

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
NORTHEASTERN DIVISION

The Spirit Lake Sioux Tribe of Indians, by)
and through its Committee of)
Understanding and Respect, and Archie)
Fool Bear, individually, and as)
Representative of more than 1004)
Petitioners of the Standing Rock Sioux)
Tribe,)

Case No. 2:11-cv-95

Plaintiffs,)

**ORDER GRANTING DEFENDANT’S
MOTION TO DISMISS**

vs.)

The National Collegiate Athletic)
Association,)

Defendant.)

INTRODUCTION AND SUMMARY OF HOLDING

At the outset, it is important to note what the pending motion is not about. It is not about the wisdom of the NCAA’s policies. It is not about whether or not the “Fighting Sioux” nickname and logo will remain employed by the University of North Dakota (“UND”). It is not about the collateral consequences that UND might suffer if it continues to use the nickname and logo. And it is most decidedly not about whether the Spirit Lake Tribe has been tethered to the Standing Rock Tribe by a settlement agreement that neither tribe was a party to. Rather this motion is narrowly drawn to have the Court resolve two preliminary matters: (1) does the court have jurisdiction; and (2) if so, does the Committee have standing to bring these actions?

Before the Court is the National Collegiate Athletic Association’s (“NCAA”) motion to dismiss the complaint filed by the plaintiffs, the Committee of Understanding and Respect, and Archie Fool Bear, individually and as representative of more than 1,004 petitioners from the

Standing Rock Sioux Tribe (the “Committee”) (Doc. #10). The Committee founds its complaint on both diversity jurisdiction and federal question jurisdiction. The NCAA alleges numerous grounds for dismissing the Committee’s complaint, including lack of standing, collateral estoppel, failure to meet statutes of limitation, and failure to state any claim upon which relief may be granted. Because complete diversity of citizenship does not exist in this case, diversity jurisdiction cannot be established, and provisions of North Dakota law and related procedural considerations such as statutes of limitation are inapposite. Under the provisions of federal law pled in the complaint establishing federal question jurisdiction, the Committee fails to raise a colorable claim that survives the NCAA’s motion to dismiss. Because no relief can legally be afforded under federal law as pled by the Committee, the NCAA’s motion to dismiss is GRANTED.

FACTS

The never-ending saga of the University of North Dakota’s “Fighting Sioux” nickname controversy is tortuous and incapable of full explanation here. Spanning a spectrum of protests for and against the name, tribal resolutions, state laws, and fierce public debate, the NCAA’s championship policy has created significant turmoil within the state of North Dakota over the propriety of the continued use of the “Fighting Sioux” nickname. The facts presented here are limited to those pertinent to this federal case, with such elaboration as is necessary to put this ruling in context.

The NCAA is a private association of American universities and colleges whose members voluntarily compete for athletic championships in multiple sports. In 2005, the NCAA instituted a new championship policy addressing the display of Native American nicknames, mascots, and imagery at events conducted under its governance. (Doc. #1-3). The policy

prohibited all use of covered imagery at its events, including the use of uniforms, images, and any other references. (Id.) If a covered institution continues with an unapproved use of nicknames and imagery it suffers sanctions, including ineligibility for hosting NCAA playoff events and restrictions on the display of the banned imagery, including the use of the name, during those events.

One of the members subject to sanctions under the championship policy is the University of North Dakota (“UND”) as a result of its “Fighting Sioux” nickname and logo. In October 2007, after litigation over the NCAA policy, UND entered into a settlement agreement with the NCAA in which UND would be permitted to retain the “Fighting Sioux” nickname and imagery if it received written approval for their use from the Spirit Lake and Standing Rock Sioux Tribes. (Doc. #1-3). The Spirit Lake Sioux Reservation is located entirely within the state of North Dakota, whereas the Standing Rock Sioux Reservation straddles the border between North Dakota and South Dakota, but has its tribal headquarters in Fort Yates, North Dakota. The Spirit Lake Tribe gave written approval to UND for the use of the “Fighting Sioux” nickname and imagery on October 1, 2009. (Doc. #1-25).

The Standing Rock Tribe has never given its approval, and UND, through the North Dakota State Board of Higher Education, made a decision to retire the “Fighting Sioux” nickname and logo by August 1, 2010. Recognizing the retirement of these marks, the Standing Rock Tribal Council then passed a resolution declaring that “further discussion is not necessary and will not be conducted as there are many issues of priority that need timely attention.” (Doc. #1-12).

The Committee brought suit in state court in North Dakota seeking full enforcement of

the settlement agreement between the NCAA and the State of North Dakota, as well as an injunction preventing the retirement of the “Fighting Sioux” nickname and logo prior to the November 30, 2010 deadline for approval. Davidson v. State, 2010 ND 68, ¶ 6, 781 N.W.2d 72. The district court dismissed the Committee’s suit, concluding that the settlement agreement was not ambiguous and the State Board of Higher Education’s decision to terminate the nickname and imagery before the November 30, 2010 deadline did not violate the agreement. Id. at ¶ 7. The North Dakota Supreme Court affirmed the decision, concluding that while the tribes had “important contributions in determining whether the Fighting Sioux nickname and logo should be used by UND”, these contributions did not prevent the Board from retiring the nickname in accordance with the agreement. Id. at ¶ 19.

The Committee now brings suit in this Court in another attempt to save the “Fighting Sioux” nickname and logo. Joining the Committee as a party plaintiff is Archie Fool Bear, a former Standing Rock Tribal Councilman, on behalf of himself and an alleged group of more than 1,004 Standing Rock Tribal members who sought a vote on the nickname issue on the Standing Rock Reservation. (Doc. #1, ¶ 5). The Committee alleges an expansive set of claims, consisting of twelve counts allegedly resolvable under the laws of North Dakota through diversity jurisdiction, and various provisions of federal law through federal question jurisdiction. (Doc. #1). The Committee seeks an equally expansive twelve-item prayer for relief, including requests that the NCAA be enjoined from implementing any policies against UND for its use of the “Fighting Sioux” nickname and that the plaintiffs be awarded non-economic damages in a reasonable amount not less than \$10,000,000.00. (Id.)

The NCAA moved to dismiss the Committee’s complaint claiming: (1) the plaintiffs lack

standing; (2) collateral estoppel bars issues previously litigated; (3) many of the issues raised are time-barred; and (4) the complaint fails to state a claim on which relief can be granted. (Doc. #10). The Committee responded to the NCAA's motion on March 13, 2012, with attached affidavits and news articles. (Doc. #18). The NCAA replied to the Committee's response on March 30, 2012. (Doc. #25). A hearing was held on April 19, 2012, and the motion to dismiss is now ripe for consideration by this Court.

JURISDICTION

In its pleadings, the Committee claims that diversity serves as a basis for jurisdiction. In order to establish jurisdiction under 28 U.S.C. § 1332, there must be complete diversity of citizenship between the opposing parties, meaning that no defendant may hold citizenship in a state where any plaintiff holds citizenship. Junk v. Terminix Intern. Co., 629 F.3d 439, 445 (8th Cir. 2010). In addition to complete diversity, the plaintiff must also meet the amount in controversy requirement. 28 U.S.C. § 1332. Given the circumstances of this case, the Court need not concern itself with the amount in controversy, as citizenship alone forecloses the possibility of diversity jurisdiction.

The Committee is operating under authority from the Spirit Lake Tribe (Doc. #29-1), which is the equivalent of direct tribal action. See Auto-Owners Ins. Co. v. Tribal Court of Spirit Lake Indian Reservation, 495 F.3d 1017, 1021 (8th Cir. 2007) (Tribal sub-entity considered part of the tribe); Hagen v. Sisseton-Wahpeton Cmty. Coll., 205 F.3d 1040, 1043 (8th Cir. 2000) (Tribal agencies serve as "an arm of the tribe"). This tribal status is salient because "an Indian tribe is not a citizen of any state and cannot sue or be sued in federal court under diversity jurisdiction." Auto-Owners at 1020 (quoting Standing Rock Sioux Indian Tribe v.

Dorgan, 505 F.2d 1135, 1140 (8th Cir. 1974)). However, the individual plaintiffs residing on the Standing Rock Reservation are located in North Dakota and South Dakota. These individuals are deemed to be citizens of those states under 8 U.S.C. § 1401, thus establishing North Dakota and South Dakota as the states of citizenship for the plaintiffs in considering diversity jurisdiction.

In considering the citizenship of the NCAA, “[u]nincorporated enterprises are analogized to partnerships, which take the citizenship of every general and limited partner.” Belleville Catering Co. v. Champaign Mkt. Place, L.L.C., 350 F.3d 691, 692 (7th Cir. 2003); See also, Carden v. Arkoma Assoc., 494 U.S. 185, 195 (1990) (“We adhere to our oft-repeated rule that diversity jurisdiction in a suit by or against the entity depends on the citizenship of all the members”) (quotation omitted). The NCAA is an unincorporated association of American colleges and universities, twelve of which are located in North Dakota and South Dakota. Who We Are - NCAA.org, National Collegiate Athletic Association, <http://www.ncaa.org/wps/wcm/connect/public/NCAA/About+the+NCAA/Who+We+Are/> (last visited April 24, 2012). Complete diversity is destroyed in this case by the co-existence of the resident plaintiffs and the NCAA member institutions in the states of North Dakota and South Dakota.¹

“For a court to pronounce upon the meaning or the constitutionality of a state or federal law when it has no jurisdiction to do so is, by very definition, for a court to act *ultra vires*.” Steel Co. v. Citizens for a Better Env’t, 523 U.S. 83, 101-02 (1998). Diversity jurisdiction

¹ The following institutions are members of the NCAA in North Dakota and South Dakota: UND, North Dakota State University, University of Mary, University of South Dakota, South Dakota State University, Augustana College, Northern State University and Presentation College. The University of Sioux Falls and Minot State University are transitional members.

cannot be established in this case, and therefore provisions of North Dakota law are not applicable through the Erie Doctrine.

If the Court has jurisdiction over any of the claims, they must be subject to federal question jurisdiction using federal law as pled by the Committee. In its complaint, the Committee highlighted eleven provisions of federal law governing this case which it claims trigger federal question jurisdiction. The twelve counts alleged against the NCAA by the Committee are addressed where possible using these eleven federal legal provisions, though some of the counts pled are plainly federal statutes themselves.

DISCUSSION

I. Applicable Standard of Review

This matter is currently before the Court on a motion to dismiss filed by the NCAA. However, under Rule 12(d) of the Federal Rules of Civil Procedure, a motion to dismiss must be treated as a motion for summary judgment when matters outside the pleadings are presented to and considered by the Court in reaching its ruling. The Committee has submitted affidavits and newspaper articles in support of its injury claims, as well as information regarding the 1969 pipe ceremony, that must be considered by this Court in ruling on the NCAA's motion. Accordingly, the Court must proceed under the summary judgment standard of review, which requires that evidence be viewed in the light most favorable to the plaintiffs and that all inferences be drawn in their favor. Country Life Ins. Co. v. Marks, 592 F.3d 896, 898 (8th Cir. 2010). Summary judgment is available "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c)(2). "Credibility determinations, the

weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge.” Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 150 (2000). Thus, if it is necessary to weigh the evidence or make credibility determinations, summary judgment is unavailing. Simply stated, When the record as a whole at the time of the motion “could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial” and summary judgment is appropriate. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986).

II. The Committee’s Claims

(A) 42 U.S.C. § 1981 - Equal rights under the law

Section 1981 of Title 42 of the United States Code serves to protect the interests of all persons within the United States by ensuring rights equal to those enjoyed by white citizens.

This statute provides:

(a) Statement of equal rights

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

(b) “Make and enforce contracts” defined

For purposes of this section, the term “make and enforce contracts” includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

(c) Protection against impairment

The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

42 U.S.C. § 1981. To establish a prima facie case of discrimination under Section 1981, the Committee must show: (1) that it is a member of a protected class; (2) that the NCAA intended to discriminate on the basis of race; and (3) that the discrimination interfered with a protected activity as provided in the statute. Bediako v. Stein Mart, Inc., 354 F.3d 835, 839 (8th Cir. 2004). Though civil rights pleadings are liberally construed, “such pleadings must not be conclusory and must set forth the claim in a manner which, taking the pleaded facts as true, states a claim as a matter of law.” Id. (quoting Nickens v. White, 536 F.2d 802, 803 (8th Cir. 1976)) (emphasis in original). The plaintiffs are clearly members of a protected class, as the entire thrust of Section 1981 is to ensure that rights afforded to all persons are equal to those enjoyed by white citizens. The difficult challenge for the Committee is to prove that the NCAA acted with an intent to discriminate, and that this discrimination interfered with a protected activity.

The Committee makes two contract claims that it contends constitute a Section 1981 violation. More specifically, the Committee argues that the NCAA deprived the plaintiffs of their right to make and enforce contracts including “the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship” on account of their Sioux tribal membership.

(1) Indispensable Parties

The Committee’s first claim is that the Standing Rock and Spirit Lake Tribes were indispensable parties to the October 2007 settlement agreement between the State of North Dakota and the NCAA. The Committee bases this assertion on the terms of the agreement which required “clear and affirmative support for the ‘Fighting Sioux’ nickname and logo . . . from both

the Spirit Lake Tribe and the Standing Rock Sioux Tribe” by written confirmation in accordance with tribal procedures and constitutions. The Committee contends that even though the tribes were indispensable parties, they were systematically denied any involvement in the settlement negotiations on the basis of their race.

While North Dakota law is not pertinent to this case in the Erie context, the doctrine of collateral estoppel brings the North Dakota Supreme Court’s decision in Davidson squarely to the fore. Collateral estoppel applies when: “(1) the issue sought to be precluded is identical to the issue previously decided; (2) the prior action resulted in a final adjudication on the merits; (3) the party sought to be estopped was either a party or in privity with a party to the prior action; and (4) the party sought to be estopped was given a full and fair opportunity to be heard on the issue in the prior action.” United States v. McManaman, 673 F.3d 841, 847 (8th Cir. 2012) (quotation omitted). Judicial decisions from a state court are entitled to the same full faith and credit in every court within the United States as they have in the courts of the state from which they were rendered. 28 U.S.C. § 1738.

The Committee was the plaintiff in Davidson, and it was given a full and fair opportunity to litigate its case from the state district court through appeal in the North Dakota Supreme Court. One of the issues that was adjudicated with finality on the merits was this same indispensable parties claim, phrased as whether “the plain language of the settlement agreement delegated to the two Indian tribes the ultimate authority to determine usage of the Fighting Sioux nickname and logo.” Davidson at ¶ 12. The Committee claimed in Davidson that because the tribes’ approval was required for UND to retain the “Fighting Sioux” nickname and logo, these marks could not be retired prior to the expiration of the deadline set forth in the settlement

agreement. Id. The North Dakota Supreme Court held that the decision to retire the “Fighting Sioux” nickname and logo was left solely to UND and the North Dakota State Board of Higher Education, and that the tribes did not hold authority over that decision:

Although the language of the settlement agreement recognizes the North Dakota Sioux Tribes have important contributions in determining whether the Fighting Sioux nickname and logo should be used by UND and the agreement requires UND to continue to solicit the views of the two tribes on the use of the nickname and logo, we do not construe that language to require UND to continue using the nickname and logo through November 30, 2010. That language must be harmonized with the language allowing UND to "transition to a new nickname and logo at the end of the Approval Period, or at any time during the Approval Period.

Davidson at ¶ 19.

The distinction between the issue confronted in Davidson, that the State Board of Higher Education could not retire the nickname and logo prior to the settlement deadline, and the issue raised here, that the entire settlement agreement is void, is immaterial. The crux of both claims is an argument that the tribes were indispensable parties to the settlement agreement and that they held authority over its terms. The North Dakota Supreme Court definitively ruled that the tribes were not indispensable parties—that the authority over the name was vested in the State Board of Higher Education and that the tribes only had “important contributions” to make. These “important contributions” are not synonymous with “indispensability” as is made plain by the opinion in Davidson. This decision is entitled to full faith and credit under the doctrine of collateral estoppel as the circumstances of this case meet all four conditions requisite for the doctrine’s employment. No independent fact-finding by this Court is necessary or proper under these circumstances on this issue.

The settlement agreement was executed exclusively between the NCAA and the State of North Dakota and its sub-entities. As non-parties to the contract, the tribes were afforded no

defined contractual benefit beyond the right of consultation by the State of North Dakota and its sub-entities. The NCAA made neither a promise to the tribes nor a promise for the tribes' benefit and thus could not infringe upon any protected contractual rights guaranteed by Section 1981. The Committee's "indispensable parties" claim is without merit and must be dismissed.

(2) Tortious Interference with a Contract / Breach of Contract

The second contract-based violation of Section 1981 alleged by the Committee focuses on a 1969 pipe ceremony held on the UND campus. The Committee alleges that a delegation from the Standing Rock Tribe, and at least one representative from the Spirit Lake Tribe, traveled to the UND campus and conferred upon the university the right to use the nickname "Fighting Sioux" in perpetuity. While no formal contract was executed, the Committee urges that an accord was memorialized through the lighting of a sacred pipe. Originally framed as "breach of contract," the Committee contends that the NCAA's championship policy sanctioning UND for the use of the "Fighting Sioux" nickname and logo constitutes a tortious interference with the contract formed by the 1969 pipe ceremony.

While the Court respects the sanctity and solemnity that tribal traditions richly deserve, the 1969 pipe ceremony has no legal significance on the facts as pled by the Committee. While it is rudimentary contract law that legal obligations can be created between parties in ways other than putting pen to paper, the 1969 pipe ceremony fails to meet the basic requirements of a contract. "A contract is a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty." Restatement (Second) of Contracts § 1 (1979). The authority possessed by the tribal delegation at the ceremony is uncertain, but the Court must consider all facts in the light most favorable to the

plaintiffs under the summary judgment standard. Marks, 592 F.3d at 898. Accepting the facts as pled by the Committee, it appears that the tribes did give a blessing of some sort to UND for the use of the “Fighting Sioux” nickname, though it is axiomatic that no such blessing could have been given to the current logo which was not adopted until 1999.

Even when construing this as a binding promise on the part of the tribes, however, the remaining elements of an enforceable contract have not been met. For instance, it is entirely unclear what promise UND offered in return for the tribal blessing. Even assuming that UND agreed in some way to continue using the nickname, the Committee was unable to demonstrate at the hearing that this created a continuing duty on the part of UND, as there appears to be no tangible restriction preventing the university from making a voluntary decision to choose a new nickname at any time it determined provident. In the same vein, there was no legal obstacle under our jurisprudence barring the tribes from revoking their blessing, or alleged promise conveying the nickname. More importantly, even if such restrictions were placed on the parties, the courts would have been powerless to redress any breach of this “contract.” The Committee has not explained—and cannot explain—what legal recourse any of the parties would have had if the nickname had been retired or the blessing revoked, and what possible remedy could be employed to offer adequate redress to the parties. Simply put, viewing the facts in the light most favorable to the Committee, an agreement of some sort was reached between the parties, but it was of such a nature that it could not be construed as conferring any legal rights or obligations on the parties. While it is self-evident that the parties may have voluntarily chosen to act in accordance with the 1969 pipe ceremony, it is equally apparent that neither UND nor the tribes were compelled to do so by force of law.

Even if the 1969 pipe ceremony could be construed as placing a contractual duty on UND to keep the “Fighting Sioux” nickname, the effect of the NCAA championship policy simply cannot rise to the level of tortious interference with a contract. Under the plain terms of the policy, UND and other similarly-situated schools are under no obligation to retire their American Indian nicknames and imagery. While the policy mandates modest sanctions for the use of these marks, there is no directive that the member schools must retire them. Under either rationale, the Committee is unable to demonstrate that the NCAA has interfered with protected contractual rights under Section 1981, and these claims must fail.

(B) 42 U.S.C. § 1983 - Equal rights under the law

The Committee raises Section 1983 of Title 42 of the United States Code both in its claim for jurisdiction and as a distinct count alleged against the NCAA. This statute provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress

42 U.S.C. § 1983. To prevail on its 1983 claim, the Committee must prove (1) that the NCAA acted under color of state law, and (2) that the alleged wrongful conduct deprived the plaintiff of a constitutionally protected federal right. L.L. Nelson Enter., Inc. v. County of St. Louis, Mo., 673 F.3d 799, 805 (8th Cir. 2012). The Committee alleges that the NCAA acquires the status of a state actor through 42 U.S.C. § 2000d, which forbids racial discrimination in any activity receiving federal financial assistance. Because federal funds are received by many of the students attending the NCAA member institutions and the institutions themselves, the Committee contends that the NCAA should be deemed a state actor.

In National Collegiate Athletic Ass’n v. Tarkanian, 488 U.S. 179 (1988), the United States Supreme Court confronted the question of whether the NCAA was a state actor under Section 1983. In Tarkanian, a famous basketball coach sued the NCAA alleging that impending sanctions for violations of NCAA rules that would result in a “demotion and a drastic cut in pay” constituted a violation of his Fourteenth Amendment due process rights in violation of 42 U.S.C. § 1983. Id. at 181. Tarkanian alleged that because his public university employer, the University of Nevada at Las Vegas, delegated oversight of its athletic programs and enforcement of rules to the NCAA, the NCAA became a state actor. Id. at 191-92. The United States Supreme Court rejected this argument, and in doing so, recognized that the limited punitive powers of the NCAA weighed against a finding of state actor status: “The NCAA enjoyed no governmental powers to facilitate its investigation. It had no power to subpoena witnesses, to impose contempt sanctions, or to assert sovereign authority over any individual. Its greatest authority was to threaten sanctions against UNLV, with the ultimate sanction being expulsion of the university from membership.” Id. at 197. The Supreme Court concluded that any sanctions imposed against Tarkanian were made under the force of the university’s membership in the NCAA, and not under any force of state law. Id. at 199.

Tarkanian mirrors the instant case because like the basketball coach, the tribes are asserting state actor status and a Section 1983 violation in response to the imposition of NCAA sanctions. Those sanctions are directed at UND, however, and not the Committee or any of the other plaintiffs. Tarkanian foreclosed any claim that UND may have had that the NCAA is a state actor, and the plaintiffs, who have absolutely no privity with the NCAA at all, have a position that is even more attenuated. The NCAA’s choice to adopt a policy that includes

sanctions for the use of specified nicknames and imagery—however provident or improvident that policy may be—is merely a directive by a voluntary association to its membership. As Tarkanian demonstrates, such governance cannot rise to the level of state action.

Likewise, the receipt of federal funding by institutions and students cannot transform the NCAA into a state actor. If this were true, any private entity whose employees or members received a federally-backed loan would conduct all of its activities under color of state law. Such a finding would be absurd and render the “state actor” analysis a meaningless formality in any case alleging a violation of Section 1983, or Title VI.

Even under a view of the facts most deferential to the Committee, the NCAA is not a state actor based upon the plain record in this case and the Supreme Court’s holding in Tarkanian. More importantly, there is no valid contractual right between the Committee and the NCAA that could have been infringed, and the Committee raises no other credible claim that a protected right was violated. As a result, the Committee fails to raise a colorable claim for a constitutional violation of 42 U.S.C. § 1983 and this count must be dismissed.

(C) 42 U.S.C. 1996 - Protection and preservation of traditional religions of Native Americans

The Committee alleges that the 1969 pipe ceremony was a sacred ritual with a basis in their traditional tribal religion, and the NCAA’s failure to acknowledge the significance of the ceremony constitutes a violation of the American Indian Religious Freedom Act. The Act provides:

On and after August 11, 1978, it shall be the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions of the American Indian, Eskimo, Aleut, and Native Hawaiians, including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites.

42 U.S.C. § 1996. Even when viewing all facts in the light most favorable to the Committee, this statute cannot possibly form the basis for the relief sought.

In Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988), a group of American Indians contested the United States Forest Service's plan to construct a road through federal land which contained an area traditionally used for religious rituals requiring an undisturbed natural setting. Id. at 442-43. They asserted that the American Indian Religious Freedom Act mandated that the federal government could not disturb this land traditionally used for religious practices. Id. at 455. The United States Supreme Court squarely rejected this argument, ruling that the Act mandated some higher level of consideration for effects on Native religions, but "[n]owhere in the law is there so much as a hint of any intent to create a cause of action or any judicially enforceable rights." Id. The Supreme Court explained the history undergirding this finding:

What is obvious from the face of the statute is confirmed by numerous indications in the legislative history. The sponsor of the bill that became AIRFA, Representative Udall, called it "a sense of Congress joint resolution," aimed at ensuring that "the basic right of the Indian people to exercise their traditional religious practices is not infringed without a clear decision on the part of the Congress or the administrators that such religious practices must yield to some higher consideration." 124 Cong.Rec. 21444 (1978). Representative Udall emphasized that the bill would not "confer special religious rights on Indians," would "not change any existing State or Federal law," and in fact "has no teeth in it."

Id. Such a result is sound, because the conferral of substantive rights on the sole basis of religion would likely mandate a violation of the First Amendment on the part of the government. See id. at 452-53, Lockhart v. Kenops, 927 F.2d 1028, 1036 (8th Cir. 1991).

Even if all the facts as pled by the Committee regarding the sanctity of the 1969 pipe ceremony are taken as true, the Committee still cannot obtain legal relief through the American

Indian Religious Freedom Act because the Act does not establish any judicially enforceable rights. As a result, this count must be dismissed.

(D) 25 U.S.C. § 1302 - Constitutional rights (Indian Civil Rights Act)

The Committee contends that the NCAA championship policy has the effect of abridging the plaintiffs' religion and rights, and their "freedom of speech to use and honor the name of their people." Because these rights are codified in the Indian Civil Rights Act ("ICRA"), the Committee contends it is entitled to relief.

ICRA codified many of the rights present in the Bill of Rights and applied them to situations where an Indian tribe is the governmental actor. See United States v. Cavanaugh, 643 F.3d 592, 596 (8th Cir. 2011). Codified at 25 U.S.C. § 1302, the statute declares that "No Indian tribe in exercising its powers of self-government shall" abridge the rights later delineated. Patently obvious is the requirement that the party alleged to have violated the enumerated rights be an Indian tribe. Clearly the NCAA is not an Indian tribe, and no claim has been or could be advanced asserting that the Association holds such status. Because the NCAA is not an Indian tribe, it could not have abridged any of the plaintiffs' rights in violation of ICRA. This claim necessarily must be dismissed.

(E) Federal Copyright Infringement

The Committee urges that the NCAA championship policy interfered with UND's exclusive right to display and market the "Fighting Sioux" nickname and logo, which are marks owned by the university under force of federal law. The Committee also contends that the tribe obtained some form of copyright ownership in the nickname through North Dakota law, though this claim is foreclosed because diversity jurisdiction cannot be established, and the only

possible relief must be founded on questions of federal law.

While pled as copyright infringement, it is likely that the Committee meant to plead a trademark infringement claim. A trademark is “[a] word, phrase logo, or other graphic symbol used by a manufacturer or seller to distinguish its product or products from those of others.” Black’s Law Dictionary (9th ed. 2009). A copyright, meanwhile, is “[t]he right to copy; specifically a property right in an original work of authorship” *Id.* The name “Fighting Sioux” and all associated imagery are more accurately characterized as being protected trademarks, rather than property rights in authored works.

Even when viewing all facts pled in the light most favorable to the Committee, it is impossible for the Committee to establish a credible claim. In advancing a trademark infringement claim, the plaintiff must first show “that it has a valid, protectible mark” *B & B Hardware, Inc. v. Hargis Indus., Inc.*, 569 F.3d 383, 387 n.2 (8th Cir. 2009). As the NCAA aptly notes, the Committee pleads itself out of a valid claim by asserting that UND owns the rights to the “Fighting Sioux” nickname and associated marks. While the Committee later alleges that the plaintiffs acquired some form of copyright ownership because they are Sioux Indians, such a result is impossible under the well-defined procedures for registering intellectual property with the United States Patent and Trademark Office. The Committee has no standing to assert claims on the basis of UND’s federal intellectual property rights, and as a result, this claim must be dismissed.

(F) 28 U.S.C. § 1337 - Commerce and antitrust regulations

The Committee alleges that the NCAA’s championship policy constitutes an unlawful restraint on trade, triggering original jurisdiction under 28 U.S.C. § 1337. In its complaint, the

Committee specifically alleges that its claim is founded on Section 1 of the Sherman Act, which provides:

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding \$100,000,000 if a corporation, or, if any other person, \$1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.

15 U.S.C. § 1. “A showing of antitrust injury requires proof that the possibility for the alleged harm to competition actually existed and that competition was diminished by the defendants’ actions.” St. Louis Convention & Visitors Com’n v. National Football League, 154 F.3d 851, 864 (8th Cir. 1998). Three elements must be met to establish a violation of the Sherman Act under 15 U.S.C. § 1:

- (1) That there was an agreement, conspiracy, or combination [by the NCAA] in restraint of trade;
- (2) That as a direct and proximate result thereof plaintiffs have been injured in their business and property; and
- (3) That the damages which the plaintiffs sustained are capable of reasonable ascertainment and are not speculative or conjectural.

Admiral Theatre Corp. v. Douglas Theatre Corp., 585 F.2d 877, 883-84 (8th Cir. 1978).

In its complaint, the Committee details the governance structure of the NCAA and refers to the alleged void in the NCAA Constitution providing for policies pertaining to “hostile and abusive” nicknames and imagery. Because no such provision exists, the Committee asserts that “The NCAA, and others who have collaborated with them, have formed a conspiracy, or contract . . . against Plaintiffs . . . to restrain trade of the ‘Fighting Sioux’ name and restrain competition

of the UND ‘Fighting Sioux’ athletics in violation of Section 1 of the Sherman Act”

If the facts are viewed in the light most favorable to the Committee, the NCAA is a multi-level organization that does not have a specific constitutional provision dealing with nicknames, yet chose to enact the championship policy and its corresponding sanctions. This unspectacular finding does nothing to explain what would prevent a voluntary organization from enacting rules governing the staging of its events, nor why the enacting of those rules fits the necessary elements of a Section 1 Sherman Act violation. Even assuming that the championship policy could be construed as some sort of conspiracy aimed at restraining trade, the Committee is totally unable to allege how it was injured by the policy. The sanctions currently imposed on UND, such as postseason athletic bans and the requirement of conforming uniforms, are not in any way directed to towards the Committee and the other plaintiffs. Affidavits have been submitted to the Court alleging how the loss of the nickname has affected certain individuals, though it appears that some of these individuals are not even plaintiffs in this case, and of the ones that are, their claimed injuries are of loss of identity and pride—realistic concerns which the Court sympathizes with, but yet nonetheless fall into the category of conjectural injury that is not capable of ascertainment.

The plain fact is that the Committee and the other plaintiffs are not participants in the market alleged to be restrained by the NCAA, which is intercollegiate athletics. This claim could only have been raised by UND, and even then the essential Sherman Act elements would have been difficult to meet. Because there is no possible way under the pleadings that the Committee can meet the elements required to establish a Sherman Act violation, this claim must be dismissed.

(G) Remaining Counts and Legal Provisions

The remaining statutes alleged as conferring federal jurisdiction are incapable of offering relief for the Committee. Section 1988 of Title 42 of the United States Code merely provides the procedural framework for proceedings in a civil rights action. Section 1331 of Title 28 defines what federal question jurisdiction is; it does not of itself create federal question jurisdiction.

Similarly, the three remaining counts pled are incapable of providing relief for the Committee and must be dismissed. “Lack of jurisdiction” is without merit, as the NCAA, as a private, voluntary organization, has the wide discretion to conduct events staged for its voluntary membership as it sees fit. “Defamation” and “Intentional Infliction of Emotional Distress” are common law torts that are raised with no basis in federal law. Even if they could be raised under federal law, the facts as pled by the Committee make it extremely unlikely that a claim could be made that could satisfy the elements commonly present in those torts to survive a motion to dismiss.

CONCLUSION

After full consideration of the record and the pleadings in this case, none of the counts pled by the Committee state a legal claim sufficient to survive a motion to dismiss under the provisions of federal law as pled. Many of the counts are entirely without merit, and the ones that could potentially have been meritorious could only have been properly brought by UND, which was in actual privity with the NCAA. As a voluntary, private organization, the NCAA was free to implement the policies it saw fit for governing its events, no matter how provident or improvident those policies may have been. None of the plaintiffs are members of the NCAA, and their lack of standing is a fatal flaw in nearly every count dismissed in this Order. More

importantly, the Committee has failed to raise a colorable claim under any of the provisions of federal law pled and the NCAA's motion to dismiss is **GRANTED**.

IT IS SO ORDERED.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated this 1st day of May, 2012.

/s/ Ralph R. Erickson
Ralph R. Erickson, Chief Judge
United States District Court