’ ‘quick look,’ and ‘rule of reason’ tend to make them appear.” *Id.* at 779. As acknowledged by the D.C. Circuit, the movement is “away from any reliance upon fixed categories and toward a continuum.” *Polygram Holding, Inc. v. Federal Trade Comm’n*, 416 F.3d 29, 35 (D.C. Cir. 2005). Instead of focusing so heavily on the formal distinction between *per se* and Rule of Reason, the Supreme Court has indicated that a court must make “an enquiry meet for the case, looking to the circumstances, details, and logic of the restraint.” *California Dental*, 526 U.S. at 781. From a practical point of view, the analytical benefit of the “quick-look” nomenclature is to remove the need to do a detailed market analysis.

<sup>30</sup> See also *Polygram*, 416 F.3d at 35 (noting that in *Board of Regents*, “the Court did not insist upon the elaborate market analysis ordinarily required under the rule of reason to prove the defendant had market power and the restraint it imposed had an anticompetitive effect.”); *Fed. Trade Comm’n v. Indiana Fed’n of Dentists*, 476 U.S. 447, 459-60 (1986) (relying on *Board of Regents* in rejecting argument that Rule of Reason demanded an elaborate market analysis).

championship events has an anti-competitive effect on customers and markets where individual NCAA members lose their freedom to compete. *See e.g., Board of Regents*, 468 U.S. at 106.

**2. Application of the “Quick-Look” Rule of Reason Demonstrates that the Policy is an Unreasonable Restraint on Trade.**

In applying the Quick-Look analysis to the NCAA in *Board of Regents*, the United States Supreme Court first considered whether the NCAA relevant bylaw at issue therein had “a significant potential for anticompetitive effects.” 468 U.S. at 104.<sup>31</sup> After establishing this potential, the Court stated “these hallmarks of anticompetitive behavior place upon [the NCAA] a heavy burden of establishing an affirmative defense which competitively justifies this apparent deviation from the operations of a free market.” *Id.* at 113 (emphasis added). Thus, the Quick-Look analysis requires a two-pronged inquiry: (1) UND must first show that the Policy poses a significant potential for anticompetitive effects, and (2) if so demonstrated, then the NCAA must justify its Policy with sufficient procompetitive effects.

**(a) The Policy Has Substantial Adverse Effects on Competition.**

The restrictions that the NCAA has placed on UND and similarly situated schools via the Policy undeniably inhibit and restrain competition because the Policy bans participation in and hosting of championship events absent UND’s compliance with the Policy.<sup>32</sup> Thus, UND easily

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<sup>31</sup> The subject of the dispute was a television plan, adopted as a NCAA bylaw, for the 1981-85 college football seasons, which established a package price and contained appearance requirements and appearance minimums. *Board of Regents*, 468 U.S. at 94 (“The basic requirement imposed on each of the two networks is that it must schedule appearances for at least 82 different member institutions during each 2-year period. Under the appearance limitations no member institution is eligible to appear on television more than a total of six times and more than four times nationally, with the appearances to be divided equally between the two carrying networks.”).

<sup>32</sup> In addition to the direct prohibitions on competing with the institution’s valuable trademark identification and hosting, and bidding to host, post-season play, the NCAA Policy also pressures member institutions to refrain from contracting with and scheduling regular season games with UND and other identified institutions. Acting in concert through the NCAA, member institutions effectively are targeting certain institutions to have less favorable regular season play, which impacts the ability of that institution to compete for athletes, fans, media contracts for marquee matchups, and even access to championship competition itself, as the relative weight of a regular season schedule may determine whether an institution makes the post-season at all. The arbitrary restraints on competitive negotiation for regular season games also impacts

meets its burden to show that the Policy has a “significant potential for anticompetitive effects” because of the championship ban. *See Board of Regents*, 468 U.S. at 104. There are two ways to show the adverse effects of the Policy in a Quick-Look analysis. If the Policy would be subject to *per se* treatment absent the unique exemption of the NCAA from *per se* violations, then adverse effects are shown.<sup>33</sup> In the alternative, a showing of a facially anticompetitive restraint is sufficient to demonstrate the Policy’s adverse effects on competition. *See California Dental*, 526 U.S. at 763 (noting that a “quick-look” treatment is proper “for restraints that are not *per se* unlawful but are sufficiently anticompetitive on their face they do not require a full-blown rule of reason inquiry”). UND meets its burden of demonstrating adverse competitive effects under either alternative, as demonstrated below.

(1) The Policy Is a Group Boycott Which Would Normally Invite *Per Se* Treatment.

Restraints typically subject to *per se* treatment include “price fixing, division of markets, group boycotts, and tying arrangements.” *Craftsmen Limousine, Inc. v. Ford Motor Co.*, 363 F.3d 761, 773 (8th Cir. 2004) (quoting *Northern Pacific Ry. Co. v. United States*, 365 U.S. 1, 5 (1958)). The classic example of a group boycott is a “concerted refusal to deal.” *See St. Paul Fire & Marine Ins. Co. v. Barry*, 438 U.S. 531, 543 (“[t]he Court also has stated broadly that ‘group boycotts, or concerted refusals to deal, clearly run afoul of § 1 [of the Sherman Act]’”) (quoting *Times-Picayune v. United States*, 345 U.S. 594, 625, 73 S.Ct. 872 (1953)); *see also Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing*, 472 U.S. 284, 290 (1985) (“[t]his Court has long held that certain concerted refusals to deal or group boycotts are so likely to restrict competition without any offsetting efficiency gains that they should be condemned as *per se* violations of § 1 of the Sherman Act.”).

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the ability of a program to stay within certain travel cost constraints, placing effected institutions at a competitive disadvantage.

<sup>33</sup> The *Board of Regents* court recognized “participating in an association which prevents member institutions from competing against each other on the basis of price or kind of television rights that can be offered to broadcasters, the NCAA member institutions have created a horizontal restraint.” 468 U.S. at 99. This horizontal restraint created limitations on output, which “are unreasonable restraints of trade.” *Id.* Such practices “are ordinarily condemned as a matter of law under an ‘illegal per se’ approach.” *Id.* at 100.

The Policy is a group boycott normally subject to *per se* treatment. It is specifically designed to forbid members from competing with UND and similarly situated schools, absent their compliance with the Policy. The NCAA Executive Committee conspired to pass the Policy effecting a concerted refusal to deal with certain member institutions. Assertions of the NCAA’s “good motives” are unavailing: “[w]hile as the guardian of an important American tradition, the NCAA’s motives must be accorded a respectful presumption of validity, it is nevertheless well settled that good motives will not validate an otherwise anticompetitive practice.” *Board of Regents*, 468 U.S. at 101 n.23. Were it not for the NCAA’s general exemption from *per se* treatment, due to the unique need for horizontal restraints in order to provide the product of amateur collegiate sports at all, a final determination of liability under N.D.C.C. § 51-08.1-02 could be made on the basis of a group boycott, particularly given the complete market power wielded by the NCAA. Therefore, the initial burden in a Quick-Look analysis is met.

(2) The Anticompetitive Effects Inherent in the Policy Display Facially Anticompetitive Restraints.

Even if the Policy were not subject to *per se* designation as a group boycott, the facially adverse effects of the Policy on competition are plainly substantial because of its outright ban on competition absent compliance. As explained in *Board of Regents*, “when there is an agreement not to compete in terms of price or output, ‘no elaborate industry analysis is required to demonstrate the anticompetitive character of such an agreement.’” 468 U.S. at 109 (quoting *Nat’l Soc’y of Prof’l Eng’rs v. United States*, 435 U.S. 679, 692 (1978)). The D.C. Circuit, for example, has focused on “whether it is obvious from the nature of the challenged conduct that it will likely harm consumers.” *Polygram*, 416 F.3d at 35. To satisfy the burden of demonstrating anticompetitive effects, the Sixth Circuit, in a recent NCAA case, instructed courts to look for “obvious anti-competitive effects.” *Worldwide Basketball*, 388 F.3d at 957-58. The obvious adverse effects of the Policy in this case impact *at least* three distinct groups of consumers: (1) all member institutions affected by the Policy; (2) current and prospective college athletes,

particularly those attending or considering attending UND; and (3) fans of intercollegiate sports, particularly UND fans.

The Policy impacts UND and similarly situated member institutions both in their capacities as consumers and as producers. The adverse effects of a ban on bidding for contracts are obvious and have been discussed in reference to a group boycott. There are additional negative impacts to this ban and on the prohibition against hosting “home field advantage” play-off games, which in large part are determined by superiority of regular season play. UND and other like institutions that use Native American names or imagery stand to lose revenue and prestige if they are not allowed to host “home-field” games or to bid for contracts to host NCAA events. Reduced revenue and prestige puts them at a competitive disadvantage in fielding quality athletic programs.<sup>34</sup>

The NCAA itself has highlighted the adverse economic effects in a prohibition on hosting. It claims that hosting an NCAA championship event will provide “economic impact and prestige.” Ex. V, NCAA Bid Invitation at 2. It emphasizes that the benefits to the host greatly exceed the face value of the contract, because of the national exposure and secondary economic effects. Member institutions and their communities benefit “because the restaurants and hotels are full and the visitor attractions feel the impact from increased attendance.” *Id.* at 2 (quoting Carol Moody, President, St. Louis Convention & Visitors Commission). A prohibition on hosting clearly demonstrates an adverse economic effect, because members subject to the Policy are absolutely foreclosed from enjoying the benefits touted by the NCAA.

In addition, the Policy negatively impacts the willingness of member institutions to make the significant investment required in building facilities capable of hosting NCAA championship events. One of the ways for a member to recoup its investment is to win contracts to host events, thereby raising revenue, and, more importantly, increasing exposure to that institution. The

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<sup>34</sup> It is undisputed that NCAA members compete for athletes and fans. *See Board of Regents*, 468 U.S. at 99 (“The NCAA is an association of schools which compete against each other to attract television revenues, not to mention fans and athletes.”).

NCAA itself has recognized the connection. It pointed to an expected \$3.6 million impact to Long Beach for hosting the 2004 Women's Volleyball Championship, "where more than \$1 billion in renovations and new construction has recently taken place." NCAA Bid Invitation at 4 (quoting Steve Goodling, President and CEO, Long Beach Area Convention & Visitors Bureau). Arbitrary restrictions in the bidding for these events could very well cause institutions to hesitate before making future investments.

The impact of the Policy effectively banning championship participation is potentially even greater. This impact alone is sufficient to show significant anticompetitive effects. *See Hairston v. Pac. 10 Conference*, 101 F.3d 1315, 1319 (9th Cir.1996) ("plaintiffs met their initial burden by showing that the Pac-10 members banned UW from participating in bowl games for two years."). The importance of post-season play to athletes cannot be understated. Likewise, if member institutions are barred from fairly participating in NCAA championships, the negative effect on their prestige and ability to recruit athletes will be monumental. It could destroy their ability to compete, and the long-term effects would be ruinous to entire athletic programs at institutions affected by the Policy. The diminished ability to recruit athletes could also reduce the enrollment of the affected schools. Reduced enrollments would result in budget cuts and force cutbacks in the services and educational opportunities a school has to offer. This nearly inevitable chain of events will have the effect of putting institutions subject to the Policy at a significant competitive disadvantage, not only on the playing field, but also in the classroom.

The Policy also harms member institutions by devaluing the intellectual property interest affected schools have in their respective nicknames and logos. 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 Longhorns, Seminoles, Sooners, and Fighting Sioux, for example, are instantly recognized and associated with the respective member institution. The Policy negates years of efforts and identity building by (1) tainting the nickname and logo of affected schools, and (2) forcing members, as a practical result of the Policy, to

actually abandon their name and associated trademarks, copyrights, and other valuable intellectual property.

The negative effects on collegiate athletes at large are numerous. Banning athletes from championship events is an egregious harm. Athletes at other schools will also feel the adverse effects. If schools like UND, with its outstanding hockey facility, are foreclosed from bidding for NCAA championship events, these events will in many instances be held at lesser facilities with fewer fans participating.

The adverse effects will also touch future college athletes. If the athletic programs of certain institutions are completely lost, the overall choice of schools available to potential athletes will be diminished. Similarly, the number of scholarships available and the number of spots on athletic teams to be filled will be reduced, tightening the available supply to all potential college athletes. The effect will be felt with particular severity by athletes in the geographic area of the schools affected by the Policy, including UND.

The adverse competitive effects on fans of collegiate sports are similar to those felt by athletes. The importance of fair and level post-season competition for consumers of collegiate sports cannot be overstated. Not only will fans in the UND area be deprived of the opportunity to watch UND's teams play against other collegiate teams if the Policy is enforced, they will be deprived to a large degree of the opportunity to watch live collegiate team sports because virtually all of UND's competitors are members of the NCAA. Even if fans did manage to travel long distances to other venues, the quality of a spectator experience is greater "at home" and at a state-of-the-art facility like the Englestad Arena than at a less well-equipped venue.<sup>35</sup>

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<sup>35</sup> In addition, the specter of illegitimate "tainted" wins by competing teams awarded home field advantage that should have, based on win-loss records, gone to UND but for the Policy, diminishes the quality of the experience for fans of competing teams as well and consumers of collegiate sports in general.

The clear message in the Policy for institutions that the NCAA deems to have a hostile or abusive environment (*i.e.*, any nonexempt school with a Native American reference) is: “you cannot compete” and “you cannot host.” The prohibition of athletic teams from competing in the NCAA championship events is thus a facially anticompetitive restraint. The prohibition from bidding for contracts to host these championship events also has clear facially anticompetitive effects.

### **3. Even Under a Full Rule of Reason Analysis, the Policy Violates State Law.**

Even if a Quick-Look approach were not appropriate, which it is, UND would still prevail on the merits of its antitrust claim under a full Rule of Reason analysis, “according to which the finder of fact must decide whether the questioned practice imposes an unreasonable restraint on competition.” *State Oil Co. v. Khan*, 522 U.S. 3, 10 (1997). Unlike the “Quick-Look” approach discussed above, a full “Rule of Reason” analysis “involves an inquiry into the market structure and the defendant’s market power in order to assess the actual effect of the restraint.” *Double D Spotting Serv., Inc. v. Supervalu, Inc.*, 136 F.3d 554, 558 (8th Cir. 1998) (citing *Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752, 768 (1984)). Examination of the relevant market and the NCAA’s power within it demonstrate that the Policy is an unreasonable restraint on trade.

#### **(a) The Relevant Market**

There are multiple relevant markets implicated in the Policy. Under a full Rule of Reason analysis, the plaintiff carries the burden of showing a relevant market. *Brookins v. Int’l Motor Contest Ass’n.*, 219 F.3d 849, 854 (8th Cir. 2000) (“[T]he district court properly required the [plaintiffs] to define the relevant market.”); *Double D*, 136 F.3d at 560 (“[I]t is necessary for Double D to allege a valid relevant market.”).<sup>36</sup> A relevant product market is one which

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<sup>36</sup> A relevant market can be broken into two parts: a geographic market and a product market. *Double D*, 136 F.3d at 560. A Section 1 claim under federal law may be precluded if the geographic market is too narrowly defined. *Id.* at 560-61 (ruling that an alleged market at a single warehouse was insufficient and would need to be “at least, the entire Des Moines, Iowa, metropolitan area”). The NCAA is a national organization, with over 1250 members spread

“includes all reasonably interchangeable products.” *Double D*, at 560. The classic antitrust methodology in this area is to show “there is no cross-elasticity of demand.” *Brookins*, 219 F.3d at 854; *see also U.S. v. Grinnell Corp.*, 384 U.S. 563, 592-93 (1966) (“[T]he ‘reasonable interchangeability of use or the cross-elasticity of demand,’ determines the boundaries of a product market.”); *Brown Shoe Co. v. U.S.*, 370 U.S. 294, 325 (1962) (“The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it.”).

At least three separate market definitions lack viable alternatives and are sufficient to define a product market. They are (1) the market of intercollegiate athletics, (2) the submarket of participating in NCAA championship events, and (3) the submarket of hosting and venue bidding to host NCAA championship events.

(1) The Market of Intercollegiate Athletics Is a Relevant Market.

The most obvious product market is intercollegiate athletics itself. Unlike the situation of sanctioned racing events in *Brookins*, there are no viable alternative athletic leagues for colleges and universities. While a race-car driver may freely associate with a different racing organization if the driver is dissatisfied with conditions imposed by another, a university cannot choose to have its teams compete in a different athletic league—there simply are none.

(2) The Market of Championship Participation Is a Relevant Market.

There are no reasonable alternatives to the championship events of the NCAA. Men’s basketball is one of the few sports where there is even an alternate event. *See Metropolitan Intercollegiate Basketball Ass’n v. Nat’l Collegiate Athletic Ass’n*, 339 F. Supp. 2d 545 (S.D.N.Y. 2004) (denying summary judgment motions in antitrust action against the NCAA). But as any fan of college basketball knows, the NIT is hardly a real alternative to “March Madness,” the NCAA championship event for basketball. The significance of the NIT is further

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across the country. Since the Policy applies to all NCAA members, the necessary breadth of geographic market is clearly established.

diminished by the fact that it was purchased by the NCAA as part of a settlement of the anti-trust claims raised in the above-cited case.

In other sports, there simply are no alternatives. A team either plays in the NCAA championship event, or they and their fans sit out the post-season. Clearly, participation in NCAA championship events is vital to an athlete's sporting experience. And unlike the driver in *Brookins*, the collegiate athletes and the member institution for whom they play do not have any real alternatives to the NCAA for all of UND's athletic teams.

(3) The Market of Hosting and Venue Bidding to Host is a Relevant Market.

Another submarket exists in the bidding for and hosting of NCAA championship sporting events. Hosting championship events is an important source of revenue for certain member institutions, including UND. Acting as a host also boosts the institution's reputation and its ability to market its educational and athletic product. Contracts to host championship events as well as the possibility of winning the right to host through competition at lower levels provide an incentive for schools to invest in higher quality athletic venues. Since NCAA championships are the only championship events in the field, it is necessarily impossible to bid on, contract for hosting, or host a separate championship event. There simply are not any alternatives to the NCAA contracts in the market to host NCAA championship sporting events.

(b) ***The NCAA Has Market Power.***

By virtue of its predominance in the product market, the NCAA has market power. In a full market analysis, antitrust "plaintiffs must prove market power in a relevant geographic market." *Minnesota Ass'n of Nurse Anesthetists v. Unity Hosp.*, 208 F.3d 655, 662 (8th Cir. 2000). The heart of whether an antitrust defendant has market power is whether it can "force a purchaser to do something that he would not do in a competitive market." *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 14 (1984). It is intuitive that if an entity is the sole provider of a product, then that entity has market power and can force a purchaser to do what the provider wants. *Town Sound & Custom Tops, Inc. v. Chrysler Motors Corp.*, 959 F.2d 468, 479

(3rd Cir. 1992) (“If the market were so defined, of course Chrysler would have market power, being the sole seller.”).

The NCAA has the power to force a member to do things they would not otherwise do. UND would not change its own name and logo unless it was forced to do so in order to maintain the viability of its athletic programs and ability to compete in the intercollegiate field. Since the NCAA is an association of all athletic competitions between over 1250 colleges and universities, it necessarily has power in the market of intercollegiate sports. Since the NCAA is the sole provider of these championship events and has exclusive authority to determine who will compete in these events, it necessarily has power in the market of championship events. Since the NCAA is the only association that is able to hold championship events and has the exclusive authority to accept bids for potential venues, it has power in the market of bidding and provision of contracts to host NCAA championship events.

**(c) *Adverse Effects On Competition Indicate an Unreasonable Restraint.***

Having established a relevant market and market power, UND can show significant adverse effects on competition. Once a relevant market and market power are shown, a full Rule of Reason analysis then hinges on a complete examination of the effects on competition. *State Oil*, 522 U.S. at 10. This analysis has already been conducted in Section II.C(2)(a) above. For the same reasons asserted there, UND will prevail on the merits of its state law antitrust claims.

**III. UND IS ENTITLED TO AN INJUNCTION BECAUSE THE HARM TO UND IF AN INJUNCTION IS DENIED IS MUCH GREATER THAN THE HARM THE NCAA WOULD SUFFER IF AN INJUNCTION ISSUED.**

As outlined above, if the NCAA is not enjoined from applying the Policy to UND, UND and its athletic and academic programs will be irreparably harmed.<sup>37</sup> UND’s reputation will be irreparably damaged and its recruiting efforts hampered. It will be prevented from hosting

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<sup>37</sup> Even if there was no clear showing of irreparable harm, which there is, preliminary injunctive relief remains particularly appropriate in antitrust cases to prevent threatened harm to the public especially when the enjoined party cannot demonstrate any substantial harm. *See Star Fuel Marts, LLC v. Sam's East, Inc.*, 362 F.3d 639, 651 (10<sup>th</sup> Cir. 2004); *Worldwide Basketball and Sports Tours, Inc. v. Nat'l Collegiate Athletic Ass'n*, 2002 WL 32137511 \* 4 (S.D. Ohio 2002); N.D.C.C. § 51-08.1-08 (injunctive relief available for plaintiffs threatened with injury).

coveted championship games and events, even if it has earned the right to do so and even if it somehow hides the thousands of “Fighting Sioux” images embedded throughout the Engelstad Arena and other facilities. It will further be prohibited from even participating in NCAA championship events at other locations unless it covers, removes, or replaces the “Fighting Sioux” name and logo on its athletic, band, and cheerleading uniforms and associated paraphernalia. UND will be labeled a hostile and abusive institution by the NCAA, and its reputation will suffer as a leading provider of superior athletic and academic opportunities.

Alternatively, if UND is granted this injunction, then the NCAA will simply be forced to suspend application of the Policy to UND, and the status quo will be maintained. The threatened injury to UND and its students, alumni, and the community at large are substantial and irreparable. The threatened injury to the NCAA, on the other hand, is zero, other than possible delay in implementing the Policy and only as it relates to UND. Given the NCAA’s exemption to FSU and other institutions, a claimed harm to the NCAA would be absurd. The NCAA is in no way affiliated with the “Fighting Sioux” name and logo and cannot show that UND’s use of the “Fighting Sioux” name and logo can in any way be attributed to the NCAA or harm the NCAA or its member institutions.

The balancing of harms and equities in this case weighs heavily in favor of the issuance of an injunction against the NCAA. A preliminary injunction would protect UND’s interest in hosting, bidding to host, and participating in NCAA championship events while ensuring that any potential future application of the Policy would be a legal one, based on an adjudication of UND’s claims challenging the legality of the Policy. *See Glenwood*, 940 F.2d at 372 (holding that preliminary injunction would protect contractor’s interest in participating in legal bidding process and would ensure that contract awarded would be legal one).

Moreover, the injury to UND in applying the Policy is greatly disproportionate to any possible injury to the NCAA. *See Graven v. Backus*, 163 N.W.2d 320 (N.D. 1968) (refusing to issue an injunction forcing adjoining landowner to tear down wall encroaching only three inches, because cost of removal was disproportionate to any damage caused to plaintiff’s property). In

this case, an imbalance of equities clearly exists. To comply with the Policy, UND would have to purchase additional uniforms for its athletes, cheerleaders, and band players just for post-season use. Further, the only way in which to presently comply with the Policy, and thereby host earned home-field advantage playoff events, or bid for future predetermined events, would be for UND to abandon its valuable intangible property interest in the “Fighting Sioux” identity; accept the pronouncement that it created a hostile and abusive environment; accept a substantially diminished recruiting ability for students and student athletes; accept a diminished and less competitive athletics program; and in the process, spend millions of dollars removing that last vestiges of UND’s history and very identity from its facilities. The NCAA, on the other hand, would simply be asked to continue regulating athletic events under the current status quo. *See Brookins v. Wisconsin Promoters Ass’n., Inc.*, 142 F. Supp. 2d 1149, 1152 (D.N.D. 2000) (finding that car racers forced to purchase new transmissions would suffer greater harm than organization that adopted new policy clarification mid-season).

Clearly, the injury to UND if the injunction does not issue greatly exceeds any possible injury to the NCAA. Indeed, it is difficult to conceive of any possible injury that UND’s use of the “Fighting Sioux” nickname and logo could cause the NCAA. Thus, UND’s Motion for Preliminary Injunction should be granted.

#### **IV. UND IS ENTITLED TO AN INJUNCTION BECAUSE GRANTING AN INJUNCTION SERVES THE PUBLIC INTEREST.**

The people of North Dakota have a pivotal interest in having a nationally recognized, superior state institution of higher education with a correspondingly superior academic program. UND serves this interest and plays an important role in North Dakota higher education by providing both superior academic and athletic programs to students, and sporting events to the consuming public at large, where it proudly displays the “Fighting Sioux” name and logo. The NCAA is not entitled to the presumption that UND’s use of the “Fighting Sioux” name and logo creates a hostile or abusive environment without any evidentiary basis for this conclusory allegation.

The “Fighting Sioux” name and logo is ubiquitous in UND athletic programs and in the state-of-the-art Engelstad Arena. The logo is a classic depiction of an authentic Native American Sioux warrior that was designed and created by a well-respected Native American artist who received his Master of Fine Arts degree from UND. UND adopted the name “Fighting Sioux” more than 70 years ago in order to associate itself with the courage, loyalty to cause, honor, and commitment exhibited by the Sioux people who inhabited the Northern Plains before settlers and pioneers moved into the region. UND has more than 32 separate programs designed to support Native American students pursuing university educations, including the “Native Americans into Medicine” program that has been in existence for over 30 years and has generated approximately twenty percent of all Native American physicians in the United States. More than 400 Native American students are enrolled at UND. 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.

Further, UND uses Native American imagery with consummate respect. Before every hockey and football game, UND shows fans a video explaining the reasons for adopting the Sioux name and imagery, and fans are asked to be aware of and respectful of the historical culture the nickname represents. No disrespectful actions such as “tomahawk chops” or other stereotypical behaviors are encouraged or permitted at UND events. On December 21, 2000, the North Dakota State Board of Higher Education voted unanimously that UND should retain the “Fighting Sioux” name and logo. The Office for Civil Rights conducted an investigation on UND’s campus in 2001, in response to a complaint on the use of the name and logo, and did not find that UND’s use of Native American imagery created a “hostile or abusive” environment.

An injunction would prevent the NCAA from unilaterally, arbitrarily, and unlawfully forcing UND to choose between two equally harmful alternatives. Clearly the injunction favors the public interest, and UND’s Motion for Preliminary Injunction should be granted.

**CONCLUSION**

For the reasons set forth, Plaintiff's Motion for Preliminary Injunction should be granted.<sup>38</sup>

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

State of North Dakota  
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<sup>38</sup> Although it makes little sense in a case such as this where the State is bringing an action for injunctive relief to preserve and protect the public interest, N.D.C.C. § 32-06-05 may arguably require this court to direct that UND file an undertaking upon issuance of a temporary and preliminary injunction. If ordered to do so, UND will file any necessary undertaking. Given the complete absence of any harm that could flow to the NCAA from preliminary injunctive relief, UND would request that the undertaking be set in the amount of zero dollars or a nominal amount of one dollar.