

STATE OF NORTH DAKOTA
COUNTY OF GRAND FORKS

IN DISTRICT COURT
NORTHEAST CENTRAL JUDICIAL DISTRICT

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 REPLY
MEMORANDUM IN SUPPORT
OF MOTION FOR
PRELIMINARY INJUNCTION**
Civil No. 18-06-C-01333

INTRODUCTION

Because of the unfortunate tone and approach taken by the NCAA in its opposition memorandum, this Reply must begin by stating what this case is not about.

This case is not about:

- Whether the Policy is good or bad.
- Whether this Court should “substitute its own judgment” about the wisdom of the Policy.
- Whether there was “substantial evidence” to support the decision of the Executive Committee as if this Court were an appellate court reviewing a decision of some lower tribunal.
- Whether the “Fighting Sioux” name and logo is hostile or abusive.

Were this Court the proper forum, UND would readily demonstrate its arguments as to why the “Fighting Sioux” name and logo are not hostile or abusive simply because some oppose their use. But this Court is not being asked to decide that. Therefore,

despite repeatedly being called a racially discriminatory institution, UND will resist the temptation to respond to irrelevant issues and say only this: As the NCAA concedes, reasonable people disagree about the use of Native American imagery. In its Report, the NCAA MOIC concluded that even the use of Native American mascots by member institutions, which UND does not have, ranges from “respectful to offensive.” The only courts to address the novel assertion that the mere use of a name or image is a hostile, abusive, or discriminatory practice have rejected it out of hand. Member institutions of the NCAA have considered and will continue to consider the subject, and UND seeks only to compel the NCAA to proceed correctly, free from attempts by the Executive Committee to take unilateral action bypassing the contractually-mandated process, and to be dealt with in a manner consistent with good faith and fair dealing and the laws of unfair competition.

Instead of responding to the NCAA’s ad hominem attacks on UND’s institutional integrity, UND will limit this Reply to what this case is about and, more particularly, what this Motion is about. This is a motion for a preliminary injunction to preserve the status quo while the litigation is pending. Before this case is done three issues will ultimately have to be decided:

1. Under the Contract, did the Executive Committee have the power to enact and enforce the Policy?
2. Did the Executive Committee violate the duty of good faith and fair dealing in adopting and applying the Policy?
3. Does the Policy adopted by a monopolist NCAA violate North Dakota’s antitrust laws?

In the context of this Motion, the Court is not now being asked to decide any of these ultimate questions. At most, the Court need only decide the degree of UND's likelihood of success on these claims. In fact, because the NCAA does not contest any of the 143 factual assertions in UND's opening memorandum, particularly those showing the irreparable harm being done to UND, the Court does not even have to decide whether UND is likely to prevail on its three claims. Because of the undisputed irreparable harm, under North Dakota law UND need only demonstrate that a "substantial question" exists on the merits in order for the Court to preserve the status quo pending the outcome of the litigation. As detailed below, under the law and undisputed facts, UND has not only shown that a substantial question exists, it has shown that it is likely to succeed on the merits of each of its three claims.

ARGUMENT

I. UND IS SEEKING A PROHIBITIVE INJUNCTION TO PRESERVE THE STATUS QUO.

The NCAA asserts that UND requests a mandatory injunction (as opposed to a prohibitory injunction), and further implies that such a request requires that a higher standard be met. Neither contention is correct. First, UND does not seek a mandatory injunction that requires affirmative action; rather, it seeks a prohibitory injunction that enjoins the NCAA from enforcing its Policy against UND. Moreover, even if UND were seeking a mandatory injunction, its burden would not extend beyond what is required when requesting a prohibitory injunction. *Holcomb v. Hamm*, 42 N.W.2d 70, 72 (N.D. 1950) (stating that same showing of harm is required whether party is seeking mandatory or preventative relief).

The purpose of injunctive relief—prohibitory or mandatory—is to prevent irreparable injury. *Canal Auth. v. Callaway*, 489 F.2d 567, 576 (5th Cir. 1974) (“The purpose of a preliminary injunction is always to prevent irreparable injury”); *Viestenz v. Arthur Twp.*, 54 N.W.2d 572, 578 (N.D. 1952) (“to warrant injunctive relief, it must clearly appear that some act has been done, or is threatened, which will produce irreparable injury”). To achieve this objective, courts’ general practice is to maintain the status quo. *Union Mgmt. Corp. v. Koppers Co.*, 366 F.2d 199, 204 (2d Cir. 1966) (“the general purpose of a preliminary injunction is to preserve the status quo”) (citation omitted); *see also Ferry-Morse Seed Co. v. Food Corn, Inc.*, 729 F.2d 589, 593 (8th Cir. 1984). “Preserving the status quo is taken to mean not merely freezing the situation as the court now finds it but to mean figuratively the restoration of the parties to the last, actual, peaceable, noncontested status which preceded the pending controversy.” *State ex rel. Schoenbacher v. Kelly*, 408 S.W.2d 383, 388 n. 2 (Mo. Ct. App. 1966) (quotation and citation omitted); *see also Transport Co. of Tex. v. Robertson Transports, Inc.*, 261 S.W.2d 549, 553-54 (Tex. 1953) (same).

The NCAA would have this Court believe that UND seeks to alter the status quo by having the Policy struck and thereby affirmatively changing recent NCAA decisions. This assertion represents nothing more than an attempt to confuse the issue through semantics. The true status quo is UND’s designation as the “Fighting Sioux,” which has been in effect for over seventy years. The status quo is also that the Bylaws give home field advantage to the top-seeded teams and do not mention Native American imagery as a consideration in awarding the bid to host championships at pre-determined sites. UND simply seeks to enjoin the NCAA’s enforcement of its Policy which extra-contractually

overrides those Bylaws. It is the NCAA that wants to change the status quo by forcing UND to either change its name and logo or be banned from fully competing in and hosting NCAA championships while branding UND a discriminatory institution in the process. The overwhelmingly harmful effects of such action by the NCAA are the very type of irreparable injury that injunctive relief is intended to prevent.

Moreover, if the NCAA's argument were accepted, it would mean that in order to obtain a "prohibitory" injunction, UND would have had to have sought relief prior to the NCAA's announcement of the Policy, and prior to exhausting its administrative remedies.¹ Since UND had no notice that the Executive Committee intended to circumvent the Constitution and Bylaws and promulgate the Policy prior to the time it did so, UND could not have moved for an injunction prior to the announcement of the Policy to preserve the "status quo." Such an interpretation of "status quo" is plainly inconsistent with established law.

In addition, even if Plaintiff's far-reaching mischaracterization of the status quo—that is, the Policy being in effect—could be accepted, it must be considered that

there is [no] particular magic in the phrase "status quo." The purpose of a preliminary injunction is always to prevent irreparable injury It often happens that this purpose is furthered by preservation of the status quo, but not always The focus always must be on prevention of injury by a proper order, not merely on preservation of the status quo.

Canal Auth., 489 F.2d at 576. This principle is well illustrated in the *Ferry-Morse* case, where the Eighth Circuit Court of Appeals upheld an injunction that prohibited a party's

¹ Even if UND had sued the NCAA in May 2006, an injunction would still need to be issued in November to preserve the status quo and prevent the irreparable injury of UND losing the home field advantage its football team has earned. That is, even if filed in May, this case would still be in the early stages of complex litigation and the Court would be asked to preserve the status quo prior to the ultimate merits being resolved.

inaction because the status quo was actually one of continuous action which that party had wrongfully halted. 729 F.2d at 593. Thus, even if UND's request were seen as one for affirmative action, the status quo should not be seen as the state of injury that the Policy imposes. Accordingly, UND needs only to raise a "substantial question" on the merits of its claim to qualify for injunctive relief. *Dataphase Sys., Inc. v. C L Sys., Inc.*, 640 F.2d 109, 114 (8th Cir. 1981); *see also F-M Asphalt, Inc. v. N.D. State Hwy. Dept.*, 384 N.W.2d 663, 665 n.1 (N.D. 1986) (approving of *Dataphase*).

II. UND IS LIKELY TO PREVAIL ON ITS CONTRACT CLAIM AND HAS CERTIANLY ESTABLISHED A "SUBSTANTIAL QUESTION."

A. The Executive Committee has Willfully Breached the Contract.

Notwithstanding the NCAA's lengthy and heated rhetoric regarding UND's name and logo, the only issue relevant in adjudicating UND's breach of contract claim is this: did the Executive Committee exceed its contractual authority in unilaterally banning UND and other members from post-season competition.

"The interpretation of a written contract to determine its legal effect is a question of law." *City of Bismarck v. Marineer Constr., Inc.*, 2006 ND 108, ¶ 11, 714 N.W.2d 484. Where the written language is plain and unambiguous, the interpretation of the contract is a pure question of law for the court. *Executive Bd. of Missouri Baptist Convention v. Carnahan*, 170 S.W.3d 437, 447 (Mo. Ct. App. 2005) ("The constitution and bylaws of an association, much like corporate articles and bylaws, are construed according to the general rules of contracts, and extrinsic evidence is not admissible to vary, add, or contradict the terms of an unambiguous and complete written document."). In North Dakota, as in every jurisdiction, a court must review a contract in its entirety to give effect and meaning to all of its provisions. N.D. Cent. Code § 9-07-06 (2006). In

this case, the Contract is unambiguous, and its provisions, read together, do not permit the Executive Committee to promulgate the Policy.

Apparently believing that its violations of the NCAA Constitution and Bylaws are excusable because they are “technical,” the NCAA has not even attempted to refute the exhaustive and detailed analysis of the Constitution and Bylaws contained in UND’s opening memorandum, which demonstrates that the Executive Committee does not have the power to promulgate the Policy. Instead, the NCAA simply re-asserts an argument already addressed in UND’s opening memorandum: that the unelected Executive Committee’s responsibility to “identify core issues” and “act to resolve” them permits it to promulgate any policy, regulation, or penalty it sees fit. The only support for this position is the conclusory assertion in the affidavit of Walter Harrison, the chair of the Executive Committee, that the NCAA membership “cannot make or ratify all decisions necessary for operation of the Association.” (Def. NCAA’s Mem. Opp’n to Pl.’s Mot. for Prelim. Inj. at 5; Harrison Aff. ¶ 8).

This is another straw man. UND is not arguing that all Executive Committee decisions need to be made by the adoption of bylaws. Rather, UND has demonstrated that the “action” the Executive Committee is entitled to take is limited, and certainly does not extend so far as to permit it to enact “policy” which is the equivalent of legislation. This is clear from both: (1) the express language and structure of the Constitution and Bylaws, which unambiguously vest all legislative authority in the Association membership, which the membership has exercised to extensively regulate NCAA championships; and (2) the express provisions of Article 4.1.2 of the Contract, which

assigns only very limited and specific duties and responsibilities to the Executive Committee.

As explained in depth in UND's opening memorandum,² under the clear, unambiguous language of the Constitution and Bylaws, only the NCAA membership can adopt "policies" to advance the "principles" set forth in the Constitution, and this must be done through the legislative process, which is very detailed and demanding.³ Exercising this power, the NCAA membership has adopted thousands of bylaws, governing even the most minute details of intercollegiate athletics.⁴ In particular, the NCAA membership has adopted very detailed and specific bylaws governing the administration of NCAA championships, the eligibility of member institutions for participation in those championships, and the criteria used for determining the hosts of such championships. (*See* Pl.'s Mem. in Supp. of Mot. for Prelim. Inj. at 50-52). The NCAA membership has declined to adopt any polices or regulations, much less any Bylaws, prohibiting member

² In order to avoid unnecessary duplication, UND will not restate its entire analysis here, but instead directs the Court to Section II(A) of its opening memorandum.

³ The NCAA Constitution and Bylaws make it crystal clear that while the NCAA Constitution "sets forth basic purposes, fundamental policies, and general principles that generally serve as the basis upon which the legislation of the Association shall be derived," "*all regulations governing the administration of intercollegiate athletics appear in the bylaws.*" Contract, Art. 5.2.1, at ix (emphasis added). The Constitution and Bylaws further make it clear that "*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." Contract, Art. 5.01 (emphasis added).

⁴ By definition, this legislation is designed to advance the "principles" contained in the Constitution. *See* Contract, Art. 5.01.1 (all legislation "shall be designed to advance one or more principles such as those set forth in Constitution 2").

institutions from competing in or hosting championship competition based upon the institutions' use of Native American imagery.⁵

In short, the facts that (1) the Contract expressly and exclusively vests the Association membership and divisional bodies with the power to adopt any legislation they deem advisable; (2) the Contract sets forth a detailed and exhaustive legislative process and enforcement program; and (3) the membership has expressed its legislative intent on virtually every issue relevant to the administration of intercollegiate athletics, including championship events, clearly indicate that it is the Association membership, not the Executive Committee, that is entitled to decide how to best promote the "principles" set forth in the Constitution. In particular, the foregoing facts demonstrate that it is the membership, not the Executive Committee, that is empowered to decide whether member institutions who use Native American imagery should be banned from competing in or hosting NCAA championship contests.

Although the duties and responsibilities assigned to the Executive Committee are comparatively narrow,⁶ this does not mean that the Executive Committee does not have

⁵ Indeed, it is clear that this is not a mere oversight on the part of the NCAA membership. When asked, the NCAA governance structures expressly charged by the Bylaws with the duty to administer NCAA championships openly opposed any action which would "prevent or eliminate championship opportunities" for member institutions who use Native American imagery. *See* MOIC Oct. 2002 Rep. & Ex. G thereto.

⁶ In contrast to the virtually unlimited authority granted to the Association membership to adopt any legislation it believes will advance one or more of the principles set forth in the Constitution, the Executive Committee is vested with only a relatively limited set of duties and responsibilities. These include the duty to employ a "chief executive officer" who may "employ such other persons as may be necessary to conduct efficiently the business of the Association," "provide final approval and oversight of the Association's budget," provide "strategic planning for the Association" and "initiate and settle litigation." Whereas other executive bodies, such as the divisional presidential groups, are expressly vested with some limited legislative and rule-making authority, the Executive Committee is not expressly vested with any such powers. (*See* Pl.'s Mem. in

the power to take certain types of actions without going through the legislative process. For example, the Executive Committee may certainly take ministerial acts necessary for the day-to-day operations of the Association. The Executive Committee may hire and fire staff, enter into contracts on behalf of the Association, provide long-term planning, and retain professionals when necessary to provide financial, legal, or business advice.

With regard to identifying and acting to resolve “core issues,” the Contract can be reasonably read to permit the Executive Committee to use its judgment in identifying important issues that affect the Association. However, any “action” the Executive Committee takes in order to “resolve” the issue must be action that is within its power under the express terms of the Contract and its structure. Accordingly, when “acting” to resolve perceived social or organizational issues, the Executive Committee could ask the staff it oversees to research the issue, seek input on the issue from NCAA committees who report to it, or develop a recommendation to the membership on the issue.

Under subsection (j), the Executive Committee is also expressly empowered to forward “dominant legislation to the membership for a vote” if it believes the issue requires action which would be binding upon all members of the Association. If the issue involves actions by members of a division that it believes are “contrary to the basic purposes, fundamental policies and general principles set forth in the Association’s constitution,” subsection (j) authorizes the Executive Committee to go so far as to “[c]all for a vote of the entire membership on the action.” If a two-thirds super-majority of

Supp. of Mot. for Prelim. Inj. at 49-50). Likewise, while the Constitution and Bylaws have established a detailed and comprehensive process for enforcement of the Contract and imposition of penalties for violations, the Executive Committee is not vested with any such enforcement or disciplinary authority.

Association members agree with the Executive Committee, the action complained of can be overridden. *Id.*

However, nothing in the express provisions of the Constitution and Bylaws, much less the structure of the Contract, would authorize the unelected Executive Committee to act as a sort of “super-legislature,” imposing by administrative edict rules, regulations, and “policies” governing issues the Constitution and Bylaws dictate must be addressed, if at all, by the membership through legislation. Such a reading of the Constitution and Bylaws would transform the NCAA from a “bottom-up organization in which the members rule the association” to one ruled by the Executive Committee.⁷ If the Executive Committee actually had the power it now asserts it has, it would have no need to “forward . . . dominant legislation to the membership for a vote” because it could simply enact the proposed legislation itself as a “policy.” There would be no need to expressly empower the Executive Committee to “call for a vote of entire membership” to override action of a division that the Executive Committee believes is inconsistent with the Constitution because it could simply override the action itself by promulgating a “policy.” Since all possible legislation ultimately must relate to a constitutional principle, and accordingly in some manner to a “core issue,” there would be virtually no rule, regulation, or penalty the Executive Committee could not impose if its urged reading of the Constitution and Bylaws is correct. Such a reading would be absurd, as it would completely contradict the carefully constructed and detailed mechanism for membership control over the NCAA created by the Contract.

⁷ NCAA’s website (http://www2.ncaa.org/about_ncaa/overview/).

Ignoring all of this, the Executive Committee seems to believe that as long as it is convinced that its extra-contractual action “furthers the fundamental purposes and core principles of the NCAA,” it is free to ignore the Constitution and Bylaws and take any action it pleases. Regardless of how benevolent the Executive Committee may believe its motivations are, or how “consistent” with the principles of the constitution and bylaws the Executive Committee may believe its actions are, the Contract cannot reasonably be read to afford the Executive Committee the power to take “action” which amounts to legislation, and which the membership itself could not take without adopting a bylaw by a two-thirds majority vote.⁸

The NCAA’s utter failure to even attempt to reconcile its asserted basis of authority to promulgate the Policy (the power to “identify” and “act to resolve” core issues”) with the other clear and unambiguous provisions of the Constitution and Bylaws identified in UND’s opening memorandum can only be interpreted as a concession that such a reconciliation is not possible. The NCAA’s argument ignores the plain language of the Contract and is contrary to the basic requirement that all provisions of a written document be construed to give effect and meaning to all of its provisions.

In short, the Executive Committee’s strong feelings or good intentions do not entitle it to openly breach its contractual obligations and ignore UND’s rights under the Contract. Accordingly, UND is likely to prevail on its breach of contract claim.

B. North Dakota Law Does Not Permit Associations to Breach Their Contractual Obligations to Their Members.

⁸ In order to pass legislation which applies to all divisions of the NCAA (“Dominant” legislation), a two-thirds majority vote of member institutions is required. Contract, Art. 5.02.1.1.

The NCAA next attempts to excuse its blatant violations of the Contract's terms by asserting that UND's claim for breach of contract "is properly viewed as a judicial challenge to an Association policy which UND dislikes," and that the Court should be "reluctant to interfere" with the NCAA's adoption of the Policy. (Def. NCAA's Mem. Opp'n to Pl.'s Mot. for Prelim. Inj. at 23). This assertion is not entitled to serious consideration.

By repeatedly arguing the merits of the Policy in the abstract, the NCAA seeks to distract the Court from the fact that UND's breach of contract claim has nothing to do with the wisdom of the Policy.⁹ Rather, UND has demonstrated that under the Constitution and Bylaws, the Executive Committee has acted in breach of contract in promulgating the Policy in the first place. Accordingly, UND is not requesting that the Court overturn a properly enacted policy with which UND disagrees.¹⁰ Rather, UND is requesting that the Court enjoin the Executive Committee from violating the NCAA Constitution and Bylaws by promulgating a Policy it does not have the power to adopt.

Indeed, the very case the NCAA cites in support of its argument, *Crandall v. North Dakota High School Activities Association*, 261 N.W.2d 921, 925-26 (N.D. 1978), actually supports UND's breach of contract claim. As the Court explained in *Crandall* "it is the duty of courts, regardless of personal views or individual philosophies, to uphold regulations adopted by" voluntary associations. *Id.* at 928 (quoting *Brown v. Wells*, 181 N.W.2d 708, 711 (Minn. 1970)). In this case, the NCAA Constitution and

⁹ Accordingly, none of the cases cited by the NCAA regarding the propriety of judicial involvement in evaluating the propriety of bylaws and rules is apposite.

¹⁰ Given this, the court need not reach the issue of whether the Policy itself can be struck down as "arbitrary or unreasonable" or "discriminatory" in considering UND's breach of contract claim.

Bylaws unambiguously provide that only the NCAA membership, not the Executive Committee, can regulate eligibility to participate in and host NCAA championships. *See supra*, § II(A). It is accordingly the “duty” of the court to uphold the Constitution and Bylaws by precluding the Executive Committee from acting in violation of them.

Courts considering the issue have repeatedly held that the constitution and bylaws of voluntary member associations constitute a contract that is enforceable against both individual members and the association itself.¹¹ In fact, courts addressing this question in cases involving the NCAA have determined that the NCAA and its members are in a contractual relationship. *Hall v. Nat’l Collegiate Athletic Ass’n*, 985 F. Supp. 782, 796 (N.D. Ill. 1997) (treating “NCAA’s constitution, bylaws, and regulations” as contract between NCAA and its members); *Bloom v. Nat’l Collegiate Athletic Ass’n*, 93 P.3d 621, 623-24 (Colo. Ct. App. 2004) (affirming decision that plaintiff was third party beneficiary of contract between NCAA and members); *Trustees of the Cal. State Univ. & Coll. v. Nat’l Collegiate Athletic Ass’n*, 147 Cal Rptr. 187, 192 (Ct. App. 1978) (affirming that “the relationship between the parties was one of contract, between the

¹¹ *See 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 in the charter, bylaws, and 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 Ala. Educ. Found., Inc.*, 417 So.2d 572, 573 (Ala. 1982)); *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.”).

NCAA as a voluntary association and CSUH as a member, evidenced by the constitution and bylaws”).

The Executive Committee has breached the plain and unambiguous terms of the NCAA Constitution and Bylaws in attempting to usurp the legislative power of the NCAA membership and promulgate the Policy. Courts in North Dakota and elsewhere have not hesitated to enforce the properly adopted constitution and bylaws of voluntary associations, and this court should not hesitate to enforce the NCAA Constitution and Bylaws in this case by enjoining the Executive Committee’s clear breach to prevent irreparable harm to UND.

III. UND IS LIKELY TO PREVAIL ON ITS CLAIM FOR BREACH OF THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING.

Contrary to the NCAA’s assertion that the implied duty of good faith and fair dealing is not inherent in traditional contracts, the vast majority of authority to expressly consider the issue has recognized the covenant. Restatement (Second) of Contracts § 205 (2006) (“Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement.”); 17A Am. Jur. 2d *Contracts* § 370 (2006) (Generally, there is an implied covenant of good faith and fair dealing in every contract, whereby neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract.”). The doctrine is not a judicial extension of the law, but a common-law principle recognized in almost every state and in the federal courts. It is therefore highly likely that the North Dakota Supreme Court, if faced with this issue, would join the vast majority of jurisdictions that find that an implied covenant of good faith and fair dealing is inherent in the Contract.¹²

¹² The mere fact that the North Dakota Supreme Court has not yet had occasion to address the issue of the duty of good faith and fair dealing in this context does not change

This is especially true considering that North Dakota has already codified the implied duty of good faith and fair dealing in the UCC, and North Dakota courts have recognized that the implied duty of good faith and fair dealing is inherent in insurance contracts. *See Fetch v. Quam*, 2001 ND 48, ¶ 12, 623 N.W.2d 357. These authorities demonstrate that the North Dakota Supreme Court has not “consistently declined” to read an implied duty of good faith and fair dealing into traditional contracts, as the NCAA claims.¹³

The NCAA enjoys virtually unchecked monopoly power over the conduct of intercollegiate athletics and championship competition. UND’s association with the NCAA is largely one of adhesion, but it is necessary to reap the substantial financial, economic, and intangible benefits that flow to a member institution conducting intercollegiate athletics. The NCAA is, simply put, the only game in town, and given the tremendous financial attributes of membership, a duty of good faith and fair dealing is quite clearly implied under North Dakota law. UND is thus likely to prevail on the issue

the analysis on whether UND has demonstrated a likelihood of success on the merits. This court’s pronouncement of North Dakota law at the merits stage is of the same controlling effect.

¹³ In two of the three cases cited by the NCAA for this proposition, the North Dakota Supreme Court did not even reach the issue of whether the plaintiff had stated a cause of action for breach of an implied covenant of good faith and fair dealing. In *Barnes v. St. Joseph's Hosp.*, 601 N.W.2d 587, 590 (N.D. 1999), the court expressly stated that it was not reaching the issue of whether the plaintiff had stated a *tort* cause of action for breach of an implied covenant of good faith and fair dealing. In *Aaland v. Lake Region Grain Coop.*, the court declined to consider the plaintiff’s *tort* cause of action for breach of the implied covenant of good faith and fair dealing in the employment context because the issue was not adequately briefed. 511 N.W.2d 244, 247 (N.D. 1994). And in the third case cited, *Jose v. Norwest Bank N.D., N.A.*, 599 N.W.2d 293, 297 (N.D. 1999), the court found that there was *no contract* between the at will plaintiffs and their employer and further rejected the plaintiffs’ contention that an implied covenant of good faith and fair dealing should nonetheless independently apply in the limited context of at will employment.

of whether there is an implied covenant of good faith and fair dealing inherent in the Contract that obligates the NCAA to treat UND fairly and reasonably.¹⁴

A. The NCAA Has Breached the Implied Covenant of Good Faith and Fair Dealing.

UND's claim for breach of the implied covenant of good faith and fair dealing is based upon the following: (1) the Executive Committee's willful violation of the Constitution and Bylaws in promulgating the Policy when it clearly had no authority to do so; (2) the Executive Committee's *post-hoc* creation of an "exemption" from the Policy inconsistent with the stated goals of the Policy for the primary benefit of a single member institution; 3) the Executive Committee's intellectually dishonest and arbitrary application of the "hostile and abusive" standard it claimed it had adopted, and its repeated alteration of the evidentiary standards applied in the appeals process.

Much as is did in issuing its final decision rejecting UND's appeal, the NCAA attempts to dismiss its arbitrary, outcome-oriented actions by asserting that these substantive and procedural infirmities are irrelevant because there is "substantial evidence" to support the Executive Committee's ultimate conclusion that the Policy should be applied to UND. As with UND's breach of contract claim, the NCAA apparently believes that if it can persuade the Court of the merits of the Policy in the abstract, the Executive Committee's arbitrary and unreasonable actions in implementing the Policy and carving out inconsistent exceptions to placate a powerful member will be overlooked. Unfortunately, no matter how strongly the NCAA believes in the correctness

¹⁴ Moreover, UND does not have to make a "clear showing," as the NCAA claims, that it will likely succeed on the merits in order to warrant injunctive relief. *Dataphase Sys., Inc. v. C L Sys., Inc.*, 640 F.2d 109, 113 (8th Cir. 1981).

of the Policy, it cannot escape the obligations imposed by the implied covenant of good faith and fair dealing.

1. The Executive Committee Willfully Violated the Constitution and Bylaws in Promulgating the Policy.

As discussed at length in Section II(A), *supra*, the Constitution and Bylaws expressly charge the Association membership with the responsibility to determine how best to advance the “principles” set forth in the Constitution. The legislative process is very detailed and exhaustively treated in the Bylaws. *See* Contract, Art. 5. Under this thoughtfully created legislative process, Bylaws which would affect all members of the NCAA require a two-thirds super-majority vote to become effective. Contract, Art. 5.02.1.1. Pursuant to this authority, the membership has formally adopted thousands of Bylaws and every year votes to accept or reject hundreds of additional proposed Bylaws. *See, e.g.*, Pl.’s Mem. in Supp. of Mot. for Prelim. Inj., Ex. 2, 2006 NCAA Convention Proceedings.

The Executive Committee was well aware that despite adopting incredibly detailed and exhaustive rules and regulations regarding eligibility for participation in and hosting of NCAA championships, the Association membership has thus far declined to adopt any rules, regulations, or bylaws prohibiting or penalizing the use of Native American imagery by member institutions. The Executive Committee was also aware that the divisional governance structures vested with responsibility for NCAA championships have advised the Executive Committee that they oppose any such prohibition or penalization. (Pl.’s Mem. in Supp. of Mot. for Prelim. Inj., Ex. E, MOIC Oct. 2002 Rep. & Ex. G thereto). The Executive Committee was further aware that in order for any legislation it recommended to the Association membership imposing such

prohibitions or penalties to become effective, it must be approved by a two-thirds majority of all members. Contract, Art. 5.02.1.1.

Despite this knowledge, the Executive Committee opted to promulgate the Policy itself, without going through the legislative process, likely because the Executive Committee perceived that there was insufficient support within the Association membership to adopt the Policy as a Bylaw. Given the NCAA's utter failure to respond to UND's analysis of the Contract, and its only tepid attempt to defend its assertion that its conduct was authorized by its responsibility to "act to resolve" "core issues," it is plain that the Executive Committee did not and could not have had a good faith belief that its action was proper under the Constitution and Bylaws. By willfully exceeding its authority to the great harm of UND, the Executive Committee has acted in bad faith and in breach of the implied covenant of good faith and fair dealing.

2. The Creation of a Special Namesake Exemption for FSU and Others Demonstrates the Executive Committee's Bad Faith.

The NCAA does not even attempt to rebut UND's evidence concerning the inconsistencies inherent in the Policy and the Namesake Exemption other than to say that "the NCAA will not substitute its views for those of the sovereign Tribes most affected." (Def. NCAA's Mem. Opp'n to Pl.'s Mot. for Prelim. Inj. at 39).¹⁵ The NCAA also

¹⁵ For the reasons set forth in its opening memorandum, the Spirit Lake Tribe Resolution No. A05-01-041, which is still in effect, satisfies the Executive Committee's requirement that only one "namesake tribe" consent to UND's use of the Sioux name and imagery. The NCAA attempts to distinguish UND's situation from CMU's by stating that it "received no Resolutions or other official statements in opposition from Chippewa Tribes in connection with use of the name by CMU" (emphasis added) while not denying that it has been on actual notice that in fact five other Chippewa Tribes in Michigan actually do oppose CMU's use of the name, which UND pointed out to the NCAA in its Nov. 4, 2005 UND Memo. (Def. NCAA's Mem. Opp'n to Pl.'s Mot. for Prelim. Inj. at 41-42). The NCAA's disparate treatment of CMU and UND constitutes bad faith.

glosses over the fact that while it took the NCAA four years to study the issue and decide that the use of Native American imagery in sports created a hostile and abusive environment for Native Americans, it took the NCAA only a little more than *four days* to create a blanket exception to the Policy that exempts one of the most prevalent users of inaccurate and stereotypical Native American imagery, FSU. Since that time, the NCAA has also granted Namesake Exemptions to Central Michigan University, the University of Utah, San Diego State, and Catawba College. Far from demonstrating the NCAA's "flexibility," the adoption of the Namesake Exemption demonstrates its bad faith.

FSU submitted its letter suggesting that the NCAA create an exception to the Policy based on the blessing of a namesake tribe on August 12, 2005. A week later, an Executive Committee press release dated August 19, 2006, announced just such an exception. Just four days after that, on August 23, 2005, the Executive Committee announced that it had granted a Namesake Exemption to FSU. Given the sequence and timing of these events, there can be no doubt that the Namesake Exemption was created specifically for FSU, at its request, and to avoid a confrontation with the large and powerful school.

Moreover, because FSU is the most prominent and publicly visible user of the type of stereotypical Native American imagery that the NCAA claims the Policy is intended to prevent, as UND argues at length in its opening memorandum, the application of the Namesake Exemption to FSU swallows the Policy whole and renders its application to UND—who has no stylized Hollywood mascot and whose logo accurately depicts an authentic American Indian drawn by a well-respected Native American

artist—arbitrary, capricious, and a breach of the NCAA’s duty of good faith and fair dealing.

The NCAA places UND at an extreme competitive disadvantage, denies UND significant financial benefits of membership, and extinguishes UND’s very identity in post-season play. Yet, powerful members like FSU are given free reign to engage in stereotypical behavior beyond the mere use of a name (which the Executive Committee believes harms the Association and other member institutions). This is outrageous and a clear act of bad faith.

3. The Executive Committee Arbitrarily Labeled UND “Hostile and Abusive” and Arbitrarily Modified the Evidentiary Standards in the Appeals Process.

The use of Native American imagery in sports has become controversial because while some small but very vocal groups assert that they are “offended” by the use of such imagery, it is clearly recognized that the mere use of such imagery does not violate federal or state civil rights laws. Indeed, courts who have considered the issue have repeatedly held that in order to demonstrate a civil rights violation, it must be shown that conduct is “hostile or abusive,” and not “merely offensive.” *See e.g., Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993). Those courts which have specifically considered the use of Native American imagery in sports have expressly held that while the use of Native American imagery in sports may be “offensive” to some, it in no way rises to the level of being discriminatory or “hostile and abusive.” *See Munson v. State Superintendent of Public Instruction*, 577 N.W.2d 387, 1998 WL 61018 (Wis. Ct. App. 1998) (holding that sports team’s Native American name and logo were not “discriminatory,” despite the fact that plaintiff was “offended” by them); *Illinois Native American Bar Ass’n v. University of Illinois*, 2006 WL 2684269, *6-7 (Ill. App. Ct. Sept.

19, 2006) (dismissing complaint alleging University of Illinois' use of Native American mascot violated state civil rights act, explaining that the mascot was not "discriminatory" and did not create a "hostile environment," even though plaintiff found them "offensive" and felt "exploited"). While, as the NCAA concedes, "reasonable minds differ regarding use of Native American nicknames in sports,"¹⁶ there is no legal authority for the proposition that such use is unlawful. (Def. NCAA's Mem. Opp'n to Pl.'s Mot. for Prelim. Inj. at 2).

Although it is well-aware of this authority,¹⁷ throughout its opposition memorandum and in the appeals process, the NCAA has repeatedly attempted to impugn UND's institutional integrity by asserting that UND is "hostile and abusive" to Native Americans. The NCAA has repeatedly smeared UND as "exploitive" and "discriminatory," all based upon its allegation that UND's name and logo are "hostile and abusive" to Native Americans. The motivation for such distortion is made clear from the NCAA's opposition memorandum: if it can label UND as racially discriminatory by repeating the allegation frequently enough, it hopes the Court will overlook the unlawful nature of the NCAA's conduct in promulgating and applying the Policy.

¹⁶ Not only do reasonable people disagree... reasonable Native Americans disagree as well. In fact, polls indicate that Native American opposition has been highly overstated. S.L. Price, "The Indian Wars," SPORTS ILLUSTRATED (March 4, 2002)("Indeed, a recent SI poll suggests that although Native American activists are virtually united in opposition to the use of Indian nicknames and mascots, the Native American population sees the issue far differently. Asked if high school and college teams should stop using Indian nicknames, 81% of Native American respondents said no."). Associated Press, "Poll Finds Support for Fighting Sioux Nickname," GRAND FORKS HERALD (N.D.), 2005 WLNR 1425932, (September 9, 2005)("When asked if they are offended by the nickname, 61 percent of North Dakota's American Indians said they are not.").

¹⁷ The NCAA was certainly aware of the *Munson* case at the time it decided UND's appeal, as it was cited repeatedly in UND's appeals memoranda. Although *Illinois Native American Bar Ass'n* had not yet been decided at the time of UND's appeal, it was cited in UND's opposition memorandum.

Such tactics should not be rewarded by the Court. The NCAA willfully ignored the authority cited by UND in its appeals documents, even going so far as to create a “presumption” that all use of Native American imagery is “hostile and abusive” in order to avoid a case-by-case application of the legal standards for determining whether UND’s actual conduct is “hostile and abusive” that the Executive Committee originally claimed it had adopted. *See* Pl.’s Mem. in Supp. of Mot. for Prelim. Inj., at 57-60. All the while, the Executive Committee was well aware that the only “evidence” it had adduced in support of its assertion that UND’s name and logo are “hostile and abusive” were subjective feelings and opinions from activists, entities known to take political positions like the American Psychological Association, and Native American leadership groups (but not a majority of actual Native Americans) that all use of Native American imagery in sports was “offensive” to them.¹⁸ While such entities are entitled to their opinions, the Executive Committee was well aware that such opinions were insufficient to satisfy the legal standard of “hostile and abusive.” By arbitrarily modifying and redefining the “hostile and abusive” standard, and then arbitrarily creating a “presumption” when it became clear that even the modified standard could not be satisfied, the Executive Committee acted in bad faith and in breach of the implied covenant of good faith and fair dealing.

IV. UND IS LIKELY TO PREVAIL ON ITS ANTITRUST CLAIMS AND HAS CLEARLY ESTABLISHED A “SUBSTANTIAL QUESTION”

¹⁸ Although the Executive Committee at some point claimed to rely on an unpublished “study” performed by Dr. Stephanie Fryberg, it quickly backtracked from this reliance when UND demonstrated that the study was riddled with methodological and intellectual inconsistencies. (Pl.’s Mem. in Supp. of Mot. for Prelim. Inj. at 60-61). The NCAA has also now attached a number of offensive T-shirts and other materials as exhibits to its opposition memorandum. However, there is no evidence that such materials were created, endorsed or in any fashion connected with UND, or that they are even authentic.

The NCAA has attempted to sidestep the core issues by mischaracterizing UND's pleadings and raising ancillary issues which are a distraction from the primary analysis the Court must undertake.¹⁹ The bulk of the NCAA's antitrust discussion is aimed to establish unremarkable antitrust principles. UND has no issue with these principles themselves. The cursory and inaccurate application of these principles made by the NCAA, however, does not withstand scrutiny.

A. A Clear Relevant Market Has Been Pled.

The NCAA would like to invoke a classic antitrust defense: failure to state a relevant market. It expends many pages to make this argument, but such effort is misplaced. First, case law involving the NCAA indicates that a detailed analysis of the relevant market is unnecessary. Second, a relevant market has clearly been alleged. Multiple relevant markets are actually implicated, but the most obvious is the market for hosting at pre-determined sites. The NCAA accepts bids based exclusively on economic forecasts and ability to host the event, evaluates those bids, and then awards a contract to the best bid. The relevant market of hosting pre-determined sites is clear and easily defined; the NCAA's arguments regarding relevant market must be rejected outright.

B. The Policy Is Commercial and Subject to Antitrust Scrutiny.

The NCAA spends many pages discussing the "trade or commerce" requirement, but the case law lays out a relatively simple test. For ease of analysis, courts have divided NCAA rules into two categories: commercial and noncommercial. Some rules,

¹⁹ The NCAA argues that UND has somehow admitted the antitrust legality of the Policy in its Breach of Contract argument. (Def. NCAA's Mem. Opp'n to Pl.'s Mot. for Prelim. Inj. at 47). Nonsense. Even if the NCAA had followed the proper procedure in enacting the policy, that does not equate to *per se* legality under the anti-trust laws.

like NCAA rules requiring student athletes to attend class or limiting the number of calls a college coach can make to a high school athlete, are sufficiently non-commercial that a court can comfortably determine that the antitrust laws do not apply.²⁰ Other rules have a commercial impact that subjects the rules to antitrust analysis.

To lay out the applicable test, the NCAA cited a recent Sixth Circuit opinion, which stated that the antitrust laws would apply only if the “rule itself is commercial in nature.” *Worldwide Basketball & Sports Tours, Inc. v. Nat’l Collegiate Athletic Ass’n*, 388 F.3d 955, 958 (6th Cir. 2004). After doing so, however, the NCAA failed to discuss the facts of the case or the court’s actual holding. The NCAA rule at issue in *Worldwide* limited the number of certified tournaments in which basketball teams could participate during any four year span. *Id.* at 957-58.²¹ In deciding whether the rule was sufficiently commercial, the Sixth Circuit determined “that the Two in Four rule has some commercial impact insofar as it regulates games that constitute sources of revenue for both the member schools and the Promoters.” *Id.* at 959. For this reason, it affirmed “the district court’s implicit finding that the Two in Four rule is commercial.” *Id.*

The decision to treat the Two in Four Rule as commercial is consistent with the treatment accorded in *Nat’l Collegiate Athletic Ass’n v. Board of Regents of University of Oklahoma*, 468 U.S. 85 (1984) and *Law v. Nat’l Collegiate Athletic Ass’n*, 134 F.3d 1010 (10th Cir. 1998). In both cases, the suspect rules were created to fulfill a noncommercial

²⁰ See, e.g., *Smith v. Nat’l Collegiate Athletic Ass’n*, 139 F.3d 180, 185 (3d Cir. 1998), reversed, in part, on other grounds, 525 U.S. 459 (1999) (finding that rule prohibiting graduate students from participating in intercollegiate sports other than at institution from which they received their undergraduate degree was noncommercial).

²¹ Teams desire to participate in certified tournaments because it allows them to play three or four games (and gain game experience) but only have one count against the NCAA-imposed season limit of 28 games.

intent. Ultimately, however, the rules were deemed commercial because of their clear commercial impact.²² In *Board of Regents*, the dissent argued that the NCAA's television plan should be allowed because it was designed with the noncommercial objective of "maintaining some balance of strength among competing colleges and of minimizing the tendency to professionalism in the dominant schools." *Board of Regents*, 468 U.S. at 100-01 (White, J., dissenting). In *Law*, the NCAA argued that antitrust laws should not apply because its rule was a product of the noncommercial intent to retain entry-level coaching positions and help maintain the competitive balance between teams. *Law*, 134 F.3d at 1021-24.

While the Policy may have a noncommercial intent, like those rules in *Board of Regents*, *Law*, and *Worldwide Basketball*, the commercial impact is significant. On its face, the Policy is more commercial than the Two in Four Rule. In enforcing the Policy, the NCAA will deny member institutions the opportunity to present an economic bid to host the lucrative NCAA championship events. As detailed in UND's opening brief, the NCAA itself trumpets the economic benefit of hosting. *See* Pl.'s Mem. in Supp. of Mot. for Prelim. Inj., Ex. V, NCAA Bid Invitation. Prohibiting UND from bidding definitely reduces the number of suppliers in the market for hosting pre-determined sites. In addition, the Policy promises to carry other extensive economic impacts. A ban on

²² The case relied on by the defense, *Adidas America, Inc. v. NCAA*, 40 F. Supp. 2d 1275 (D. Kan. 1999), is inapplicable to the case at hand, because the members indirectly benefiting from UND's exclusion are direct competitors of UND. *See Adidas*, 40 F. Supp. 2d at 1286 ("In sum, the court concludes that the NCAA and its members are not competitors of Adidas and do not realize any financial or competitive advantage by limiting the amount of advertising on the backs of student-athletes."). Furthermore, the Adidas court recognized that economic impact was part of the commercial analysis. *Id.* at 1285 (finding that bylaw at question "has neither the purpose or the effect of giving the NCAA or its member institutions an advantage in any commercial transaction").

home-field advantage in the post-season will impose a significant commercial impact. So too will being forced to sit out post-season competition altogether or to purchase new uniforms at a cost in the hundreds of thousands of dollars. The combined commercial impact is potentially devastating, and it is significantly greater than that contemplated in *Worldwide Basketball*. Antitrust scrutiny is appropriate.

C. UND Has Shown a Group Boycott.

The NCAA’s claim that the Policy is a vertical, rather than horizontal, restraint is surprising and unsubstantiated.²³ By establishing a rule in which members (acting through the NCAA) refuse to deal with some of the other members, “the NCAA member institutions have created a horizontal restraint.” *Board of Regents*, 468 U.S. at 99 (emphasis added). The NCAA arguments about the value of association behavior are misplaced. If an association can show sufficient procompetitive effects, then courts may allow a group boycott restraint to survive an antitrust attack, but this does not mean the association is not a group boycott. Furthermore, the NCAA assertion that UND’s argument “rests entirely” on its group boycott claim is simply wrong. Although UND has shown a group boycott, such showing is not necessary to satisfy its burden. *See* Def. NCAA’s Mem. Opp’n to Pl.’s Mot. for Prelim. Inj. at 71. A showing of obvious anticompetitive effects satisfies the burden, and UND has put forward such a showing. *See* Pl.’s Mem. in Supp. of Mot. for Prelim. Inj. at 72-76.

D. UND Has Alleged and Shown Widespread Harm to Competition.

Somewhat confusing is the NCAA’s contention that “UND has made no showing – or even any attempt to show – that the Policy injures competition as a whole, rather

²³ Just because the Executive Committee has usurped the authority of the membership in promulgating the Policy does not mean the Policy is transformed into a vertical restraint.

than simply injuring UND itself.” (Def. NCAA’s Mem. Opp’n to Pl.’s Mot. for Prelim. Inj. at 53). A quick review of UND’s initial memorandum reveals that the opposite is true.

UND discussed, at length, anticompetitive effects on three separate and distinct groups of consumers in multiple relevant markets.²⁴ Rather than completely restate these arguments, a few simple examples are sufficient. If the Policy is enforced, an athlete on a hockey team in another state will not be able to compete in the Engelstad Arena during an NCAA championship event; a fan of Division II football will not be able to watch a NCAA event at the Alerus Center; and a center-fielder on the UND softball team, wearing the same jersey she has worn all year, will be unable to take the field in a NCAA play-off game.

E. North Dakota Antitrust Law Is Consistent With the Commerce Clause.

This Court may address the Policy without fear of abridging the dictates of the Commerce Clause. UND is not trying to impose special or unique restrictions upon the NCAA; it is merely asking the Court to enforce the NCAA’s own Constitution and Bylaws and to evaluate antitrust principles which would apply uniformly across the entire United States. Because there is no conflict between the antitrust laws of North Dakota and those of the United States, the Commerce Clause is not even implicated.

The NCAA’s reliance upon *NCAA v. Miller*, 10 F.3d 633 (9th Cir. 1993), is entirely misplaced. In *Miller*, the Commerce Clause was clearly implicated by direct

²⁴ See Pl.’s Mem. in Supp. of Mot. for Prelim. Inj. at 72-76 (“The obvious adverse effects 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.”).

conflict between the NCAA bylaws and state legislation. 10 F.3d at 637 (“Many of the procedures required by the Statute are not included in the NCAA enforcement program.”). Allowing the Nevada law to stand would have forced “the NCAA to regulate the integrity of its product in every state according to Nevada’s procedural rules.” *Id.* at 639. The court found that such an assertion of extra-territorial jurisdiction was a violation of the Commerce Clause.

No such concern exists here. North Dakota law, to the extent it is implicated in this lawsuit, is entirely consistent with federal antitrust law. The discussion and cases cited in UND’s antitrust argument are indicative of this consistency. “Where state law prohibits the same, or less than the federal antitrust laws, there is, therefore, no general difficulty in giving effect to the state’s commands.” Phillip Areeda & Donald F. Turner, *ANTITRUST LAW, AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION*, ¶ 208 (1978). UND is asking the Court to apply the same antitrust principles that would be applied in a federal court. Accordingly, the Commerce Clause is not implicated.

F. The NCAA Has Failed to Show Sufficient Procompetitive Effects.

Antitrust analysis in cases involving the NCAA is relatively straightforward. The basic framework, established by the United States Supreme Court in *Nat’l Collegiate Athletic Ass’n v. Board of Regents of University of Oklahoma*, 468 U.S. 85 (1984) was set forth in UND’s initial memorandum. First, UND has the initial burden to show a clear anti-competitive effect of the challenged NCAA regulation. Now that UND has met this burden, the burden shifts, and the NCAA must show sufficient procompetitive effects to justify its Policy. Because UND has shown obvious anticompetitive effects and the

NCAA has not presented meaningful procompetitive effects, UND is likely to prevail on its antitrust claim. At the very least, it has certainly shown a “substantial question.”

After a great deal of discussion on ancillary issues, the NCAA finally addressed the pivotal question of procompetitive effects with a short discussion at the end of its antitrust section. (*See* Def. NCAA’s Mem. Opp’n to Pl.’s Mot. for Prelim. Inj. at 57-58.) It offers only two possible procompetitive effects; it claims that the Policy “ensures that participating institutions do not use racial imagery and nicknames that demoralize a segment of the student population or the public at large” and “serves to provide a clean, wholesome environment for intercollegiate athletics.” *Id.* To prevail on the merits, the NCAA must do more than just claim a procompetitive effect; it must show that the rule in question actually produces such an effect on the NCAA product.²⁵ To defeat UND’s request for a preliminary injunction, the NCAA must show clear procompetitive effects which will almost certainly outweigh the anticompetitive effects of the Policy.

First, if the NCAA was seriously addressing the supposed problem of hostile or abusive Native American imagery, then it would not exempt large member institutions while enforcing the Policy against other relatively small institutions. The Florida State University Seminoles, the University of Utah Utes, the Central Michigan University Chippewah, and the San Diego State Aztecs are all Division I schools that have been

²⁵ The NCAA cannot salvage the Policy from antitrust scrutiny because of good intentions. Social welfare arguments, based on subjective perception, are insufficient procompetitive justifications for violations of the antitrust laws. *See, e.g., Nat’l Soc’y of Prof’l Eng’rs*, 435 U.S. 679, 695 (1978) (rejecting argument based on safety considerations and professional ethics); *Indiana Fed’n of Dentists*, 476 U.S. at 462 (rejecting defendants “noncompetitive ‘quality of care’ justifications”); *Law*, 134 F.3d at 1021-22 (“While opening up coaching positions for younger people may have social value apart from its affect on competition, we may not consider such values unless they impact upon competition.”).

exempted from the Policy. These schools have much larger audiences; they have a much larger impact on the NCAA product. The NCAA cannot claim that the Policy improves the NCAA product when it allows these institutions to act inconsistently with the Policy. Any claim of product improvement is dissipated by the Namesake Exemption. Inconsistent application is a definitive rejection of the very procompetitive effects now offered to justify the Policy.²⁶

Second, the NCAA has never explained how UND's use of its "Fighting Sioux" nickname and logo actually "demoralize[s] a segment of the student population or the public at large." The NCAA has never put forth any evidence, or any argument, that anything but "a clean, wholesome environment" exists at UND athletic events.²⁷ To the contrary, the NCAA has repeatedly dodged this request and relies solely on general opposition voiced by third parties. Because the NCAA has not, and cannot, meet its responsibility to show a sufficient procompetitive effect, the Policy is likely a violation of the antitrust laws of the State of North Dakota. At the very least, there is a "substantial question" and the injunction should issue.

V. THE NCAA'S ARGUMENTS REGARDING IRREPARABLE HARM, PUBLIC INTEREST, AND BALANCING OF THE HARMS, ALL HINGE ON THE SAME FAULTY PRESUMPTION.

The NCAA's arguments addressing the elements of irreparable harm, balancing of the harms, and the public interest are entirely based on the same faulty presumption

²⁶ See *Los Angeles Mem'l Coliseum Com'n v. Nat'l Football League*, 726 F.2d 1381, 1396-98 (9th Cir. 1984) (recognizing restraint was unreasonable because of possibility that personal animosity towards one owner could motivate inconsistent application of restraint).

²⁷ Buried in the NCAA exhibits are examples of crude and wholly distasteful distortions of the UND name. The NCAA rightfully does not rely on those unusual instances which (1) occurred off campus and out of UND's control, (2) occurred long ago, and/or (3) met with immediate and stiff reaction from the UND administration.

which afflicts the NCAA's arguments on the merits of UND's claims: that UND's name and logo are hostile and abusive in violation of state and federal law.

The NCAA calls upon the authority of the North Dakota Human Rights Act and related federal legislation to affirm its naked assumptions. (Def. NCAA's Mem. Opp'n to Pl.'s Mot. for Prelim. Inj. at 59.) As already explained in Section III(A)(3), *supra*, there has been no finding by any court or administrative agency that UND's name and logo violate these statutes. To the contrary, those courts to specifically consider the use of Native American imagery in sports have expressly held that, while the use of Native American imagery in sports may be "offensive" to some, it in no way rises to the level of being "hostile and abusive." *See Illinois Native Am. Bar Ass'n v. University of Ill.*, 2006 WL 2684269 (Ill. App. Ct. Sept. 19, 2006) (dismissing plaintiffs' complaint alleging that performance by Indian Chief mascot at university football games violated Civil Rights Act); *Munson v. State Superintendent of Public Instruction*, 577 N.W.2d 387, 1998 WL 61018 (Wis. Ct. App. 1998) (unpublished) (dismissing plaintiff's complaint alleging that Native American name and logo created hostile or abusive environment).

A. UND Will Suffer Irreparable Harm in the Absence of a Preliminary Injunction.

In its opposition memorandum, the NCAA does not dispute that UND will suffer irreparable harm. To rebut this admitted harm, the NCAA only advances two arguments: (1) UND's use should not be protected because it violates federal and state "policy"; and (2) UND "delayed" in bringing this action. The first argument is dependent on the false presumption addressed above in Section III(A)(3).²⁸

²⁸ Moreover, the cases cited by the NCAA are inapplicable or actually support issuance of an injunction. The NCAA cites *Freedom Holdings, Inc. v. Spitzer*, 408 F.3d 112 (2d Cir.

The NCAA's second argument raises what is, essentially, an equitable defense to its decision to inflict irreparable injury. It invokes the equitable doctrines of "clean hands" and "laches" to argue that UND should not be able to claim irreparable harm. Its arguments stretch the limits of credibility. Not only do the cases cited by the NCAA reach contrary results to that requested by the NCAA,²⁹ but more applicable law supports the position of UND. *Gilder v. PGA Tour, Inc.*, 936 F.2d 417, 423 (9th Cir. 1991) (rejecting assertion that pro golfer could have simply complied with association rule at an earlier time to prevent irreparable harm flowing from the immediate application of the rule).

UND participated in an ad hoc appeals process which finally ended with a letter of the NCAA Executive Committee to UND, dated May 15, 2006. After being denied its appeal, UND was faced with a difficult decision: (1) initiate a lawsuit with an entity that not only continues to govern athletic events in which UND participates, but also has a budget of over \$500 million dollars at its disposal; or (2) submit to the dictates of the Executive Committee and the injustices of the Policy.

2005), for the proposition that UND cannot claim irreparable harm in complying with non-discrimination requirements. This court actually recognized, however, that even an injunction against government enforcement of a law would be appropriate if plaintiff could show "irreparable harm absent the injunction." *Id.* at 114. The decision of a private association should be given significantly less deference.

²⁹ Preliminary injunctions were actually granted in the primary cases the NCAA cites. In rejecting the delay arguments, the court looked to factors other than the delay itself. *Ty, Inc. v. Jones Group, Inc.*, 237 F.3d 891, 903 (7th Cir. 2001) ("Jones has not presented any affirmative evidence that Ty's delay in seeking a preliminary injunction caused Jones to be lulled into a false sense of security or that Jones in any way relied on Ty's delay."); *United States v. Local 6A, Cement & Concrete Workers*, 663 F. Supp. 192, 195 (S.D.N.Y. 1986) ("Injunctive relief looks to the future, and if I were to find the Government's application to be untimely, I would have to be 'satisfied that there is no reasonable expectation of future injurious conduct.'") (quoting 11 Wright & Miller, *Federal Practice and Procedure*: Civil § 2942 at 371-72 (1973)).

To reach a final decision, UND was forced to conduct serious deliberations with multiple decision-making bodies. First, UND had to make an internal decision as an institution. Next, UND had to seek permission from its governing body, the North Dakota Board of Higher Education, to proceed. Finally, UND had to demonstrate to the office of the North Dakota State Attorney General – who would ultimately be responsible – that such a lawsuit was appropriate.

Even if UND has unnecessarily expended time, any delay was irrelevant to the present motion. Had UND initiated this lawsuit earlier, in the summer for example, and immediately asked for a preliminary injunction, the NCAA would have argued that UND's irreparable harm was too speculative, as the Policy would not be applied until the end of the fall sports season. UND has not "sat on its rights" – it has deliberated on the costs and benefits of litigation and timely filed a lawsuit as soon as harm to it from the Policy became imminent.

As discussed in its initial memorandum, UND will suffer irreparable harm to its reputation and to its ability to recruit top students and athletes if the Policy is applied. (*See* Pl.'s Mem. in Supp. of Mot. for Prelim. Inj. at 40-46.) The impending Division II play-offs highlight the potential irreparable harm. If the "Fighting Sioux" football team is denied home field advantage because of this Policy, it will suffer irreparable harm. If the football team is forced to forfeit a game because of noncompliant uniforms; it will suffer irreparable harm. These games can not be replayed. The decisions of the NCAA cannot be undone. No amount of monetary damages can compensate for that loss. If the football team is forced to affix patches of dark tape over its "Fighting Sioux" name and logo, the ensuing negative stigma that would attach to UND would constitute irreparable

harm. Harm to UND's reputation cannot be undone and monetary damages cannot possibly adequately compensate UND.³⁰

B. Balance of Harms.

In its opposition memorandum, the NCAA has exaggerated the harms to it, other members, and student athletes. Much of the alleged harm is based on the false assumption that the use of Native American imagery is legally cognizable as "hostile" or "abusive," a flaw sufficiently addressed above in Section III(A)(3). In addition, the NCAA's claims of harm are exposed as pretextual when the impact of the Namesake Exemption is considered.

The thrust of the NCAA's argument is that, if an injunction is issued, NCAA championship events will be marred by the presence of offensive Native American imagery. The NCAA cannot now claim such harm, however, when its own Namesake Exemption will create the same exact alleged harm. FSU, CMU, San Diego State University, and the University of Utah are Division I schools with much larger fan bases and potential audiences. Any "harm" incurred by the presence of the "Fighting Sioux" at NCAA events is minimal compared to the combined impact of these schools' Native American imagery.

The NCAA's other arguments alleging harm are equally unavailing. An injunction preserving the status quo, which existed prior to the Executive Committee's breach of contract, does not harm the NCAA's institutional integrity or diminish its authority. On the contrary, a determination by this Court of the boundaries and proper

³⁰ Likewise, if not permitted to bid or host pre-determined sites, UND cannot be adequately compensated with money damages since damages would be difficult to establish in that there would inevitably be proof issues as to whether UND would have been awarded the bid in any event.

interpretation of the Contract will provide the NCAA greater stability and give future actions of the NCAA membership greater legitimacy. An injunction would actually reinforce the preeminence of the Constitution and Bylaws, affording members comfort in the enforceability of these provisions.

As discussed above, the potential irreparable harm to UND is great, while, in light of the Namesake Exemption, purely illusory for the NCAA. When the two are weighed against each other, the balance of harms factor supports issuance of an injunction.

C. Issuance of an Injunction is in the Public Interest.

The NCAA's claim of acting in the public interest is also premised on the false presumption discussed above in Section III(A)(3). Moreover, issuing a preliminary injunction effectuates North Dakota's strong public interest in upholding contracts and ensuring that voluntary associations such as the NCAA adhere to their own constitutions and bylaws. *See Crandall v. North Dakota High Sch. Activities Ass'n*, 261 N.W.2d 921, 926 (N.D. 1978) (recognizing that constitution and bylaws of voluntary association make up valid and enforceable contract); *Basin Elec. Power Coop. v. MPS Generation, Inc.*, 395 F. Supp.2d 859, 867 (D.N.D. 2005) (finding that public interest weighed in favor of issuance of preliminary injunction in breach of contract case). Issuing a preliminary injunction also serves North Dakota's strong public interest in protecting the reputation of its state university. The fact that the decision to request an injunction was made initially by a public university, was affirmed by a unanimous vote of the Board of Higher Education of North Dakota, and is currently being prosecuted by the Attorney General of North Dakota is highly indicative of the public interest involved.

Moreover, UND is not seeking to interfere with a lawful decision of a private association, as the NCAA claims. Rather, UND is requesting that this Court enforce the NCAA's constitution and bylaws. By enforcing the Contract, this Court is not, as the NCAA asserts, creating inconsistent rules for nationwide competition. If that were the case, no court would ever be able to enforce the Contract and stop the Executive Committee from breaching it. The solution to the NCAA's perceived problem is simple: to ensure uniform application of its internal regulations in the fifty states, the NCAA should abide by its own constitution and bylaws. In sum, the public interest factor weighs heavily in favor of UND's request for an injunction.

VI. THERE ARE NO FIRST AMENDMENT ISSUES.

The NCAA's First Amendment argument is fatally flawed. UND is not asking the Court to tell the NCAA "how to organize its athletic championships," or contesting the propriety of a properly enacted constitutional provision or bylaw. Rather, UND is requesting that the Court enforce the properly enacted Constitution and Bylaws of the Association, prevent the Executive Committee from usurping the Association membership's power to determine how NCAA championships are organized, and preclude the NCAA from violating its duty of good faith and fair dealing and state antitrust laws. Accordingly, the NCAA's "right of association" claim should be rejected out of hand.

The First Amendment is a shield to governmental action, not a sword to excuse a breach of contractual and legal obligations that arise independent of any expressive activity. UND is not asking this court to mandate an association between UND and any other member institutions or take sides in the underlying social debate. UND is simply

asking that this Court require the NCAA to fulfill its express contractual obligation under the Constitution and Bylaws, fulfill its duty of good faith and fair dealing, and comply with state antitrust laws. To contort this into a case impacting the First Amendment crosses the line of fair argument.

CONCLUSION

For the reasons set forth above and in its initial memorandum, Plaintiff's Motion for Preliminary Injunction should be granted.

Dated this 7 day of November, 2006.

State of North Dakota
Wayne Stenehjem
Attorney General

Tag C. Anderson
Attorney General
State Bar ID No. 04858
Office of the Attorney General
600 East Boulevard Ave
Bismarck, ND 58505-0040
Telephone (701) 328-2210
Facsimile (701) 328-2226

Peter W. Billings
Kevin N. Anderson
Christian D. Austin
FABIAN & CLENDENIN, P.C.
215 South State Street, Twelfth Floor
P.O. Box 510210
Salt Lake City, Utah 84151-0210

Attorneys for Plaintiff