IN DISTRICT COURT, GRAND FORKS COUNTY, NORTH DAKOTA

State of North Dakota, by and through the North Dakota State Board of Higher Education, and The University of North Dakota, Plaintiff,	)	**MEMORANDUM DECISION AND ORDER**
vs.	)	**Civil No. 06-C-1333**
National Collegiate Athletic Association, Defendant.	)	

Procedural Background

The State of North Dakota, by and through the North Dakota State Board of Higher Education and The University of North Dakota (hereafter referred to as "UND"), has initiated a civil action against the National Collegiate Athletic Association (hereafter referred to as "NCAA"). The State seeks declaratory, injunctive, and related relief to enforce certain contractual and legal rights, which it asserts UND has as a member institution of the NCAA. At the core of this litigation is an August 4, 2005 decision by the NCAA's Executive Committee to adopt 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 88 NCAA championships." UND was among 18 schools that were identified by the NCAA as subject to this policy. Subsequent administrative appeals by UND to the NCAA Executive Committee to reconsider its determination that it was an offending member institution were unsuccessful. The State then commenced this action, claiming that the NCAA Executive Committee "vastly exceeded its authority in both promulgating and then thereafter applying the policy" to UND. The State asserts further that in the application of this policy to UND, the NCAA breached contractual obligations and an implied covenant of good faith and fair dealing with UND. Finally, the State alleges that enforcement of the NCAA policy violates North Dakota antitrust law.

The NCAA adamantly denies the allegations and insists that its policy was promulgated only after a long, deliberate, and unbiased study of the impact upon colleges and universities of use of Native American nicknames and imagery. It is the NCAA's position that the August 2005 policy was properly adopted by its governance structure and therefore binds all member institutions unless specifically exempted therefrom by the NCAA.

Concurrent with the filing of its Complaint on October 6, 2006, the State moved for immediate injunctive relief, which would enjoin the NCAA from actively enforcing the August 2005 policy against UND until this litigation is concluded.

The NCAA has responded to the request for immediate injunctive relief by stating that if the trial court were to grant the State's request, "it would harm the NCAA's integrity and effectiveness in maintaining recognized standards for intercollegiate athletic contests."[1] Others associated with, or members of, the NCAA Executive Committee have also submitted affidavits for the trial court's consideration.[2] They basically set forth the background for the Executive Committee's adoption of the August 2005 policy and proffer their opinions as to what harm the NCAA would suffer if the trial court granted UND an exemption from the policy or otherwise ordered that the policy be modified. The NCAA also asserts that UND cannot meet its four-prong burden for preliminary injunctive relief.

The undersigned held a hearing on the State's motion for a preliminary injunction on November 9, 2006. Appearing on behalf of the State were North Dakota Attorney General Wayne K. Stenehjem, Assistant Attorney General

[1] Affidavit of Dr. Walter Harrison, October 30, 2006, ¶ 20, appended to Defendant NCAA's Memorandum in Opposition to Plaintiff's Motion for Preliminary Injunction.

[2] Affidavits have also been submitted by Ms. Delise O'Meally, Director of Governance and Membership for the NCAA, and Dr. Bernard Franklin, Senior Vice President for Governance and Membership for the NCAA.

Tag Anderson, and Special Assistant Attorney General Peter W. Billings. Appearing on behalf of the Defendant were attorneys Wickham Corwin, Linda J. Salfrank, and Gregory L. Curtner.[3]

From the documentation and arguments presented to the trial court to date, the following appear to be undisputed facts:

1. The NCAA is an unincorporated association of more than 1,250 member institutions, all of which have athletic programs. It is organized into three major divisions, each governed by its own rules and regulations as adopted by the respective memberships. UND is a member in good standing in the NCAA, and its athletic teams, depending upon the sport, engage in Division I or Division II competitions. UND's hockey program is within the Division I classification, and all of UND's other sports are within Division II.

2. Each member institution has a contractual agreement with the NCAA, and each contract is divided into three sub-divisions: Constitution, Operating Bylaws, and Administrative Bylaws. UND's contractual agreement with the NCAA is set forth in the NCAA Division II Manual.[4]

3. The Constitution "consists of information relevant to the purposes of the Association, its structure, its membership and legislative-process information, and the more important principles for the conduct of intercollegiate athletics."[5]

4. The Bylaws contain all regulations governing the administration of intercollegiate athletics. The Operating Bylaws "consist of legislation

[3] The Court must comment on the excellent argument advanced by each counsel in support of their respective positions. The Court is cognizant of the sensitive nature of this action, and was impressed with the professionalism, demeanor, and preparedness of counsel.
[4] The trial court has been provided with a copy of the 2005-2006 NCAA Division II Manual, which has an effective date of August 1, 2005. All references hereafter to "Manual" are references to that publication.
[5] Manual, pg. ix.

adopted by the membership to promote the principles enunciated in the constitution and to achieve the [NCAA's] purposes."[6] The Administrative Bylaws "set forth policies and procedures for the implementation of (a) the general legislative actions of the Association, (b) the NCAA championships and the business of the Association, (c) the Association's enforcement program, and (d) the Association's athletics certification program. … These administrative bylaws may be adopted or modified by the applicable presidential administrative groups in Divisions I and II … on recommendation of the Committee on Infractions in Divisions I and II. … These same bylaws also may be amended by a majority vote of the membership [or applicable division(s)] at NCAA Conventions."[7]

5. The NCAA's Operating Bylaws include legislation governing NCAA championships,[8] as well as enforcement provisions.[9]

6. The NCAA Constitution directs that "[A]ll legislation of the Association that governs the conduct of the intercollegiate athletics programs of its member institutions shall be adopted by the membership in Convention assembled, or by the presidential administrative groups and the division management councils as set forth in Constitution 4, as determined by the constitution and bylaws governing each division... ."[10]

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[6] *Id.*
[7] *Id.*
[8] Manual, pgs. 253-259, Operating Bylaws, Article 18. Article 18.1 states that"[A]ll NCAA championships shall be conducted in accordance with this bylaw and the policies and procedures established by the Championships Committee, which shall establish and revise the policies and procedures governing the administration of NCAA championships, including selection processes, formats and distribution of revenues to participating institutions. NCAA championships shall be under the control, direction and supervision of the appropriate sports committees, subject to the requirements, standards and conditions prescribed in Bylaw 31. (The court notes that Bylaw 31 has no applicability to this litigation. It deals with institutional and individual eligibility *to participate* in championships. UND has not been denied that opportunity.)
[9] Manual, pgs. 261-268, Operating Bylaws, Article 19.
[10] Manual, pg. 37, Constitution, Article 5.01.

7. The NCAA's governance structure includes an Executive Committee, which oversees Association-wide issues and which is charged with ensuring that each division operates consistent with the basic purposes, fundamental policies, and general principles of the Association as set forth in the Constitution, Articles 1 and 2. In addition, the administrative structure of each division is directed to empower a body of institutional chief executive officers (known as the Division Presidents Council) to set forth the policies, rules, and regulations for operating the division.[11]

8. The NCAA's Executive Committee consists of 20 members. The Association's chief executive officer and the chairs of each of the divisional management councils are ex-officio nonvoting members, except that the Association's chief executive officer is permitted to vote in the case of a tie among the voting members of the Executive Committee present and voting. The other 16 voting members include various chief executive officers from each of the three NCAA divisions.[12]

9. The NCAA's Executive Committee is charged with the responsibility of, *inter alia*, identifying core issues that affect the Association as a whole, and then acting on behalf of the Association to resolve those core issues.[13]

10. The composition of the NCAA's Division II Presidents Council includes chief executive officers from each of Division II's four geographical regions based upon a weighted regional representation by member institutions, as well as two "at large" members.[14]

11. The NCAA Division II Presidents Council is charged with, *inter alia*, adopting non-controversial and intent-based amendments, administrative

[11] *Id.* at 27, Article 4.01.1.
[12] *Id.* at 28, Article 4.1.1.
[13] *Id*. at 28, Article 4.1.2(d) and (e).
[14] *Id.* at 29, Article 4.3.1.

bylaws, and regulations to govern Division II, and sponsoring Division II legislation.[15]

12. The Division II Management Council is responsible for, *inter alia*, implementing policies adopted by the NCAA Executive Committee and the Presidents Council. It is also charged with hearing and acting on appeals by member institutions of decisions made by a Division II committee or NCAA staff regarding the application of NCAA legislation (except actions of a committee with final authority over the issues subject to the appeal).[16]

13. The NCAA membership has recognized that "certain fundamental polices [sic] practices and principles have applicability to all members,"[17] and "the NCAA Constitution has specific provisions for the adoption of Association-wide legislation."[18]

14. The NCAA Constitution defines the elements of the Association's intended legislative provisions. It provides: "[T]he membership may adopt legislation to be included in the constitution of the Association, which sets forth basic purposes, fundamental policies and general principles that generally serve as the basis on which the legislation of the Association shall be derived and which includes information relevant to the purposes of the Association."[19] The Constitution further provides: "[E]ach division may adopt legislation to be included in the operating bylaws of the Association, which provide rules and regulations not inconsistent with the provisions of the constitution and which shall include, but not be limited to, the following

[15] *Id*. at 29, Article 4.3.
[16] *Id.* at 31, Article 4.6.2.
[17] *Id.* at 37, Article 5.01.2. This legislation is referred to as a "dominant" legislative provision. The Constitution defines such a provision as "a regulation that applies to all members of the Association and is of sufficient importance to the entire membership that it requires a two-thirds majority vote of all delegates present and voting in joint session at an annual or special Conv ention." Article 5.02.1.1.
[18] *Id*. at 37, Articles 5.01.2 and 5.02.1.
[19] *Id.* at 40, Article 5.2.1.

particulars: … (b) the establishment and control of NCAA championships (games, matches, meets and tournaments) and other athletics events sponsored or sanctioned by the Association… ."[20]

15. Division II of the NCAA has adopted only one Operational Bylaw that governs the use of logos on equipment, uniforms, and apparel. That particular Bylaw, however, does not specifically prohibit a student athlete from using Native American imagery while participating in a NCAA-sanctioned event.[21]

16. With regard to site selection for post-season playoff/championship athletic games, the criteria for site selection is governed by the NCAA Administrative Bylaws.[22]

17. On August 4, 2005, the NCAA Executive Committee "adopted a new policy to prohibit NCAA colleges and universities from displaying hostile and abusive racial/ethnic/national origin mascots, nicknames or imagery at any of the Association's national or regional championship competitions." The NCAA identified UND as a member institution subject to and affected by the new policy.[23] The policy became effective February 1, 2006, except for the institutions seeking an exemption from its application. The policy had emanated from a request by St. Cloud State University President Roy

[20] *Id.* at 40, Article 5.2.2.
[21] Manual, Operating Bylaws, pg. 75, Article 12.5.4.
[22] Manual, Administrative Bylaws, pg. 310, Article 31.1.3, sets forth the specific selection criteria.
[23] August 9, 2005 letter from Dr. Myles Brand, NCAA President, to UND President Charles E. Kupchella. That correspondence indicated that one of the NCAA's core principles included "promoting an atmosphere of respect for and sensitivity to the dignity of every person and integrating intercollegiate athletics into higher education so that the educational experience of the student-athlete is paramount." Dr. Brand's letter also indicated two avenues of appeal for any one of the 18 member institutions identified as being affected by the NCAA's action: Either appeal the Executive Committee's determination that its use of Native American imagery created a hostile or abusive environment, or seek to amend the Executive Committee's policy decision through a "modified process". Plaintiff's Brief in Support of Motion for Preliminary Injunction, October 6, 2006, Attachment J.

Saigo that the NCAA consider a resolution stating that the NCAA does not condone the use of Native American logos and nicknames.[24]

18. An August 9, 2005 letter from NCAA President Dr. Myles Brand to UND President Dr. Charles Kupchella indicated that UND was considered an offending member institution. The letter further explained that the appellate process required a member institution to appeal the determination first to the Executive Committee's Subcommittee on Gender and Diversity Issues. Then, if the first-level appeal was unsuccessful, the member institution could appeal the decision to the Executive Committee.

19. On August 19, 2005, the NCAA released a statement through the media indicating that it had changed the appellate process as earlier outlined in the August 9, 2006 letter to UND. The new policy directed appeals to be sent through Dr. Bernard Franklin, the NCAA's Senior Vice President for Governance and Membership, to an NCAA staff committee designated by the Executive Committee. That release also indicated that the "staff's decisions may be reviewed by the NCAA Executive Committee."[25]

20. On August 30, 2005, UND requested clarification from both Dr. Brand and Dr. Franklin.

21. On September 28, 2005, Dr. Brand wrote Dr. Kupchella advising him that the NCAA "staff committee has considered the University of North Dakota's request dated August 30, 2005, for a review of the NCAA Executive Committee's determination that the university's use of the 'Fighting Sioux' nickname and logo is hostile or abusive. This letter is to serve as formal notice that the staff review committee has determined that

[24] NCAA Memorandum, December 9, 2005, pg. 2, Plaintiff's Brief in Support of Motion for Preliminary Injunction, Attachment R.
[25] Plaintiff's Brief in Support of Motion for Preliminary Injunction, Attachment M.

North Dakota should be retained on the list of colleges and universities subject to restrictions on the use of Native American mascots, names and imagery at NCAA championships." Dr. Brand concluded by stating that if UND wished to appeal the staff committee's decision, it could do so by forwarding its appeal to the Executive Committee for consideration by the Division II Presidents Council.[26]

22. On November 4, 2005, UND responded to the NCAA staff committee's September 28, 2005 denial of its appeal and requested additional information regarding further appellate procedures to follow within the NCAA.[27]

23. On December 9, 2005, Dr. Franklin advised UND that if it wished to appeal the decision further, it had ten days to submit a written rebuttal to a staff committee memorandum, which was also issued on December 9, 2005. The memorandum stated, *inter alia*, that UND had the burden in the appellate process to rebut the presumption that the use of Native American imagery creates or leads to the creation of a hostile or abusive campus environment. It also required UND to meet a clear and convincing evidentiary standard.[28] Dr. Franklin indicated further that the NCAA Division II President's Council and the Executive Committee would consider both the rebuttal and the staff committee's December 9, 2005 memorandum prior to a formal appeal hearing on January 9, 2006 before the Executive Committee. He also indicated that the appeal hearing would be a paper-review process only, without further comments taken from UND or the staff committee.[29]

[26] Plaintiff's Brief in Support of Motion for Preliminary Injunction, Attachment N.
[27] Plaintiff's Brief in Support of Motion for Preliminary Injunction, Attachment Q.
[28] NCAA Memorandum, December 9, 2005, pg. 5, Plaintiff's Brief in Support of Motion for Preliminary Injunction, Attachment R.
[29] *Id.*

24. UND responded to the December 9, 2005 staff committee memorandum on December 23, 2005. It objected to the staff committee's appellate process and its "ever changing standard" in an attempt to justify the position that UND's use of Native American imagery was hostile and abusive. UND stated further that the Executive Committee had exceeded its authority in promulgating the policy.[30]

25. On January 18, 2006, the NCAA provided UND with a copy of the staff committee's memorandum response to the December 23, 2005 letter and indicated that UND had until February 1, 2006 to file a rebuttal to the committee's most recent response. The NCAA also explained that the Executive Committee would conduct a paper-review appeal on April 27, 2006, but that the policy in question was not subject to further discussion in the appeals process.[31]

26. On January 30, 2006, UND filed with the NCAA its response to the January 18, 2006 staff committee memorandum, reiterating what it had stated earlier. For what is relevant with regard to the pending motion for preliminary injunctive relief, the trial court considers only those assertions relative to what UND has characterized as a "fundamentally flawed" appellate process surrounding the entire Native American imagery issue within the NCAA, and its assertion once again that the Executive Committee had exceeded its authority in dealing with the issue.[32]

[30] UND Memo to NCAA, December 23, 2005, Plaintiff's Brief in Support of Motion for Preliminary Injunction, Attachment S.
[31] NCAA Staff Committee Memorandum, Subject: Reply to the University of North Dakota "Rebuttal," January 18, 2006, Plaintiff's Brief in Support of Motion for Preliminary Injunction as Attachment T.
[32] UND Letter, January 30, 2006, Plaintiff's Brief in Support of Motion for Preliminary Injunction, Attachment U.

27. On May 15, 2006, the NCAA advised UND that its appeal was unsuccessful and that the decision of the Executive Committee regarding application of the August 2005 policy was final.[33]

Pending Issue for Determination

The sole issue at this early juncture in this litigation is whether the State is entitled to preliminary injunctive relief pending the ultimate resolution of the underlying issues.

Applicable Law

An injunction is a court order that either prohibits or compels a party to do a specific act. A preliminary injunction is a provisional remedy granted to restrain action temporarily until the court can render a final decision on the merits. A preliminary injunction is an extraordinary and drastic remedy that is not granted routinely. Voracek v. Citizens State Bank, 461 N.W.2d 580, 585 (N.D. 1990) (citation omitted). However, "a preliminary injunction may issue if the movant has raised questions so serious and difficult as to call for more deliberative investigation." Dataphase Sys., Inc. v. C L Sys., Inc., 640 F.2d 109, 113 (8th Cir. 1981).[34] The moving party bears the burden of persuasion "by a clear showing." Voracek, 461 N.W.2d at 585.

A trial court has discretion to grant or deny a request for preliminary injunctive relief, and that discretion is based on the following factors: (1) substantial probability of succeeding on the merits; (2) irreparable injury; (3) harm to other interested parties; and (4) effect on the public interest. Eberts v. Billing County Bd. of Comm'rs, 695 N.W.2d 691, 693 (N.D. 2005) (citations omitted). No single factor is dispositive; the trial court must balance all factors to determine whether an injunction is appropriate.

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[33] NCAA letter, May 15, 2006, Plaintiff's Brief in Support of Motion for Preliminary Injunction, Attachment F.

[34] The analysis set forth in Dataphase is consistent with North Dakota law on the issue of whether injunctive relief is warranted. See F-M Asphalt, Inc. v. N.D. State Highway Dep't, 384 N.W.2d 663, 664 n.1 (N.D. 1986).

"A preliminary injunction will usually be denied if the applicant has an adequate alternative remedy in the form of damages or other relief." Voracek, 461 N.W.2d at 585; see also Viestenz v. Arthur Township, 54 N.W.2d 572, 578 (N.D. 1952) ("An injury is irreparable when it cannot be adequately compensated in damages, and it is not necessary that the pecuniary damage be shown to be great. … Acts which result in a serious change of, or are destructive to, the property affected either physically or in the character in which it ha been held or enjoyed, … do an irreparable injury"). The trial court must also balance the irreparability of injuries and inadequacy of damages if an injunction were not granted against the damages that granting an injunction would cause. Coleman v. Block, 632 F. Supp. 1005, 1012 (D. N.D. 1986) (citing Dataphase Sys., Inc., 640 F.2d 109).

The NCAA is correct in its assertion that North Dakota courts generally defer to association rules and decisions, citing Crandall v. North Dakota High Sch. Act. Assoc., 261 N.W.2d 921, 925-926 (N.D.1978).[35] The North Dakota Supreme Court has clearly stated that "it is the duty of the courts, regardless of personal views or individual philosophies, to uphold regulations adopted by administrative authorities unless those regulations are clearly arbitrary and unreasonable." Id. It is for that very reason that this court did not rule immediately after the November 9, 2006 hearing, as suggested by the State. Instead, before ruling on the motion, the court conducted a very deliberate and comprehensive review of all argument and materials presented by both parties. The court notes, however, that the State is challenging the policy as arbitrary and unreasonable. Although the court will not second-guess the wisdom of an association's rule or policy, it may determine whether that rule or policy comports with the law.

[35] Defendant NCAA's Memorandum in Opposition to Plaintiff's Motion for Preliminary Injunction, pg. 23.

Nonetheless, the court emphasizes that the determinations on the issues raised in this matter are preliminary. They are based on the limited evidence presented to date. Neither party should attempt to predict the ultimate outcome of this litigation based on the court's determinations on this motion, especially since both parties have indicated the need for additional discovery, and perhaps pre-trial motions, before presentation of the facts of this case to a jury in April 2007.

Decision

As the court stated at the outset of the November 9, 2006 hearing, this litigation will not determine whether UND's use of Native American imagery and the term "Fighting Sioux" are "hostile and abusive." That issue implicates the First Amendment, and is not before this court. The purpose of this lawsuit is to examine the methodology utilized by the NCAA Executive Committee in initially determining that UND could neither display its Native American logo on its uniforms during NCAA-sanctioned post-season play, nor bid to host a NCAA post-season championship or other playoff event as long as UND continued to use the imagery in sports-related activities. The procedures employed by the NCAA during the appellate process are also being challenged. Both issues involve a determination as to whether the NCAA Executive Committee has complied with its own procedural mandates as set forth in the NCAA Constitution and Bylaws. In sum, this case is about procedure and not substance.

The State has asserted three separate causes of action in its Complaint. With regard to the State's request for preliminary injunctive relief, the court now summarizes the parties' arguments relating to whether the State has established a substantial probability of succeeding on the merits of each of the claims.

Breach of Contract

The State asserts that the NCAA's Constitution and Bylaws do not vest the NCAA Executive Committee with legislative authority. Rather, the Executive Committee is empowered only to "forward proposed amendments to [the Constitution] and other dominant legislation to the entire membership for a vote," or "[c]all for a vote of the entire membership on the action of any division that it determines to be contrary to the basic purposes, fundamental policies and general principles set forth in the Association's constitution."[36] The State contends that the August 2005 policy was Association-wide legislation, and that the NCAA breached its contract with UND by failing to follow its own Constitution and Bylaws in enacting that legislation.

The NCAA responds that "Under the NCAA Constitution, one of the Executive Committee's obligations is to '[i]dentify core issues that affect the Association as a whole.'"[37] It further asserts that the Executive Committee was fulfilling one of its responsibilities delineated in Association Bylaws by identifying a core issue affecting the Association and then acting on behalf of the Association to resolve that issue. Thus, according to the NCAA, rather than breaching a contract with a member institution, it was fulfilling its obligation to the entire Association membership.[38] Finally, the NCAA emphasizes that courts should not disturb the rulings of an administrative body unless the rulings are arbitrary or unreasonable.[39]

Thus, the issue is whether the Executive Committee's promulgation and application of the policy relating to Native American imagery was within the parameters of its authority as set forth in the Association's Constitution and/or Bylaws.

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[36] Plaintiff's Brief in Support of Motion for Preliminary Injunction, pg. 3 (emphasis in original).
[37] Defendant NCAA's Memorandum in Opposition to Plaintiff's Motion for Preliminary Injunction, pg. 22.
[38] *Id.* at 22-23.
[39] *Id*. at 24 (citing Crandall v. N.D. High Sch. Act. Ass'n, 261 N.W.2d 921 (N.D. 1978).

Breach of Implied Covenant of Good Faith and Fair Dealing

The State claims that the NCAA has breached an implied covenant of good faith and fair dealing and focuses on three alleged indicia of bad faith. First, the NCAA purportedly interpreted and applied its August 2005 policy in an arbitrary, self-serving, and inconsistent manner. Second, the appellate process used to review UND's objections was repeatedly changed, eventually to the point of adopting evidentiary "presumptions" against UND. Third, at least one other member institution was treated differently than UND when it was granted a "namesake exception".[40]

The NCAA first responds by asserting that there is no North Dakota case law supporting the State's argument that inherent in every contract is an implied duty of good faith and fair dealing. It argues further that since this appears to be a case of first impression in North Dakota on this specific issue, the State cannot show a likelihood of success, at this preliminary stage, on a claim not "recognized by the North Dakota Supreme Court."[41] However, simply because an issue is one of first impression does not preclude a trial court from determining the issue. Nor does it detract from the potential validity of the claim.

With regard to the appellate process, the NCAA argues that there simply was no inconsistency nor any changes made in the procedure employed. It asserts that in every appeal, an appellant has the burden of showing that it is entitled to the relief it seeks.[42] In this particular case, it claims that "rather than showing bad faith and unfair dealing, the facts demonstrate that the NCAA provided multiple layers of meaningful administrative appellate review."[43]

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[40] Plaintiff's Brief in Support of Motion for Preliminary Injunction, pg. 4.
[41] Defendant NCAA's Memorandum in Opposition to Plaintiff's Motion for Preliminary Injunction, pg. 28.
[42] *Id.* at 36.
[43] Defendant NCAA's Memorandum in Opposition to Plaintiff's Motion for Preliminary Injunction, pg. 38.

Concerning the "namesake exemption" issue, the NCAA argues that allowing such exemptions demonstrates "flexibility at the NCAA rather than bad faith. It demonstrates an understanding that, on a case-by-case basis, exceptional circumstances may justify individual relief from a general position." It also argues that even though the NCAA itself may consider the use of Native American imagery to be "abusive and hostile," this exemption also demonstrates its respect for the sovereignty of federally-recognized Native American nations.[44]

Violation of State Antitrust Laws

The antitrust claim is the most complex of the claims. North Dakota has adopted antitrust legislation,[45] which follows the Uniform State Antitrust Act and which contains language similar to that of Section 1 of the Sherman Act.[46]

Antitrust laws are aimed at conduct that threatens to deprive consumers of benefits of competition. Antitrust legislation has application only when two prerequisites are present. First, the conduct complained of must constitute trade or commerce, and second, such conduct must unreasonably restrain competition. Absent a statutory violation, antitrust violations are not usually *per se* offenses, and the courts apply a "rule of reason" analysis in determining the validity of such a claim. Such an analysis requires a balancing of the effect of a given practice on competition, including a consideration of the pro-competitive and anti-competitive consequences of a given practice.

The State argues that the NCAA's decision to not consider a competitive bid from UND to host any NCAA championship events constitutes a group

[44] *Id.* at 39.
[45] N.D.Cent.Code Ch. 15-08.1.
[46] 15.U.S.C. §§ 1-7.

boycott and, therefore, it is a *per se* violation of antitrust law. It argues further that economic benefits lost as a result of its inability to host NCAA championship events clearly brings it under the antitrust law umbrella.

The NCAA responds that "courts have repeatedly held that NCAA rules regulating intercollegiate athletics are not restraints of 'trade or commerce' and thus cannot be challenged under antitrust laws."[47] Relying on Adidas American, Inc. v. NCAA, 40 F. Supp. 2d 1275 (D. Kan. 1999), the NCAA argues that the August 2005 policy neither has a commercial objective nor provides any commercial advantage.[48] Therefore, from its perspective, neither the Sherman Act nor N.D.Cent. Code § 15-08.1-02 has any application in this case.

The NCAA further notes that United States Supreme Court precedent has limited the application of the *per se* rule to cases involving "horizontal agreements among direct competitors."[49] It then asserts that since the NCAA is in a vertical relationship with its member institutions who supply their athletic teams for its championship competitions, the situation complained of by the State must be analyzed under the rule of reason standard.[50]

Finally, the NCAA argues that UND has made no showing that the August 2005 policy injures competition within the NCAA. Rather, it asserts that UND has only alleged harm to itself. Relying on the doctrine that antitrust laws

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[47] Defendant NCAA's Memorandum in Opposition to Plaintiff's Motion for Preliminary Injunction, pg. 44.

[48] In Adidas, the sportswear manufacturer challenged an NCAA bylaw that governed the size and placement of logos on athletic uniforms worn in NCAA competition. It argued that the bylaw in question was an unreasonable restraint on advertising and promotion markets since it prevented Adidas from making greater use of NCAA uniforms as an advertising vehicle. The trial court rejected Adidas's argument and denied its request for injunctive relief by concluding that the bylaw had "noncommercial purposes and objectives" and did not provide the NCAA with any commercial or economic advantage.

[49] Defendant NCAA's Memorandum in Opposition to Plaintiff's Motion for Preliminary Injunction, pg. 49 (citing Nynex v. Discon, 525 U.S. 128, 135 (1998)).

[50] *Id.* (citing Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 55 (1977)). The NCAA further asserts that even if enforcement of the August 2005 policy against UND could be characterized as a horizontal agreement, it still would not be an action subject to antitrust action since the policy is not commercially motivated. *Id.*

were promulgated to protect competition—not competitors,[51] the NCAA argues that the State does not have antitrust standing.[52] Finally, the NCAA directs the court's attention to Les Shockley Racing, Inc., v. Nat'l Hot Rod Ass'n, 884 F.2d 504, 508 (9th Cir. 1989), which held that an antitrust plaintiff must "plead and prove a reduction of competition in the market in general and not mere injury to their own positions as competitors."

Based on the arguments of counsel all other matters of record, the Court issues the following findings and order:

1. Resolution of the breach of contract claim is uncertain due to what appear to be inconsistent or incomplete provisions within the NCAA Constitution and Bylaws. For example, the following issues have already been raised: What is policy? What is legislation? Can policy be deemed legislation? If so, under what circumstances? Can NCAA Executive Committee policy be enforced as association-wide legislation without a vote of its membership? What is the exact appellate process to be followed under given situations? Can the Executive Committee usurp the Division II Championship Committee's authority and responsibilities for post-season play? Does the Executive Committee's responsibility to identify and act upon core issues include the promulgation of binding policy, or does it mandate the proposal of suggested legislation to the membership to resolve such issues? Did the Division II Management Council have the authority or responsibility to review UND's appeal? Does the NCAA Constitution or Bylaws allow the Executive Committee to be the final arbiter of its own decisions? These are all questions that counsel for both parties will certainly focus upon during trial for ultimate jury resolution as to whether the NCAA breached its contractual duties to UND. Several rules of construction will likely apply,

[51] *Id*. at 55 (citing Am. Ad Mgmt., Inc. v. Gen. Tel. Co. of Ca., 190 F.3d 1051, 1055 (9th Cir. 1999); Baglio v. Baska, 940 F.Supp. 819, 828 (W.D.Pa. 1996)).
[52] *Id*. (citing Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 334 (1990); Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489 (1977); Pool Water Prods. v. Olin Corp., 258 F.3d1024, 1026 (9th Cir. 2001)).

such as the rule that ambiguities in contracts are generally construed against the drafter. Given these rules, as well as the record showing a lack of clarity in the NCAA Constitution and Bylaws, the court finds that the State has met established a substantial likelihood of prevailing on the merits of the breach on contract claim.

2. Ultimate resolution of the breach of an implied covenant of good faith and fair dealing will be determined by a jury. However, at this juncture, the Court finds that the State has established a substantial likelihood of prevailing on the breach of implied covenant of good faith and fair dealing claim. The State has presented substantial evidence that the appellate rules changed and burdens shifted after the NCAA identified UND as an offending member institution.

3. However, the State has not, based upon the evidence before the court at this juncture, met its burden of establishing a substantial likelihood of prevailing on the merits of its state antitrust claim against Defendant NCAA. In particular, the State has not presented sufficient evidence to establish that enforcement of the August 2005 policy will result in a reduction of competition of the market in general.

4. The State has met its burden of establishing irreparable harm to the reputation of UND if it is characterized as an institution which allows a "hostile and abusive" environment to exist toward Native Americans. This litigation is very likely to be quite protracted, and such harm can only be mitigated now by granting injunctive relief pending a resolution. Ultimately, a jury will decide whether the NCAA's determination comported with its Constitution and Bylaws and after according UND proper due process in defending against its determination. Monetary damages cannot repair damaged reputations. The court notes that its decision on this point is not based on any claimed potential economic loss that UND has asserted it may suffer in the interim; those damages, if any, may be compensated for

monetarily if the State ultimately prevails in this action. Nonetheless, the court finds that the potential damage to UND's reputation is broad, dramatic, and real. Thus, the court finds that the State has satisfied the irreparable harm requirement.

5. The trial court has balanced the harm of not granting injunctive relief to UND to the harm that might be suffered by the NCAA if a preliminary injunction would issue. From a strictly economic standpoint, the NCAA would lose nothing. The playoffs will go on regardless, and its share of revenues for post-season play will be approximately the same regardless of the venue. On the other hand, UND would lose significant revenues if it had to forfeit home-field advantage(s) while this litigation is pending. This, coupled with the stigma of UND being hostile to Native Americans, shows that UND will suffer more harm than the NCAA should preliminary injunctive relief be denied.

6. All parties to this litigation have agreed that the underlying issue in this case is one of great sensitivity, emotion, and controversy. Until the issues are resolved with finality through exhaustion of all appropriate means, there will be no resolution for those on either side of the issue, and it will remain a matter of great public interest. Until such resolution is achieved, the controversy between UND and the NCAA will continue to have a negative impact on the public at large—regardless of which side of the issue individuals may be on. Simply put, the issues underlying this litigation must be resolved for the good of all. Thus, although the court finds the public interest factor significant, it also finds the factor neutral.

Order

Based upon the foregoing, the State's request for preliminary injunctive relief pending full litigation and resolution of the issues raised in its Complaint is **GRANTED**. Consistent therewith, **IT IS HEREBY ORDERED THAT** the

NCAA is enjoined from enforcing its August 4, 2005 policy, which prohibits UND from using Native American imagery in post-season NCAA athletic competitions and from hosting post-season NCAA playoff events. This injunction remains in effect pending resolution of all issues raised in this matter or by earlier court order. Until such time as the NCAA can establish that the preliminary injunction is causing it any definitive financial harm, there shall be no need for the State to furnish a bond or undertaking in this matter.

Dated this 11th day of November 2006.

BY THE COURT:

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Lawrence E. Jahnke
District Judge