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## Let's Go Sue: The Attorney General's Historical Perspective on *State of North Dakota v. National Collegiate Athletic Association*

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LET’S GO SUE:  
THE ATTORNEY GENERAL’S  
HISTORICAL PERSPECTIVE ON  
*STATE OF NORTH DAKOTA V. NATIONAL COLLEGIATE  
ATHLETIC ASSOCIATION*

WAYNE STENEHJEM<sup>†</sup> & MATTHEW SAGSVEEN<sup>††</sup>

*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.<sup>1</sup>*

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## I. INTRODUCTION

In October 2006, the State of North Dakota initiated litigation on behalf of the North Dakota State Board of Higher Education (SBHE) and the University of North Dakota (UND) against the National Collegiate Athletic Association (NCAA). The State sued the NCAA because a seemingly autonomous committee, the Executive Committee, adopted a policy to be applied to all institutional members without following the legislative process of the NCAA. The policy prohibited a member of the NCAA from using Native American “nicknames and imagery” deemed by the Executive Committee to be “hostile and abusive” during any of the NCAA’s championship competitions.<sup>2</sup> In conjunction with the release of the policy, the Executive Committee determined eighteen member schools, including UND and its “Fighting Sioux”<sup>3</sup> nickname and Indian head logo,<sup>4</sup> used a hostile and abusive Native American nickname and image.<sup>5</sup>

After UND weaved its way through the NCAA’s appellate labyrinth, North Dakota initiated a lawsuit alleging the NCAA’s Executive Committee had overstepped its authority, breached its contractual agreement with UND as a member of the NCAA, and violated antitrust laws.<sup>6</sup> This article will examine the NCAA policy and its background, the opaque appeals process, the State’s legal claims, and the ultimate resolution of the lawsuit.

## II. THE “POLICY”

On August 5, 2005, the NCAA Executive Committee announced it had adopted a “policy to prohibit NCAA colleges and universities from displaying hostile and abusive racial/ethnic/national origin mascots, nicknames or imagery at any of the [eighty-eight] NCAA championships.”<sup>7</sup> The “Policy” requires “institutions with hostile or abusive references [to] take

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2. The Policy further recommended NCAA member schools not schedule regular season sporting events with schools like UND that were identified by the Executive Committee as having hostile and abusive nicknames. Press Release, Nat’l Collegiate Athletic Ass’n, NCAA Executive Committee Issues Guidelines for Use of Native American Mascots at Championship Events (Aug. 5, 2005) (on file with author).

3. “The ‘Fighting Sioux’ name is a registered trademark of UND and the logo is copy-righted.” Complaint at 6, *State v. Nat’l Collegiate Athletic Ass’n*, No. 18-06-C-01333 (N.D. Dist. Oct. 31, 2006).

4. “UND’s logo is a male silhouette of an authentic Sioux Warrior, created by a widely respected American Indian artist, Bennett Brien . . . .” *Id.*

5. *Id.* at 7; see also Letter from Myles Brand, President, Nat’l Collegiate Athletic Ass’n, to Charles Kupchella, President, Univ. of N.D. (Aug. 9, 2005) (on file with author).

6. See N.D. CENT. CODE ch. 51-08.1 (2007).

7. Press Release, Nat’l Collegiate Athletic Ass’n, *supra* note 2. NCAA President Myles Brand was quoted in the release as stating “[t]he NCAA objects to institutions using racial/ethnic/national origin references in their intercollegiate athletics programs . . . .” *Id.*

reasonable steps to cover those references at any predetermined NCAA championship site that has been previously awarded . . . .”<sup>8</sup> Additionally, “[i]nstitutions displaying or promoting hostile or abusive references on their mascots, cheerleaders, dance teams and band uniforms or paraphernalia are prohibited from wearing the material at NCAA championships . . . .”<sup>9</sup> Lastly, “institutions with student-athletes wearing uniforms or having paraphernalia with hostile or abusive references must ensure that those uniforms or paraphernalia not be worn or displayed at NCAA championship competitions.”<sup>10</sup> The Executive Committee also included a “best practices” statement to the policy suggesting “institutions follow the best practices of institutions that do not support the use of Native American mascots or imagery.”<sup>11</sup> Model institutions identified by the Executive Committee included the Universities of Iowa and Wisconsin, who do not schedule athletic competitions with schools using Native American nicknames, imagery, or mascots.<sup>12</sup>

Included within the press release was a list of eighteen colleges and universities the Executive Committee deemed subject to the Policy based upon those institutions’ use of Native American imagery or references.<sup>13</sup> The NCAA included UND on the list of eighteen, deeming it as having a hostile or abusive nickname and logo.<sup>14</sup> No exceptions were identified or explained by the Executive Committee in the release.<sup>15</sup>

#### A. THE FOUNDATIONS OF THE POLICY

The Policy’s origin may date as far back as 2001, at which time the Executive Committee voted to refer the issue of eliminating the use of American Indian mascot nicknames and logos by NCAA member institutions to two NCAA subcommittees, the Minority Opportunities and Interests Committee (MOIC)<sup>16</sup> and the Executive Committee Subcommittee

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8. *Id.* This element of the Policy was effective February 1, 2006. *Id.*

9. *Id.* This element of the Policy was effective August 1, 2008. *Id.*

10. *Id.* This element of the Policy was effective immediately. *Id.*

11. *Id.*

12. *Id.* In its press release, the Executive Committee further suggested member institutions “create a greater level of knowledge of Native American culture through outreach efforts and other means of communication.” *Id.*

13. *Id.*

14. *Id.*

15. *See id.*

16. The MOIC consists of six members from Division I, three members from Division II, and three members from Division III. NAT’L COLLEGIATE ATHLETIC ASS’N, DIVISION II MANUAL 285 (2010). Committee membership includes at least eight ethnic minorities, including four males and four females. *Id.* The committee is required to “review issues related to the interests of ethnic

on Gender and Diversity Issues. According to the NCAA, three events prompted the Executive Committee's discussion and eventual referral of the issue to the MOIC. The events included "1. The Executive Committee's detailed review of issues related to the Confederate Battle Flag . . . ; 2. St. Cloud State University President[']s . . . request to the Executive Committee to consider a resolution stating the NCAA does not condone the use of Native American logos and nicknames; and 3. The United States Commission on Civil Rights' Statement on the use of Native American images and nicknames as sports symbols . . ."17

The MOIC took up the Executive Committee's request<sup>18</sup> and concluded "the use of American Indian mascots in intercollegiate athletics must be a concern<sup>19</sup> to the NCAA."<sup>20</sup> Thereafter, the MOIC developed a strategic plan to research<sup>21</sup> the issues in order to provide the NCAA and Executive Committee with recommendations.<sup>22</sup> The MOIC sought comments from the public,<sup>23</sup> American Indian tribes,<sup>24</sup> NCAA membership, and student

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minority student-athletes, NCAA minority programs and NCAA policies that affect ethnic minorities." *Id.* at 286.

17. Letter from Ronald J. Stratten, Vice President for Educ. Servs., Nat'l Collegiate Athletic Ass'n, to Charles Kupchella, President, Univ. of N.D. (Nov. 8, 2004) (on file with author) (outlining self-study guidelines and background). The NCAA indicated in its letter the referral to the MOIC occurred after the U.S. Commission on Civil Rights' April 13, 2001 conclusion that the "use of Native American nicknames and images in sports was 'disrespectful,' 'offensive' and 'particularly inappropriate.'" Defendant NCAA's Memorandum in Opposition to Plaintiff's Motion for Preliminary Injunction at 7, *State v. Nat'l Collegiate Athletic Ass'n*, No. 18-06-C-01333 (D. Ct. Grand Forks County) [hereinafter Defendant's Memorandum]; *see also* NAT'L COLLEGIATE ATHLETIC ASS'N MINORITY OPPORTUNITIES & INTERESTS COMM., REPORT ON THE USE OF AMERICAN INDIAN MASCOTS IN INTERCOLLEGIATE ATHLETICS TO THE NCAA EXECUTIVE COMMITTEE SUBCOMMITTEE ON GENDER AND DIVERSITY ISSUES (Oct. 2002). In 2001, the Civil Rights Commission issued a statement calling for an end to the use of Native American images and team names by non-native schools. *See* NAT'L COLLEGIATE ATHLETIC ASS'N MINORITY OPPORTUNITIES & INTERESTS COMM., *supra* note 17.

18. The October 2002 "Report" states, in preparation for its discussion, the committee reviewed a "variety" of materials, including the NCAA Constitution, recent language issued by the U.S. Commission on Civil Rights, and "varied" articles and publications. *Id.* Additionally, Dr. Cornel Pewewardy from the Department of Teaching and Leadership at the University of Kansas presented a historical overview of American Indian mascot issues, such as American Indian culture within sports entertainment. *Id.* Dr. Pewewardy is an award-winning educator and author of numerous papers addressing the use of Native American images and negative stereotypes.

19. The term "concern" is undefined within the NCAA bylaws.

20. NAT'L COLLEGIATE ATHLETIC ASS'N MINORITY OPPORTUNITIES & INTERESTS COMM., *supra* note 17.

21. The Report shows the MOIC gathered specific data on the number of NCAA member institutions that use Native American mascots and in the process summarized many articles and pieces of research regarding the topic. *Id.* Additionally, the Report shows the MOIC reviewed more than fifty pieces of literature presenting "various" perspectives on this volatile issue. *Id.* The Report does not identify any of the perspectives relied upon. *Id.*

22. *Id.*

23. The MOIC publicized the opportunity to comment through the NCAA News, the NCAA website, and correspondence to groups and individuals. *Id.*

athletes from Divisions I, II, and III through the divisional Student-Athlete Advisory Committee (SAAC) distribution list.<sup>25</sup> The results showed ninety percent of the responses received from the public<sup>26</sup> supported the elimination of American Indian mascots, nicknames, images, and logos in intercollegiate athletics, while ninety-nine percent of the American Indian tribes that responded to the request asked the NCAA to ban the use of American Indian mascots in intercollegiate athletics.<sup>27</sup> Although fewer than ten comments were received from student athletes and only one supported elimination,<sup>28</sup> the SAAC collectively voted to support NCAA member institutions eliminating the use of American Indian mascots, nicknames, and logos.<sup>29</sup>

The MOIC also requested comments from the NCAA Committee on Sportsmanship and Ethical Conduct (CS&EC), the Division I Championships and Competition Cabinet, the Division II Championships Committee, and the Division III Championships Committee.<sup>30</sup> Although the CS&EC urged all NCAA member institutions to cease using American Indian mascots, the committee recognized the issues “may be addressed most effectively by the individual institution, its community and its conference, rather than at the national level.”<sup>31</sup> The Division I Championships and Competition Cabinet took the position that institutions should be encouraged to review their individual situations and ensure their actions and policies are not contrary to the cabinet’s statements regarding non-discrimination.<sup>32</sup> The Division II Championships Committee endorsed “a position that encourages and promotes an atmosphere of respect for and sensitivity to the dignity of every person.”<sup>33</sup> The Division III Championships Committee believed the focus of the study should be, among other things, “based upon the NCAA’s principles of the appropriate environment

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24. The MOIC received a ten percent response rate from 500 American Indian tribes solicited. *Id.*

25. *Id.*

26. The MOIC Report did not provide the number of comments received, only that “[i]ndividuals who offered comments were both Native and non-Native,” and “comments were received from individuals who are associated with colleges and universities using American Indian mascots and from those who are not.” *Id.*

27. *Id.*

28. “One supported the elimination of American Indian mascots, two were undecided, and three were against the elimination of the mascots.” *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

for championship participants.”<sup>34</sup> The Division III Committee further concluded “the selection or use of Native American mascots [fell] within the realm of institutional autonomy and may not be an issue within the purview of the [NCAA].”<sup>35</sup> The MOIC Report states, collectively, the Division I Cabinet and Division II and III Committees are “committed to the creation and preservation of quality championship opportunities for all student-athletes . . . [and] each supports the position that access to championship events should not be restricted because of issues related to the use by institutions of American Indian mascots or images.”<sup>36</sup>

The MOIC concluded in its October 2002 Report that “current uses of American Indian mascots by NCAA member institutions range from being respectful to offensive,” and “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.”<sup>37</sup> Despite the consensus within NCAA membership and acknowledgement by the MOIC that American Indian nicknames, mascots, and logos did not necessarily present a national or association-wide issue, but rather an issue to be resolved by each institution, the MOIC recommended the NCAA consider taking action through legislation to address the areas of concern.<sup>38</sup>

The MOIC specifically concluded the NCAA had several options. First, it could do nothing.<sup>39</sup> Second, it could pass legislation barring members from using offensive Native American mascots.<sup>40</sup> If legislation were passed, the NCAA could penalize institutions who used offensive Native American imagery and violated the legislation, by making the institutions ineligible for NCAA post-season championship opportunities.<sup>41</sup> The NCAA could also penalize institutions with offensive nicknames or mascots by restricting the participation of mascots, bands, cheerleaders, and the logos worn by the athletes.<sup>42</sup> The NCAA could further prevent institutions from hosting post-season championships.<sup>43</sup> Lastly, the NCAA could begin to enforce a policy restricting member institutions with offensive American

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34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*



Indian mascots from receiving revenue distribution, or it could institute fines for institutions continuing to use American Indian mascots.<sup>44</sup>

The MOIC further recommended the NCAA require member institutions “using American Indian mascots to complete a self-analysis checklist to determine if their depiction of a mascot, nickname, logo, or behaviors can be viewed as offensive.”<sup>45</sup> Finally, the MOIC recommended the NCAA develop and monitor the issue and establish criteria for championship events in accordance with certain articles of the NCAA Constitution.<sup>46</sup> The latter recommendation, though seemingly innocuous and inconsistent with the wishes of the NCAA leadership queried about the issue, likely struck a chord with the Executive Committee.

The Executive Committee, believing the MOIC had identified a “core issue” rather than just a concern, concluded it had a corresponding responsibility under Bylaw 4.2.1(e) “to ‘act on behalf of the Association’ to ‘resolve core issues<sup>47</sup> and other Association-wide matters.’”<sup>48</sup> The Committee further believed it was “obligated under the NCAA Constitution to act on behalf of the Association to resolve the issue.”<sup>49</sup>

#### B. LETTERS AND APPEALS

Following the release of the Executive Committee’s new Policy, NCAA President Myles Brand sent a letter to UND President Charles Kupchella to inform UND of the Policy, the background for the Policy, the remedies available to UND to appeal the application of the Policy to UND, and the steps UND could take if it sought to amend or change the Policy itself.<sup>50</sup> UND promptly objected to the application of the Policy to UND and sought additional information regarding the bases the institution could

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44. *Id.*

45. *Id.*

46. *Id.*

47. The phrase “core issue” is undefined within the NCAA bylaws.

48. Defendant’s Memorandum, *supra* note 17, at 8.

49. *Id.* The belief perhaps implied the role of the NCAA was to address broad and nationwide social issues as opposed to ones within its own reach.

50. Plaintiff’s Memorandum in Support of Motion for Preliminary Injunction at Exhibit J, *State v. Nat’l Collegiate Athletic Ass’n*, No. 06-C-01333 (N.D. Dist. Ct. Nov. 8, 2006) [hereinafter Plaintiff’s Memorandum] (Letter from Myles Brand, President, Nat’l Collegiate Athletic Ass’n, to Charles Kupchella, President, Univ. of N.D. (Aug. 9, 2005)). Brand indicated if an institution or group of institutions wanted to amend or change the policy, a request was to be submitted through the respective division presidential governing body for its consideration. *Id.* The bodies would then develop a recommendation for the Executive Committee’s consideration. *Id.* Further, an appeal would have to set forth the terms and rationale for suggesting an amendment or policy change. *Id.*

use to appeal.<sup>51</sup> UND was not the only member of the NCAA to object to the NCAA's new Policy; Florida State University (FSU) also objected to the Policy.<sup>52</sup> FSU, whose nickname is the "Florida Seminoles," suggested the Policy be amended to recognize and respect tribal sovereignty and the rights of each tribe to determine whether their names were being used appropriately.<sup>53</sup> FSU requested the Executive Committee "remove from its list all colleges and universities whose 'namesake tribes' have officially supported the use of their name and symbols."<sup>54</sup>

In a subsequent press release from the NCAA Executive Committee only days after FSU's letter, the Executive Committee revealed it had "approved the process" by which colleges and universities subject to restrictions on the use of Native American mascots, names, and imagery at NCAA championships would be reviewed.<sup>55</sup> The release stated, in part:

Reviews will be directed to Bernard Franklin, NCAA senior vice-president for governance and membership, who will chair an NCAA staff committee designated by the Executive Committee. This staff review committee will consider all of the facts related to each institution's appeal and is expected to start on the first review early next week.

The staff review committee will decide<sup>56</sup> if an institution should remain subject to the policy and the staff's decisions may be reviewed by the NCAA's Executive Committee . . . .

Each review will be considered on the unique aspects and circumstances as it relates to the specific use and practice at that college or university.

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51. *Id.* at Exhibit K (Letter from Charles Kupchella, President, Univ. of N.D., to the Nat'l Collegiate Athletic Ass'n (Aug. 12, 2005)).

52. *See id.* at Exhibit L (Letter from T.K. Wetherell, President, Fla. State Univ., to Myles Brand, President, Nat'l Collegiate Athletic Ass'n (Aug. 12, 2005)).

53. *Id.*

54. *Id.*

55. *Id.* at Exhibit M (Press Release, Executive Committee (Aug. 19, 2005)).

56. Although committees or subcommittees for boards and commissions are common, the elements of the Executive Committee's delegation of authority are unusual. It is quite common for a subcommittee of a governing body to have authority delegated to it, but it is unusual for a subcommittee to have authority to independently overrule or grant an exception to a governing body's policy or decision. The authority to make a decision under normal governance structures might be qualified such that any decision of a subcommittee would have to be submitted back to the governing body upon recommendation for either concurrence or rejections. In this case, the press release indicated the staff review committee's decision "may" be reviewed by the NCAA's Executive Committee. *Id.*

One 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.<sup>57</sup>

Only four days later, the “staff committee” granted its first exception.<sup>58</sup> Senior Vice-President for Governance and Membership and chair of the staff committee, Bernard Franklin, issued a press release, explaining “[t]he NCAA staff review committee has removed [FSU] from the list of colleges and university subject to the restrictions of the Policy.”<sup>59</sup> Mr. Franklin further stated on behalf of the Executive Committee:

The NCAA Executive Committee continues to believe the stereotyping of Native Americans is wrong. However, in its review of the particular circumstances regarding Florida State, the staff review committee noted the unique relationship<sup>60</sup> between the university and the Seminole Tribe of Florida as a significant factor. The NCAA recognizes the many different points of view on this matter, particularly within the Native American community. The decision of a namesake sovereign tribe, regarding when and how its name and imagery can be used, must be respected even when other may not agree.<sup>61</sup>

The Executive Committee subsequently removed Central Michigan University (CMU),<sup>62</sup> Catawba College, Mississippi College, and the

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57. *Id.*

58. *See id.* at Exhibit N (Press Release, Executive Committee (Aug. 23, 2005)).

59. *Id.*

60. *Id.* Ironically, the MOIC’s analysis of FSU’s relationship with the Seminole Tribe was inapposite to the staff committee’s depiction of the relationship between the Seminole Tribe and FSU. The MOIC’s report provided:

A few institutions, with Florida State probably being the most well known, have developed some type of relationship with some members of a particular tribe. Proponents of American Indian mascots point out that this relationship gives them “permission” to use American Indian imagery. American Indians are loosely organized politically; however, it’s difficult for any institution to claim that they have the permission of the relevant people. For example, Seminoles outside of Florida (and even many inside the state) are opposed to Florida State’s usage.

*Id.* at Exhibit E (NAT’L COLLEGIATE ATHLETIC ASS’N MINORITY OPPORTUNITIES & INTERESTS COMM., *supra* note 17).

61. *Id.* at Exhibit N. Mr. Franklin further indicated in the release that the “NCAA position on the use of Native American mascots . . . has not changed.” *Id.*

62. Notably, CMU was removed from the list of schools prohibited from using Native American mascots, names, and imagery based upon namesake tribe approval from only the tribe closest to the school, the Saginaw Chippewa Indian Tribe of Michigan. Letter from Charles Kupchella, President, Univ. of N.D., to the Nat’l Collegiate Athletic Ass’n Exec. Comm. (Nov. 4, 2005) (on file with author) (appealing the NCAA’s decision). Numerous other federally recognized tribes refer to or consider themselves as part of the Chippewa nation, including others within the state of Michigan. *Id.*

University of Utah from the list of schools prohibited from using Native American names and imagery based upon the namesake tribe exception.<sup>63</sup> It is not apparent whether the NCAA conducted a formal investigation or appeals process for the exempted institutions, nor is it apparent whether the Executive Committee made any finding that the exempted institutions' use of Native American imagery would not give rise to a hostile or abusive environment at NCAA championship events. Although institutions like FSU and other schools quickly obtained their exemption from the NCAA, UND's experience was not as swift.

### C. UND SEEKS EXEMPTION

On August 30, 2005, UND submitted a letter to the NCAA seeking an exemption from the Policy and its application to UND. The letter explained, in part, that UND uses its Fighting Sioux logo and nickname with consummate respect,<sup>64</sup> UND qualified for a "namesake exception" because it received permission to use the Fighting Sioux name from the Sioux Tribe geographically closest to UND—the Spirit Lake Nation,<sup>65</sup> and UND has a strong relationship with American Indians.<sup>66</sup> The NCAA staff committee issued a response with a formal notice to UND, stating the

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63. *See id.*

64. The August 30, 2005 letter provided background concerning the logo and, in particular, a detailed description of the logo:

[It] is a classic depiction of an authentic American Indian Sioux warrior, rendered by a widely respected American Indian artist, Bennett Brien . . . . It is a classic representation of the warriors of the 18th and 19th centuries and is similar to images found on North Dakota highway signs, North Dakota Highway Patrol cars and on U.S. coins, images *all* intended to convey respect. When the logo was transferred from Mr. Brien to UND, he described the symbolism of his work: "The feathers symbolize the outstanding rewards that students, faculty, staff and alumni will achieve for academic, athletic and lifelong excellence. The determined look in the eyes symbolizes fortitude and never giving up and the focus necessary for sustained academic, athletics and lifelong achievement. The paint on the cheekbone symbolizes that life can be a battle and we have daily struggles. The color green symbolizes the development of young people and their growth at the University of North Dakota. The color yellow symbolizes the sun which provides humanity light and warmth in order that life may continue. The color red symbolizes the lifeblood that has been poured out to make our state and peoples great."

*Id.* at Exhibit O (Letter from Charles Kupchella, President, Univ. of N.D., to Myles Brand, President, & Bernard Franklin, Senior Vice-President for Governance & Membership, Nat'l Collegiate Athletic Ass'n (Aug. 30, 2005)).

65. *Id.* In 2001, UND received a tribal resolution from the Spirit Lake Tribe—the closest geographical tribe to UND—endorsing the use of the Fighting Sioux nickname. *See id.* (attaching Spirit Lake Tribe Resolution No. A05-01-041).

66. *Id.* (noting UND has a long history of outreach to the Native American community, enrolls more than 400 Native American students, and sponsors more than twenty-five education programs designed to support Native American students representing an investment of over \$5,000,000 in annual student programming).

committee determined UND “should be retained on the list of colleges and universities subject to [the Policy].”<sup>67</sup> The staff committee also responded to the three primary issues identified in UND’s letter.<sup>68</sup>

The staff committee did not address in any detail, however, the background behind UND’s logo, how similar logos are incorporated into many of North Dakota governmental symbols, UND’s relationship with American Indians, or any of the positive evidence that UND’s usage of the “Fighting Sioux” nickname was not “hostile or abusive.”<sup>69</sup> Rather, the staff committee focused on what it believed was uniform opposition from Sioux tribes to UND’s use of the nickname and logo.<sup>70</sup> The staff committee broadly concluded “the university’s use of the nickname and logo is offensive and disrespectful to Native Americans and, particularly, to members of the Sioux Nation.”<sup>71</sup> The staff committee further expanded upon its conclusion by stating “it is the members of the Sioux Nation that have the inherent right to determine if the use of the nickname and logo is done with respect and class, and there is a clear message that they do not.”<sup>72</sup>

It is unknown whether the staff committee intended in its reference to the words “Sioux Nation”<sup>73</sup> to refer to the seven Sioux tribes as a whole or just to the namesake tribes located within North Dakota. Regardless, the staff committee’s statement stood as an example of the insuperable burden placed upon UND compared to other institutions in conflict with the standard previously released by the Executive Committee.<sup>74</sup> If the Executive Committee’s standard had required approval from an entire American Indian nation, the comments from the MOIC regarding FSU and the

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67. *Id.* at Exhibit P (Letter from Bernard Franklin, President, Nat’l Collegiate Athletic Ass’n, to Charles Kupchella, President, Univ. of N.D. (Sept. 28, 2005)).

68. *Id.* The three issues UND identified were:

1. North Dakota’s nickname and logo are used with the utmost respect and class and are in no way inherently hostile or abusive . . .
2. North Dakota has substantive positive relationships with American Indians, and [UND has] had and continue[s] to have support, even formal support . . . of many Indian people . . .
3. Finally, North Dakota believes that it is totally unreasonable for the NCAA to ask the university to change the terms of the contract whereby it would host the regional Division I Men’s Hockey tournament in the spring.

*Id.*

69. *See id.*

70. *Id.* The staff committee stated “[s]even federally recognized tribal governments with the Sioux name have provided written documentation in opposition to the university’s continued use of the nickname and logo.” *Id.*

71. *Id.*

72. *Id.*

73. The entire Sioux Nation consists of seven tribes located across a multi-state span across the Midwest, far beyond the borders of North Dakota.

74. *See* Plaintiff’s Memorandum, *supra*, note 50, at Exhibit J.

Seminole Nation would and should have prevented granting any exception to FSU.<sup>75</sup>

When it came to addressing UND's evidenced and demonstrated positive relationship with American Indians through educational and non-educational programs, the staff committee politely "recognize[d] and commend[ed] the university"<sup>76</sup> for its relationships with American Indians, but the staff committee was not swayed. The staff committee concluded the Spirit Lake Tribe Resolution relied upon by UND as evidence of the Spirit Lake Reservation's support was "ambiguous."<sup>77</sup> The staff committee's decision appeared to have been driven by a resolution adopted by the board of directors of the United Tribes of North Dakota, comprised of representatives from the five federally recognized tribes, including the Spirit Lake Tribe, with a presence in the state, in which that board unanimously supported the NCAA decision. The staff committee concluded, despite the Spirit Lake Tribe's resolution arguably supporting UND's decision, "there [was] not *sufficient evidence*"<sup>78</sup> to support the claim that the university has substantive support from Native Americans within the [S]tate of North Dakota for continued use of the nickname and logo."<sup>79</sup>

#### 1. *UND Appeal of Staff Committee Decision*

On November 4, 2005, UND appealed to the Executive Committee, calling for a reversal of the staff committee's decision to deny UND the

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75. See *id.* at Exhibit M (describing the MOIC statement on Florida State University's relationship with the Seminole tribe).

76. *Id.* at Exhibit P. The significance of the staff committee's "recognition" is important. Later documents drafted by the staff committee arbitrarily and subjectively concluded information submitted by UND failed to contain any evidentiary worth in support of its claim for an exception.

77. *Id.*; cf. Spirit Lake Tribe Resolution No. A05-09-186 (Sept. 4, 2009) ("Whereas, in 2009, the Tribal Council authorized a referendum for the enrolled tribal members, and a significant majority of the membership voted in favor of allowing UND to continue using the Fighting Sioux name and logo . . .").

78. It is not clear from the materials released by NCAA whether the NCAA had previously released or identified a specific evidentiary standard to be applied to these appeals. See Plaintiff's Memorandum, *supra* note 50, at 28. The September 28 memo stated,

It is important to note that there is an appeals process for any decision by the staff review committee. If an institution disagrees with a decision by the staff review committee, an appeal can be filed with the Executive Committee. This appeal must be submitted in writing. Depending on an institution's divisional affiliation, appeals will be reviewed by the appropriate presidential governance entity for a recommendation to the Executive Committee.

*Id.* at Exhibit P.

79. *Id.* (emphasis added). The staff committee, however, acceded to UND's request to allow it to host the West Regional College Hockey Tournament without having to cover or remove Native American imagery in its arena.

namesake exemption.<sup>80</sup> The appeal was not, per se, a formal legal appeal, since very little direction had been given to UND about the process or any evidentiary burdens. UND, however, laid out a number of different equitable and legally styled arguments.<sup>81</sup>

UND's first argument to the Executive Committee was that the "[P]olicy [regarding Native American] nicknames and logos, although undoubtedly well-intentioned, [was] deeply flawed and should be withdrawn."<sup>82</sup> UND explained and illustrated how the staff committee had inconsistently applied the namesake exception.<sup>83</sup> UND asserted the original press release from the Executive Committee appeared to require approval from "a" namesake tribe, as opposed to more than one namesake tribe, and thus, UND was in compliance with the exception because it had approval from the Spirit Lake Nation.<sup>84</sup>

Next, UND pointed out "[t]he NCAA's newly articulated additional criterion, requiring two additional tribes to support UND's use of the nickname and logo, [was] unduly burdensome."<sup>85</sup> UND further illustrated the flaws in the Executive Committee's application of the namesake exception:

The NCAA did not require Central Michigan University ("CMU") to show support from *all* Chippewa bands in the state, only the tribe nearest the school. In addition to CMU's claimed namesake, the Saginaw-Chippewa, the following tribes or bands of Chippewa are also located in Michigan: Lac Vieux Desert Band of Lake Superior Chippewa, Sault Ste. Marie Tribe of Indians Reservation (Chippewa), Bay Mills Reservation (Anishnabek Ojibwa (Chippewa)), and the Grand Traverse Band of Ottawa [and] Chippewa.<sup>86</sup>

Additionally, UND clarified that the United Tribes of North Dakota is not a tribal governmental unit and, therefore, the staff committee should not have relied upon its resolution opposing UND.<sup>87</sup>

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80. *Id.* at Exhibit Q (Letter from Charles Kupchella, President, Univ. of N.D., to Exec. Comm., Nat'l Collegiate Athletic Ass'n (Nov. 4, 2005)).

81. *See id.*

82. *Id.*

83. *Id.* It is unclear whether, at any point prior to the appeal, the NCAA or any of its committees clarified the meaning of a "namesake tribe" or gave an objective description regarding the type of relationship required to qualify for such an exemption to UND. Needless to say, an exception with undefined terms or requirements is problematic.

84. *Id.*

85. *Id.* This additional requirement was not supported by any previous decision or statement from the NCAA or any of its committees.

86. *Id.*

87. *Id.*

UND argued the Executive Committee's stated limitation of the Policy to "championship venues" has many more far-reaching effects than recognized or admitted by the NCAA<sup>88</sup> and it further interfered with section 2.1 of the NCAA Constitution providing for institutional autonomy.<sup>89</sup> UND also argued the Executive Committee lacked the requisite authority to promulgate the Policy. Section 4.1.2(i) of the NCAA Division II Manual specifies the Executive Committee shall forward all dominant legislation<sup>90</sup> to the entire membership for a vote.<sup>91</sup> Moreover, section 1.2(h) provides the NCAA will legislate through bylaws and/or resolutions of a Convention, upon any subject of general concern to the members related to the administration of intercollegiate athletics.

UND additionally raised the basic governance concern the Executive Committee exceeded its authority and power to manage exceptions to its Policy, arguing the NCAA gave rise to a procedure that is inconsistent with section 5.01 of its Constitution requiring all legislation to be adopted by the membership.<sup>92</sup> "The wide-ranging *judicial* fiat, currently in question, goes far beyond the express or implied *legislative* authority as outlined in section 5.01."<sup>93</sup> Furthermore, UND explained "[a]rticle 1.3.2 of the NCAA Constitution provides that the Association's legislation will govern the conduct of intercollegiate athletics programs of member institutions," and "[a] finding that UND is 'hostile and abusive' is not a 'basic athletic issue.'"<sup>94</sup>

UND also argued the application of the Policy was unfairly discriminatory and in violation of the NCAA Constitution. Although the Policy expressly prohibits ethnic and national origin references—which may include "Ragin' Cajuns, Swedes, Vikings, Nanooks, Scots, and Irish"—UND explained the only schools on the Executive Committee's list were those using one type of mascot nickname and imagery: American

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88. UND asserted the NCAA is essentially "the 'only game' in town," and the "anticipated rejoinder by the NCAA that UND is not 'required' to be a member of the Association is, in fact, fallacious." *Id.*

89. *Id.* UND also asserted that by exempting some schools apparently on the basis of approval by a local tribe, the NCAA acknowledges the issue in question is ultimately a local one. *Id.*

90. Dominant legislation, or provision, is "a regulation that applies to all members . . . and is of sufficient importance . . . that it requires a two-thirds majority vote of all delegates . . . at an annual or special Convention." NAT'L COLLEGIATE ATHLETIC ASS'N, *supra* note 16, at 31.

91. *Id.* at 22.

92. Plaintiff's Memorandum, *supra* note 50, at Exhibit Q. Kupchella continued to assert the NCAA inappropriately delegated its authority to third parties wherein a non-member of the NCAA may control whether an institution is hostile and abusive by endorsing the namesake exception. *Id.*

93. *Id.*

94. *Id.*



Indian.<sup>95</sup> UND further asserted the determination that one institution's use of an American Indian name and image is hostile and abusive while a second institution's usage of a similar reference is not without articulating a reason, is the very basis for arbitrary and capricious.<sup>96</sup>

## 2. *Staff Committee December 9, 2005 Memorandum*

On December 9, 2005, the NCAA staff committee supplied a memorandum to the Executive Committee in support of its decision to reject UND's appeal and directly opposing UND.<sup>97</sup> The staff committee's memorandum was remarkable in a number of respects, particularly in its reliance on materials, reports, and other information never before cited by the MOIC, the Executive Committee, or the staff committee.<sup>98</sup> Also, just as perplexing as the staff committee's description in the memorandum of a new standard of review, newly defined terms, the appeals process, and the standards for new evidence,<sup>99</sup> the memorandum discussed and relied upon a noted author and researcher's research and analysis prepared for separate litigation involving an American Indian mascot and a resolution adopted *after* the Executive Committee's decisions in question.<sup>100</sup>

The "[r]esearch and analysis" section of the staff committee's memorandum contains a summary of research by Stephanie Fryberg, Ph.D.<sup>101</sup> The memorandum indicated Fryberg conducted five "studies" in anticipation of litigation against a Wisconsin school district which examined the psychological impact of social representations on American Indians.<sup>102</sup> The staff committee's memorandum further cites to an October 2005 resolution from the American Psychological Association (APA) "recommending the immediate retirement of Native American mascots, symbols, images, and personalities by schools, colleges, universities,

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95. *Id.* UND added the Policy further discriminates by differentiating between different American Indian references, those that are exempt and those that are not exempt. *Id.*

96. *Id.*

97. *Id.* at Exhibit R (Memorandum from Bernard Franklin, Staff Comm., Nat'l Collegiate Athletic Ass'n, to Exec. Comm., Nat'l Collegiate Athletic Ass'n (Dec. 9, 2005)).

98. *See generally id.* (describing under section F. of the memorandum the staff committee's conclusion based on various research conducted).

99. Despite the fact the committee itself developed and supplied new "evidence," the staff committee stated in its memorandum "[e]vidence that was not presented to the staff review committee may not be presented to the Executive Committee unless the evidence was not available at the time the case was presented to the staff committee and is demonstrably relevant to the outcome of the appeal." *Id.*

100. *Id.* (attaching to the memorandum the researcher's affidavit and the 2005 resolution).

101. *Id.*

102. *Id.*

athletic teams, and organizations.”<sup>103</sup> The APA press release attached to the staff committee memorandum also cites to Fryberg’s published research on the impact of American Indian sports mascots on American Indian students.<sup>104</sup>

After the staff committee’s extensive and patent attempt to establish an evidentiary foundation for its rejection of UND’s appeal and the Executive Committee’s decision, the staff committee’s memorandum discusses under its “[s]tandard of review” section a presumption to be used by the Executive Committee:

[t]he position of the NCAA is that there is a rebuttable presumption that the use of Native American mascots, names and/or imagery by member institutions . . . leads to a hostile or abusive environment for members of the campus community and/or the general public who are subjected to it and/or the student-athletes involved in the intercollegiate competition that is inconsistent with the NCAA Constitution.<sup>105</sup>

The memorandum further defined<sup>106</sup> for the first time in the process the words “hostile”<sup>107</sup> and “abusive”<sup>108</sup> and stated “[t]he Executive Committee may reverse the ruling of the staff committee only if the institution demonstrates that the [staff committee’s] ruling clearly was contrary to the evidence considered.”<sup>109</sup>

### 3. *Staff Committee’s Specific Responses to UND’s Issues on Appeal*

UND raised several issues on appeal. The staff committee, in turn, addressed each of the issues, which will be discussed in this section.

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103. *Id.*

104. *Id.*

105. *Id.* This statement is particularly inflammatory and absolutely reiterates the frustration that the NCAA’s blanket presumption is inherently misguided due to its granting of exceptions to a number of institutions.

106. The NCAA indicated it used and deferred to Webster’s New World Dictionary Third College Edition for its definitions. *Id.*

107. The staff committee defined the word “hostile” as “[o]f or characteristic of an enemy; warlike; having or showing ill will; unfriendly; antagonistic; not hospitable or compatible; adverse.” *Id.*

108. The staff committee defined the word “abusive” as “[i]nvolving or characterized by abuse or misuse; abusing; mistreating; coarse and insulting in language; scurrilous; harshly scolding.” *Id.*

109. *Id.*

- a. UND has already received approval from a namesake tribe through Resolution No. A05-01-041, dated December 13, 2000.

The staff committee explained in its memorandum to the Executive Committee the reason it did not recognize the Spirit Lake Tribe's 2000 Resolution No. A05-01-041 was because in 2005, the Spirit Lake Nation's secretary-treasurer and tribal chairman voted to support the United Tribes of North Dakota Resolution 05-06, which opposed the continued use of the "Fighting Sioux" nickname and logo.<sup>110</sup> The staff committee's stated explanation was that "[w]ith the tribe and its officers taking conflicting positions, and the tribe's subsequent failure to respond to the NCAA's request to resolve the apparent conflict, the staff committee appropriately declined to attribute support by a namesake tribe for the use of its name."<sup>111</sup> In other words, the staff committee itself failed to recognize the Spirit Lake Tribe's authority to manage its own sovereign affairs.<sup>112</sup>

- b. The NCAA criteria for tribal namesake approval are unduly burdensome and amount to selective enforcement.

The staff committee stated "[t]he NCAA did not require all the Sioux tribes in the state to support the use of the 'Fighting Sioux' name and logo."<sup>113</sup> However, the staff committee stated it was reasonable to conclude UND had no support by a namesake tribe because of the "active opposition from the other Sioux tribes and the apparent opposition of the leadership of the Spirit Lake Tribe."<sup>114</sup>

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110. *Id.*

111. *Id.* By comparison, in its own determination dated September 28, 2005, the staff committee provided three reasons for concluding it and the NCAA would not recognize Spirit Lake's approval of the Fighting Sioux nickname and logo. *Id.* at Exhibit P. First, the staff committee believed Spirit Lake Tribe Resolution No. A05-01-041 was ambiguous. *Id.* Next, the staff committee stated in 2005 the Spirit Lake Tribe General Assembly voted to withdraw the tribe's support of the nickname and logo, and "[s]everal attempts by the staff review committee to contact the leadership of the Spirit Lake Tribe to clarify its position went unanswered." *Id.* Third, the staff committee reviewed a resolution adopted in 2005 by the board of directors of the United Tribes of North Dakota, comprised of representatives from the five federally recognized tribes, in which the board unanimously supported the NCAA decision, but the staff committee concluded there was "not sufficient evidence to support the claim that the university has substantive support from Native Americans within the state of North Dakota for continued use of the nickname and logo," as opposed to support from "a namesake tribe." *Id.*

112. *See id.* at Exhibit E (describing the relationship between FSU and the Seminole Tribe).

113. *Id.* at Exhibit R.

114. *Id.*

- c. If the Spirit Lake Resolution is not sufficient, North Dakota possesses the appropriate “secondary criteria” upon which to base the granting of North Dakota’s appeal.

The staff committee, apparently speaking on behalf of the Association, explained “[t]he NCAA relie[d] on scientific research to support its position that using Native American mascots, names and symbols causes injury even if the purpose is to honor the spirit of the Indian people.”<sup>115</sup> The staff committee cited the research of Fryberg and the APA resolution to support its position, and by extension, the position of the NCAA.<sup>116</sup>

- d. The NCAA has failed to follow its constitution regarding the promulgation of these rules.

The staff committee explained “[t]he Executive Committee adopted [the P]olicy on the use of Native American mascots at NCAA championships pursuant to its authority in NCAA Bylaw 4.1.2,” among others, which speaks to core issues and the authority to act on behalf of the membership.<sup>117</sup>

- e. The NCAA does not apply the Policy uniformly, and application of the Policy is discriminatory.

The staff committee relied upon the Fryberg research and its “empirical evidence” to support its position that the use of Native American mascots, logos, and imagery has an overall negative impact on Native Americans.<sup>118</sup> In spite of the staff committee reference and citation to the Fryberg research and overall opposition to the use of Native American nicknames, mascots, and logos, the staff committee proceeded to carve a hole in its analysis for the three institutions that were granted namesake exemptions. The committee explained:

In the case of the three exempted institutions, the impact weighs most directly on specific tribes of Native Americans. To accede to the opinion of most Native Americans, the staff review committee would have to assert that those tribes cannot control the names that they own, they are simply wrong to grant their approval or that their opinion does not matter. It would be the *height* of hypocrisy and egregious irony to tell member institutions that they must

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115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

listen to those most directly impacted by their use of Native American nicknames and then to tell namesake tribes that their views do not matter.<sup>119</sup>

The staff committee further opined it continued to believe the stereotyping of Native Americans was wrong, but it had to respect the namesake sovereign tribes' decision: "In some instances, following the wishes of the namesake tribe may not reduce the potential for hostile or abusive behavior in the eyes of many or even most Native American. However, to ignore the opinions of those tribes who own those names would be equally wrong."<sup>120</sup>

- f. The NCAA has inconsistently phrased the terms hostile and abusive, the presumption that a Native American nickname is hostile and abusive is erroneous, and the NCAA is a monopoly.

The staff committee provided an explanation on behalf of the NCAA in its memorandum, clarifying the usage of various terms and explaining how the Policy uses the term "hostile or abusive."<sup>121</sup> Interestingly, the staff committee further criticized UND for not producing any "studies or research indicating that the use of Native American mascots either has no negative impact, or leads to positive psychological benefits for Native American students and therefore [UND] cannot refute the NCAA position that such use leads to a hostile or abusive environment."<sup>122</sup> Although these standards had not been previously presented to UND, scientific or psychological studies supported by empirical evidence had not been pre-

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119. *Id.* (emphasis added). Despite this statement, in the same memorandum the staff committee concluded Resolution No. A05-01-041 was ambiguous, and the committee presumed the Spirit Lake Nation opposed UND's use of the Fighting Sioux nickname because the staff committee received no communication from the tribe. *Id.* The Spirit Lake Tribe was seemingly silent on whether the Resolution was ambiguous; the result is that the NCAA relied upon the judgment of a third party to adjudicate the issue. *Id.* at Exhibit Q (raising on appeal the issue of improper delegation). It is worth considering that perhaps the only entity to determine whether the Resolution was ambiguous should be the tribe offering it. *Cf.* NAT'L COLLEGIATE ATHLETIC ASS'N MINORITY OPPORTUNITIES & INTERESTS COMM., *supra* note 17 (implying neither the MOIC nor the staff committee made such a presumption regarding the 450 tribes out of 500 that did not respond to its original inquiry relating to the use of Native American nicknames and imagery).

120. Plaintiff's Memorandum, *supra* note 50, at Exhibit R. The staff committee spoke further on behalf of the NCAA wherein it explained by granting the exceptions, the NCAA does not say the use by those institutions is not hostile or abusive. "Rather, like Indian tribes themselves, the Association will not interfere with the right of a namesake tribe to determine how its name and imagery shall be used." *Id.*

121. *Id.*

122. *Id.*

viously discussed, nor had the Executive or staff committees required expert evidence.<sup>123</sup> Even the staff committee itself raised the Fryberg research for the first time after its original decision.

In addressing UND's claim that the NCAA was a monopoly and was using its unequal position to force compliance, the staff committee directed UND to address the Policy by working within the organization through the legislative process.<sup>124</sup> Ultimately, the staff committee submitted its conclusion that UND should be retained on the list of those institutions subject to the restrictions of the Policy.<sup>125</sup>

#### 4. *UND's December 23, 2005 Reply*

UND responded to the NCAA staff committee with a reply memorandum dated December 23, 2005, objecting to the staff committee's memorandum and the chameleon-like appeals process.<sup>126</sup> UND argued

the Policy should not be applied to UND because: 1) the Executive Committee lacked the authority to promulgate the Policy . . . ; 2) the Policy, as applied, is a violation of federal anti-trust law; 3) the vacillating standard articulated by the [s]taff [c]ommittee is unworkable and based upon a faulty presumption; 4) the appropriate legal standard of "hostile" or "abusive" . . . should not apply to UND; and 5) UND should be exempt from the Policy under the "namesake tribe" exemption.<sup>127</sup>

UND demonstrated in its rebuttal that, among other things, its use of Native American imagery was neither hostile nor abusive:

a) 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.

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123. Nowhere previously had the NCAA, the Executive Committee, or the staff committee explained an institution had to make a showing supported by expert or scientific evidence that Native American mascots have either no negative impact, or lead to positive psychological benefits for Native American students. By comparison, the judicial system is not as rigidly constrained by such requirements. It hardly seems possible that FSU could satisfy this burden, particularly as it only took four days from the time the Policy was announced for FSU to be granted an exception. *Id.*

124. *Id.* It is ironic the staff committee would suggest or direct UND to work within the organization when the Executive Committee has, as is evident in this case, legislated through unilateral policy determinations.

125. *Id.*

126. *Id.* at Exhibit S (Memorandum from Phil Harmeson, Senior Assoc. to the President, Univ. of N.D., to Bernard Franklin, Liaison to Exec. Comm., Nat'l Collegiate Athletic Ass'n (Dec. 23, 2005)).

127. *Id.*

b) There was no evidence . . . of any conduct which was “frequent or “severe” which was “physically threatening or humiliating” or rose above a “mere offensive utterance.”

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d) UND demonstrated that the Fryberg Study, which provided the basis for the [s]taff [c]ommittee’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 [s]taff [c]ommittee; and

g) UND again raised concerns that the Policy violates federal anti-trust law.<sup>128</sup>

##### 5. *January 18, 2006 Staff Committee “Reply” to UND Rebuttal*

The NCAA staff committee’s surreply to UND’s reply was not unlike its previous legal memoranda wherein the committee made decisions on behalf of the entire NCAA supported by materials or justifications not previously explained.<sup>129</sup> It is noteworthy that in its preliminary discussion, the staff committee cited a letter to UND in which the committee explained the appellate procedure as “not unlike any other appellate procedure.”<sup>130</sup> In fact, the procedure described was unlike any judicial or other appellate procedure.

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128. *Id.*

129. *Id.* at Exhibit T (Memorandum from Bernard Franklin, Liaison to Exec. Comm., Nat’l Collegiate Athletic Ass’n, to Nat’l Collegiate Athletic Ass’n Exec. Comm. (Jan. 18, 2006)). The staff committee explained that UND’s December 23 rebuttal memorandum was not timely and contained new information that was available at the time the case was originally submitted, but was not presented at that time. *Id.* The staff committee recommended the Executive Committee not follow the staff committee’s strict appellate procedure and consider UND’s December 23 reply. *Id.*

130. *Id.*

At the beginning of the staff committee's reply, the committee repeated that "UND bears the burden of persuading the Executive Committee that relief from the decision is appropriate."<sup>131</sup> The staff committee asserted "[t]he Executive Committee may reverse the ruling of the staff committee only if *the institution demonstrates* that the ruling<sup>132</sup> clearly was contrary to the evidence<sup>133</sup> considered."<sup>134</sup> Therefore, it would appear UND was required to demonstrate the staff committee decisions were against the weight of evidence when, in fact, the staff committee made its determination based upon the evidence it cultivated and considered.<sup>135</sup>

The staff committee further defended its use of the Fryberg studies and the APA Resolution, despite the fact that the Fryberg studies were prepared in anticipation of litigation against a school with a Native American mascot, and that the APA Resolution was received *after* the Policy was issued and during the appellate process.<sup>136</sup> Even more surprising was the staff committee's conclusion that "attacks on the [P]olicy or the *studies* supporting it are outside the limited scope of this appeal."<sup>137</sup> The significance of this statement should be appreciated because the staff committee—the decision-maker—essentially concluded the evidence it produced in support of a Policy previously promulgated was incontrovertible. In the same breath, the staff committee concluded "UND submitted no evidence and no study contradicting the findings of these weighty authorities."<sup>138</sup>

As previously alluded to, the issue of what information constitutes "evidence" in this appellate process was an unresolved question.<sup>139</sup> UND

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131. *Id.*

132. The staff committee is apparently referring to its decision not to grant the namesake exception.

133. The committee's continued description of the "usual appellate process" and use of the word "evidence" is ironic because as previously described, the staff committee presented an entirely new study in its memorandum to the Executive Committee, which it describes as evidence. Plaintiff's Memorandum, *supra* note 50, at Exhibit T. The memorandum states "whether [the staff committee's evidence of] Fryberg's studies would be admissible in court is of no consequence here." *Id.*

134. *Id.* (citing memorandum from Bernard Franklin, Staff Comm., Nat'l Collegiate Athletic Ass'n, to Exec. Comm., Nat'l Collegiate Athletic Ass'n (Dec. 9, 2005)). In a standard legal proceeding, it would not be unusual for a high appellate court to apply such a standard. What is unique about these circumstances, of course, is the lower staff committee appears to be stating or providing the requirements for its larger governing body, the Executive Committee.

135. *Id.* In addition, the staff committee described the process as "[giving] an institution the opportunity to show that the evidence does not support application of the policy to that institution." *Id.*

136. *See id.*

137. *Id.* (emphasis added). That would seem to restrict the entire appellate process to letting the prosecutor and judge pass judgment, create evidence, and not allow one the opportunity to question or contradict said evidence.

138. *Id.*

139. *See id.* at Exhibit R (describing the staff committee's "evidentiary" standard).



submitted voluminous information to the NCAA outlining its Native American programs, the care the university took in working with the logo and nickname, and its past and current outreach efforts to the Native American community. With the information UND provided, UND may have been able to comply with the staff committee's high evidentiary standard after the committee produced its own study and could have explained the evidentiary standard upon submission of the appeal to the Executive Committee.<sup>140</sup>

Ultimately, though, the description of the studies and the resolution as "weighty authorities," or even as evidence, is subject to dispute. The staff committee's own words lessened the weight of the authorities it promoted and upon which it relied:

The admissibility of Fryberg's studies in a court of law is not relevant to the appeal analysis. Prior to enacting any policy or deciding any appeal, NCAA leadership bodies review and consider all information submitted and all potentially relevant material. The goal, of course, is to ensure that the *correct* decision is made after considering *all* viewpoints and positions. To that end, the NCAA's administrative practices are liberal—that is, decision-making bodies will consider any studies or other information submitted regardless of whether the material would be admissible in a court of law. Consequently, whether Fryberg's studies would be admissible in court is of no consequence here. Indeed, the institution's appeal is supported by documents, which would not likely be admissible in court.<sup>141</sup>

The staff committee further admitted it essentially completed its own research in addition to that of the NCAA's,<sup>142</sup> which is highly unusual for an "appellate" decision-maker.

Despite the staff committee's protests to the contrary, UND clearly raised the issue of evidence and its evidentiary requirements to the staff committee.<sup>143</sup> The staff committee's response substantiates the Kafkaesque<sup>144</sup> nature of the process:

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140. *See id.* at Exhibit Q (stating in the November 4 letter why UND appealed the decision but not based on the later provided evidentiary standard).

141. *Id.* at Exhibit T (emphasis added).

142. *Id.*

143. *Id.*

144. The word "Kafkaesque" means "having a nightmarishly complex, bizarre, or illogical quality." MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 1003 (Deluxe ed. 1998).

UND appears to suggest that the NCAA should have listed all information and evidence which institutions might present in their respective appeals. However, the NCAA does not direct member institutions to submit specific documents or types of information in support of requests for relief. To the contrary, the staff committee considered, and recommends that the Executive Committee consider, all facts and other information submitted by member institutions. As parties seeking appellate relief, member institutions have broad discretion in determining what information to submit in order to persuade the decision-making body to rule in their favor. That decision is left to the sound discretion of member institutions seeking relief. No one fact, or factor, is dispositive and institutions are free to submit anything they feel will be helpful in light of the appeal standard. Otherwise, the appeal process would be a mere *formality*.<sup>145</sup>

The staff committee further reiterated, however, that although UND had submitted documents, the institution did not include any study or empirical evidence or data “supporting a finding that its use of Native American imagery is not hostile or not abusive.”<sup>146</sup> Furthermore, in the opinion of the staff committee, UND had received more “process” than was due.<sup>147</sup> Finally, the staff committee concluded, in light of the NCAA’s independent work<sup>148</sup> and UND’s representations,<sup>149</sup> its decision was “supported by substantial and credible evidence”<sup>150</sup> notwithstanding the fact the committee developed the evidence separately from the Executive Committee.

By January 30, 2006, it had become abundantly clear the NCAA had no intentions of granting UND an exception to the Executive Committee’s Policy. UND submitted a final document to the members of the Division II

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145. Plaintiff’s Memorandum, *supra* note 50, at Exhibit T (emphasis added).

146. *Id.* The staff committee’s narrow focus of the evidence is further illustrated wherein it states “the evidence here consists of letters or decisions from seven Sioux tribes expressly disapproving of UND’s use of the ‘Fighting Sioux’ logo and images.” *Id.* The staff committee, though supportive of UND’s ability to provide “any information it deemed appropriate,” continued to question the efficacy of the Spirit Lake Resolution supporting UND. *Id.*

147. *Id.*

148. It is not clear whether the committee is referring to its own independent work as the appellate decision-maker, that of the MOIC, or that of the Executive Committee.

149. The staff committee’s double standard for evidence had become abundantly clear by this point, and it was obvious the staff committee would not consider or give any weight to anything submitted by UND.

150. Plaintiff’s Memorandum, *supra* note 50, at Exhibit T. However, previously in the same memorandum, the staff committee discounted the NCAA’s evidentiary standard in a court of law. *Id.*

Presidents Council seeking to overturn the decision of the Executive Committee.<sup>151</sup> In April 2006, the Executive Committee finally rejected UND's appeal.<sup>152</sup>

### III. WHY THE "U" HAD TO SUE

After receiving what was said to be the Executive Committee's final ruling, UND President Kupchella addressed the NCAA in an open letter informing it of the university's intent to seek legal action.<sup>153</sup> Kupchella ended his correspondence with the underlying principle he maintained throughout the process: "[a]ll of this notwithstanding, sometimes—even at some cost and some risk—it is best to stand up to injustice."<sup>154</sup> It was at this time that the Office of the Attorney General became involved.

In its complaint, the State of North Dakota offered three major arguments, each of which will be outlined in detail in this section. First, because the relationship between UND and the NCAA is contractual, the NCAA breached the contract by circumventing its own legislative processes and allowing the Executive Committee to impose its athletic name and imagery policy.<sup>155</sup> Next, the NCAA breached its contractual duty of good faith in its failure to apply a consistent standard and appeals process.<sup>156</sup> Finally, by prohibiting the institution from hosting awarded post-season events, promoting its athletic identity and merchandise, and participating in championship events, the NCAA left UND at a considerable competitive

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151. *Id.* at Exhibit U (Letter from Charles Kupchella, President, Univ. of N.D., to Members of the Division II Presidents Council and the Nat'l Collegiate Athletic Ass'n Exec. Comm. (Jan. 30, 2006)). Notably, Kupchella wrote:

I cannot imagine how the Presidents Council or the Executive Committee could make a determination about hostility and abuse from hearsay, especially since the Office for Civil Rights came here and made no such findings. I invite you to come to the campus and see for yourselves the respectful manner in which we treat our Sioux nickname and the logo created by an American Indian.

*Id.* No such visit was ever made to UND's campus by the Presidents Council, staff committee, or Executive Committee.

152. *See* Letter from Walter Harrison, Chair, Nat'l Collegiate Athletic Ass'n Exec. Comm., to Charles Kupchella, President, Univ. of N.D. (Apr. 28, 2006) (on file with author); Letter from Walter Harrison, Chair, Nat'l Collegiate Athletic Ass'n Exec. Comm., to Charles Kupchella, President, Univ. of N.D. (May 15, 2006) (on file with author).

153. Letter from Charles Kupchella, *supra* note 1. In it, he stated, "[t]he NCAA leaves us no recourse but to consider litigation to make the point that the policy you have instituted is illegitimate and that it has been applied to the University of North Dakota in an unfair, arbitrary, capricious, fundamentally irrational, and harmful manner." *Id.*

154. *Id.*

155. Complaint, *supra* note 3, at 18-19.

156. *Id.* at 19-22.

disadvantage, thus placing an unlawful restraint on trade in violation of state antitrust law.<sup>157</sup>

#### A. BREACH OF CONTRACT

The NCAA breached its contractual obligation to the UND. At its core, the relationship between UND and the NCAA, among other things, is contractual.<sup>158</sup> The NCAA governs intercollegiate athletic competition and national championships of its member institutions, including UND, through the NCAA Constitution and Bylaws, to which each member agrees.<sup>159</sup> Specific provisions of the NCAA Constitution and Bylaws outline the avenues by which legislation may be proposed and passed within the organization.<sup>160</sup> Of those avenues, the power to adopt legislation and thus

157. *Id.* at 22-24. What is important to note, however, is what the case was *not* about: Whether the Policy is good or bad.

Whether [the] 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 [the] Court were an appellate court reviewing a decision of some lower tribunal.

Whether the “Fighting Sioux” name and logo is hostile or abusive.

Plaintiff’s Reply Memorandum in Support of Motion for Preliminary Injunction at 1, *State v. Nat’l Collegiate Athletic Ass’n*, No. 18-06-C-01333 (N.D. Dist. Ct. Nov. 7, 2006) [hereinafter Plaintiff’s Reply Memorandum]. Additionally, it is important to note the three arguments submitted were never heard because shortly after the complaint was filed, a motion for preliminary injunction was filed to maintain the status quo. They were, nevertheless, discussed extensively in the supporting documents.

158. Complaint, *supra* note 3, at 18; *see also* *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 a contract between NCAA and its members); Plaintiff’s Memorandum, *supra* note 50, at 46-47 (quoting *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”); Plaintiff’s Reply Memorandum, *supra* note 157, at 14 n.11 (citing to *Austin v. Am. 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.”)).

159. Plaintiff’s Memorandum, *supra* note 50, at 3.

160. *See* Plaintiff’s Reply Memorandum, *supra* note 157, at 8 n.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 . . .*” “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.*”

*Id.* (quoting the NCAA Division II Manual).

create such a policy broadly affecting the membership is not one granted to the NCAA Executive Committee.<sup>161</sup>

The Executive Committee, under the guise of its duty to “[i]dentify core issues that affect the Association as a whole” and to “[a]ct on behalf of the Association . . . to resolve” such issues,<sup>162</sup> chose to adopt its own Policy prohibiting the use of Native American nicknames and imagery by NCAA member institutions, thereby circumventing the specific legislative processes outlined in the NCAA Constitution and Bylaws.<sup>163</sup> While it is not outside the Executive Committee’s vested authority to identify “core issues” to be resolved, the action the Committee took was vastly beyond its delegated reach.<sup>164</sup> Thus, no matter how well-intentioned the Committee’s actions may have been, it was not entitled to flagrantly breach its contractual obligation to UND.

#### B. BREACH OF CONTRACT—IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING

The NCAA breached its implied covenant of good faith and fair dealing when the Executive Committee usurped the Association’s Constitution and Bylaws without the authority to do so, created a cursory “exemption” of which the standards were inconsistently applied, and applied an evidence-less “hostile and abusive” standard yet repeatedly altered the evidentiary standards it applied.<sup>165</sup> “It is well-established that [e]very contract contains an implied covenant of good faith and fair dealing,” including the one between UND and the NCAA.<sup>166</sup> Further, “[t]he covenant of good faith requires that a party vested with contractual

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161. Complaint, *supra* note 3, at 18; *see also* Plaintiff’s Memorandum, *supra* note 50, at 48 (stating, under the NCAA’s Constitution, the Executive Committee may only “forward proposed amendments . . . 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 [C]onstitution”).

162. NAT’L COLLEGIATE ATHLETIC ASS’N, *supra* note 16, at 22.

163. *See* Press Release, Nat’l Collegiate Athletic Ass’n, *supra*, note 2.

164. *See* Plaintiff’s Reply Memorandum, *supra* note 157, at 11.

[N]othing in the express provisions of the Constitution and Bylaws . . . would authorize the unelected Executive Committee to act as a sort of “super-legislature,” imposing by administrative edict rules, regulations, and “policies” . . . . 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.

*Id.*

165. Complaint, *supra* note 3, at 19-22.

166. *See* Plaintiff’s Memorandum, *supra* note 50, at 54-55 (quoting *Hall v. Nat’l Collegiate Athletic Ass’n*, 985 F. Supp. 782, 794 (N.D. Ill. 1997)).

discretion exercise that discretion reasonably, not arbitrarily or capriciously.”<sup>167</sup>

As previously discussed, the Executive Committee lacked contractual authority to promulgate the Policy outside of the detailed and explicit legislative processes found within the NCAA Constitution and Bylaws.<sup>168</sup> Additionally, no such rule, regulation, or bylaw was undertaken by the Association membership, nor was any such proposal forwarded to the membership from the Executive Committee.<sup>169</sup> Thus, the Executive Committee knowingly acted in contravention of its authority issuing the Policy for which it had no delegated authority, thus causing great harm to UND.<sup>170</sup>

Throughout the process, the NCAA failed to announce or apply a clear standard as to how it would determine whether an institution's use of a Native American nickname or image was hostile or abusive.<sup>171</sup> At the Policy's origin, the NCAA alleged it would consider the specific circumstances of individual situations when determining whether the use of Native American imagery was, in fact, hostile and abusive.<sup>172</sup> However, it did not take long after being presented with evidence that UND's use of its nickname and logo was respectful that the Executive Committee abandoned its original standard.<sup>173</sup> Instead, the Committee adopted a “rebuttable presumption that the use of Native American mascots, names and/or imagery

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167. *Id.* at 55 (quoting *Hall*, 985 F. Supp at 794). Note that Kupchella, in his June 7, 2006 letter, sternly charged the Executive Committee's actions as arbitrary and capricious, writing:

[p]erhaps the most amazing thing is that through all of this—except for stirring things up—you have accomplished nothing. Your stand against Indian nicknames and logos—a stand that seem (sic) to start out against all references to races and national origin—fizzled before it started when you left out Irish, Celtics, Vandals, and a host of other names. Then, for highly convoluted, hypocritical, and in some instances mysterious reasons, you exempted the Aztecs and other American Indian nicknames at the outset and, following that, you exempted the use of Chippewa, the Utes, the Choctaws, the Catawbas, and the Seminoles, leaving the NCAA position on even American Indian nicknames about as solid as room-temperature Jell-O. All of this was, and remains, highly *arbitrary* and *capricious*.

Letter from Charles Kupchella, *supra* note 1.

168. The State noted “the Executive Committee opted to promulgate the Policy itself . . . likely because [it] perceived that there was insufficient support within the Association membership to adopt the Policy as a Bylaw.” Plaintiff's Reply Memorandum, *supra* note 157, at 19.

169. *Id.* at 18-19.

170. Complaint, *supra* note 3, at 22.

171. *Id.*

172. See Plaintiff's Memorandum, *supra* note 50, at Exhibit M (announcing the Executive Committee would consider “the unique aspects and circumstances as it relates to the specific use and practice at [each] college or university”); see also Plaintiff's Reply Memorandum, *supra* note 157, at 21 (quoting *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993)) (“[C]ourts who have considered the issue have repeatedly held that in order to demonstrate a civil rights violation, it must be shown that the conduct is ‘hostile or abusive,’ and not ‘merely offensive.’”).

173. Complaint, *supra* note 3, at 20-21.

by member institutions for their athletics teams and programs creates or leads to a hostile . . . environment.”<sup>174</sup>

If the change in the application of the standard was flawed, the arbitrary change in its evidentiary requirement of the new standard was worse. The new standard relied on the Fryberg and APA studies,<sup>175</sup> as well as input from Native American leadership, and was objectively impossible to satisfy.<sup>176</sup> By the end, the Executive Committee completely abandoned any objective standard and arbitrarily manipulated its evidentiary standard to the point that no UND appeal could be successful—the quintessence of bad faith.

Most of all, the NCAA’s application of the “namesake exception,” particularly in its denial of UND’s request for an exception, was arbitrary, capricious, and absolutely indicative of bad faith.<sup>177</sup> Consider this: in August 2005, FSU requested the NCAA create an exception to the Policy based upon the approval of a namesake tribe. Just one week later, the Executive Committee announced there would be such an exception; four days later, FSU was granted the exception.<sup>178</sup> The fact that a prominent and publicly visible institution such as FSU was exempted from a policy designed to prevent the stereotypical use of Native American imagery<sup>179</sup> seems to indicate the NCAA simply chose to avoid a confrontation with a Bowl Champion Series school.<sup>180</sup> Some schools with imagery flagged as hostile and abusive were excepted without any other inquiry other than the approval of a tribe, yet UND, which carries the approval of the Spirit Lake Tribe,<sup>181</sup> was denied its request, unequivocally demonstrating the NCAA’s bad faith.

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174. Plaintiff’s Memorandum, *supra* note 50, at Exhibit R. The notice of a new standard as provided in the memorandum from the staff committee to the Executive Committee was four months after the original notice of its Policy. See Letter from Myles Brand, *supra* note 5.

175. See *supra* text accompanying notes 101-04.

176. See Plaintiff’s Memorandum, *supra* note 50, at 61 (“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.”).

177. Complaint, *supra* note 3, at 21-22.

178. *Id.* at 8-9 (“[T]he decision of the namesake sovereign tribe, regarding when and how its name and imagery can be used, must be respected even when others may not agree.”).

179. As opposed to the UND Fighting Sioux logo, which is an authentic American Indian logo drawn by a respected Native American artist.

180. See Plaintiff’s Reply Memorandum, *supra* note 157, at 20-21 (describing the stereotypical drawing and use of FSU’s athletic logo).

181. See Plaintiff’s Memorandum, *supra* note 50, at Exhibit O (attaching Spirit Lake Tribe Resolution No. A05-01-041).

## C. UNLAWFUL RESTRAINT ON TRADE

Finally, the State asserted the Policy violated state anti-trust laws.<sup>182</sup> Anti-trust provisions of the North Dakota Century Code provide 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.”<sup>183</sup> In its argument, the State relied on the anti-trust “Quick-Look” rule of reason analysis to show the Policy constitutes an unreasonable restraint on competition in violation of North Dakota law.<sup>184</sup> A Quick-Look analysis is “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.’”<sup>185</sup> The analysis also requires a two-part inquiry whereby UND must show “the Policy poses a significant potential for anticompetitive events and, . . . if so demonstrated, then the NCAA must justify its Policy with sufficient pro-competitive effects.”<sup>186</sup>

It is clear the restrictions placed upon UND were a constraint on competition because the NCAA Policy limited participation in and banned hosting of championship events.<sup>187</sup> The Policy is a commercial group boycott specifically intending to forbid other member schools from competing with UND, which the State acknowledged as a *per se* violation of antitrust laws.<sup>188</sup> The impact of such anti-competitive effects is great and,

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182. Complaint, *supra* note 3, at 22-24.

183. N.D. CENT. CODE § 51-08.1-02 (2007). “The relevant market, for purposes of [this section], is intercollegiate athletics and all submarkets, including participating in championship events, hosting and bidding to host championship events, and associated marketing and merchandising in the state of North Dakota.” Complaint, *supra* note 3, at 22.

184. *See Nat’l Collegiate Athletic Ass’n v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 101 (1984); Plaintiff’s Memorandum, *supra* note 50, at 69 (noting the Quick-Look rule of reason has been applied to challenges to NCAA bylaws in *Board of Regents*).

185. Plaintiff’s Memorandum, *supra* note 50, at 69 (quoting *Cal. Dental Ass’n v. Fed. Trade Comm’n*, 526 U.S. 756, 770 (1999)).

186. *Id.* at 70.

187. *Id.* In our complaint, the State identified:

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

Complaint, *supra* note 3, at 23.

188. *Id.*; *see also* Plaintiff’s Memorandum, *supra* note 50, at 71 (citing *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing*, 472 U.S. 284, 290 (1985)) (“[C]ertain 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.”).



in some ways, immeasurable.<sup>189</sup> Beyond bidding for contracts and the economic impacts associated with the loss of the ability to host championship events, the loss of a legitimately earned “home field advantage” places UND at a competitive disadvantage.<sup>190</sup> Devaluation of intellectual property interests, the ability to recruit athletes, and, perhaps most importantly, the effect on future student athletes are each a potentially devastating result of the Policy.<sup>191</sup> Notwithstanding any of the adverse competitive effects mentioned, the NCAA “failed to announce *any* pro-competitive justification for the Policy.”<sup>192</sup>

#### IV. PRELIMINARY INJUNCTION

In conjunction with the filing of its summons and complaint, the State requested the court to issue a preliminary injunction “in order to preserve the status quo and prevent irreparable harm to UND, its students, athletes, and consumers of intercollegiate athletic competition from the applications of an arbitrary, unreasonable and unlawful ‘policy’ of the . . . NCAA.”<sup>193</sup> A hearing on the motion was held on November 9, 2006, and the trial judge issued a detailed Memorandum and Decision two days later, granting the preliminary injunction prohibiting the NCAA from enforcing its Policy during the pendency of the case, or until a further order from the court.<sup>194</sup>

Although the judge was careful to make it clear “[n]either party should attempt to predict the ultimate outcome of this litigation based on the court’s determinations on this motion,”<sup>195</sup> both parties were familiar with the statutory requirements for the granting of such a motion; specifically, that petitioners must show “substantial probability of succeeding on the merits.”<sup>196</sup> This bolstered the State’s confidence in a favorable result.

It soon became clear, however, the NCAA was preparing to correct the infirmity in its case by submitting the disputed policy to the full membership of the NCAA—a move that would obviate UND’s major legal claim and ultimately render what the State felt was its best claim moot. It

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189. See Complaint, *supra* note 3, at 24 (“[Anti-competitive effects] negatively impact multiple groups of consumers in North Dakota, including, but not limited to, member institutions, athletes, fans, and alumni.”).

190. See Plaintiff’s Memorandum, *supra* note 50, at 73. “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.’” *Id.*

191. *Id.* at 74-75.

192. Complaint, *supra* note 3, at 24 (emphasis added).

193. Plaintiff’s Memorandum, *supra* note 45, at Exhibit J.

194. State v. Nat’l Collegiate Athletic Ass’n, No. 06-C-1333 (N.D. Dist. Ct. Nov. 11, 2006).

195. *Id.* at 13.

196. *Id.* at 11.

also appeared that UND lacked the political force within the NCAA to stop that process if the matter were brought before the full membership. Clearly, awareness by the NCAA of the likelihood of ultimate success in court, the State's fear the improperly enacted Policy would ultimately be blessed by the membership of the NCAA, and the impetus from a trial judge eager to resolve the lawsuit through a settlement were all factors leading the parties to conclude it was in everyone's best interest to reach a negotiated agreement.<sup>197</sup>

## V. CONCLUSION

In settlement negotiations, the State sought to secure for itself the same right to continue the use of its nickname and logo, which other approved institutions had been given, by outlining a process to obtain "namesake approval" from affected tribes.<sup>198</sup> Through protracted discussions, each and every term in the settlement was the subject of vigorous debate. Ultimately, a settlement agreement was entered into that prescribed a period of three years for UND to secure approval from the two Sioux Indian tribes in the state, specified what that approval would entail, and set forth in detail the process for retiring the use of the nickname and logo if efforts to obtain tribal approval failed.<sup>199</sup>

Perhaps most important to UND was the requirement of the settlement that the NCAA publicly acknowledge it had never made any findings that UND's use of the nickname created a hostile and abusive environment.<sup>200</sup> It seemed only reasonable to settle the issue in this manner. The argument of opponents that the use of the nickname and logo is hostile and abusive falters if the affected Sioux tribes were to grant approval, by, in effect, saying they agree the nickname and logo use is regarded as an honor. On the other hand, it would be difficult to contend use of the nickname and logo is truly an honor if the tribal governments were to determine it is not.

The settlement set forth a process to do one fundamental thing: to put the final decision in the hands of the tribes, whose opinion matters most.<sup>201</sup> Some have suggested it was a mistake to require approval from both Sioux

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197. Settlement Agreement and Mutual Release, *Nat'l Collegiate Athletic Ass'n*, No. 06-C-01333.

198. *Id.* at 3-5.

199. *Id.* Of particular concern was the fate of the thousands of Fighting Sioux symbols located throughout the Ralph Engelstad arena at UND. The settlement set forth in great detail what is to happen with all of those symbols at the arena, and when. *Id.* at 5-6, 11-12.

200. *Id.* at 8.

201. *Id.* at 3. Before entering into the settlement, I consulted with various nickname supporters, who agreed that given the then existing facts, the approach was sound.

tribes in North Dakota rather than just one, an easy argument to make with the benefit of hindsight. The argument ignores the fact that the hard-negotiated settlement started with the NCAA insisting all Sioux tribes needed to give approval in order to constitute “namesake approval.” Through the negotiating process, the approval needed ultimately was whittled down to require only the assent of the two Sioux tribes located in North Dakota.

However, UND was unable to attain the approval in the manner set forth by the settlement agreement. Despite, or as a result of, the efforts of many to secure namesake approval, or to prevent it, the November 30, 2010 deadline for the process came and went. Though the Spirit Lake Tribal Council had granted its approval, assent from the Standing Rock Sioux Tribe fell short. Thereafter, the SBHE directed UND to begin to transition away from use of the nickname and logo, appearing to be the end of the matter.

## VI. BUT WAIT!

In its 2011 biennial session, North Dakota’s Legislative Assembly took up the matter, passing House Bill 1263 requiring UND to continue using the nickname and logo for its athletics teams.<sup>202</sup> The bill was signed by the Governor and took effect August 1, 2011.

On August 12, 2011, a delegation of North Dakota officials, including Governor Jack Dalrymple, Grant Shaft, President of the North Dakota Board of Higher Education, Representative Al Carlson, sponsor of House Bill 1263, the Attorney General, and others traveled to the NCAA headquarters in Indianapolis to meet with Mark Emmert, President of the NCAA, to see if the NCAA might have softened its position on Native American images and nicknames. The NCAA held firm.<sup>203</sup>

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202. H.R. 1263, 62d Legis. Assemb. (N.D. 2011).

The intercollegiate athletic teams sponsored by the [U]niversity of North Dakota shall be known as the [U]niversity of North Dakota [F]ighting Sioux. Neither the [U]niversity of North Dakota nor the [S]tate [B]oard of [H]igher [E]ducation may take any action to discontinue the use of the [F]ighting Sioux nickname or the [F]ighting Sioux logo in use on January 1, 2011. Any actions taken by the [S]tate [B]oard of [H]igher [E]ducation and the [U]niversity of North Dakota before the effective date of this Act to discontinue the use of the [F]ighting Sioux nickname and logo are pre-empted by this Act. If the [N]ational [C]ollegiate [A]thletic [A]ssociation takes any action to penalize the [U]niversity of North Dakota for using the [F]ighting Sioux nickname or logo, the [A]ttorney [G]eneral shall consider filing a federal antitrust claim against that association.

*Id.*

203. Chuck Haga, *NCAA Tells N.D. Delegation No Budging on Fighting Sioux Nickname*, GRAND FORKS HERALD, Aug. 12, 2011, at A1.

The week of November 7, 2011, the North Dakota Legislature met in special session to consider, among other issues, legislative reapportionment. Because of continued disagreement with the NCAA and the difficulties UND encountered in its efforts to enter a new athletic conference, an additional issue considered was the repeal of House Bill 1263.<sup>204</sup> The repeal was quickly enacted within the first days of the special session by Senate Bill 2370, which was immediately signed into law by the Governor.<sup>205</sup> The Senate Bill, however, also delays the UND's ability to adopt a new nickname or logo until after January 1, 2015.<sup>206</sup>

Although it appears this matter has now reached its conclusion with the North Dakota Legislature, it is likely resentment over the nickname probably will continue for years to come. Regardless, I remain hopeful the University of North Dakota, the State Board of Higher Education, the North Dakota Legislature, and the citizens of North Dakota will be able to set aside their disagreements to now concentrate on the foremost purpose of UND, which is to provide an exceptional education for our students.

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204. See generally Chuck Haga, *N.D. Legislature Approves Amended Bill to Repeal Nickname Law*, GRAND FORKS HERALD, Nov. 8, 2011.

205. S. 2370, 62d Legis. Assemb. (N.D. 2011), available at [www.legis.nd.gov/assembly/62-2011/special-session/documents/11-0830-0300.pdf](http://www.legis.nd.gov/assembly/62-2011/special-session/documents/11-0830-0300.pdf).

206. *Id.*