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 the more than 1004 Petitioners of the Standing Rock Sioux Tribe, Plaintiffs, vs. The National Collegiate Athletic Association, Defendant.	Case. No. 2:11-cv-00095

REPLY MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS

INTRODUCTION

Plaintiffs devote most of their Response ("Resp.") to trying to establish their lawsuit "arises" under a nineteenth century treaty and/or a 1969 religious ceremony at which they allege UND was irrevocably gifted the "Fighting Sioux" name. Avoiding any meaningful discussion of the merits of their claims, Plaintiffs broadly contend they have "sovereign standing" to challenge a NCAA Policy that does not apply to them pursuant to "Treaty rights" they never identify, but which allow them to sue the NCAA under "federal common law" unfettered by any limitations period. *Id*. at 2. As discussed below, this argument is facially frivolous and fails to address the issues before the Court, which Plaintiffs have largely abandoned.

I. PLAINTIFFS HAVE NOT MET THEIR BURDEN TO ESTABLISH THE ESSENTIAL ELEMENTS REQUIRED FOR STANDING.

A. Plaintiffs Fail to Adequately Identify Whose Rights They Purport to Represent.

As a threshold matter, it is still far from clear *whose* interests Plaintiffs purport to represent. Plaintiffs say they are asserting the "sovereign rights" of "Plaintiff, Spirit Lake Sioux Tribe," Resp. at 2, yet later state that "Plaintiffs" (plural) "have standing through sovereignty." *Id.* at 11. At other points in their Complaint and Response, Plaintiffs repeatedly refer to the "Sioux Tribes" or "Tribes" or "Tribe" interchangeably, confusing things still more. Because allegations of standing are not entitled to a presumption of truthfulness, Plaintiffs must do more than allege standing and should at least be required to unequivocally identify who they claim to represent. *See Sisseton-Wahpeton Oyate v. U.S. Dept. of State*, 659 F.Supp.2d 1071, 1077 (D.S.D. 2009).

Here, although Plaintiff Fool Bear alleges that he is authorized to represent the interests of disenfranchised members of the non-party Standing Rock Sioux Tribe, it is well-settled that

individual tribe members or groups of members cannot act on behalf of the tribe or assert the tribe's sovereign rights. *See e.g. Bingham v. Massachusetts*, 616 F.3d 1, 5 (1st Cir. 2010); *see also Powers v. Ohio*, 499 U.S. 400, 410 (1991) ("a litigant must assert his or her own legal rights and interest, and cannot rest a claim to relief on the legal rights or interests of third parties.").

For example, in *Delorme v. U.S.*, 354 F.3d 810, 812 (8th Cir. 2004), the plaintiff filed an action for an accounting of disputed distributions of federal appropriations funds, alleging that he represented the lineal descendants of a beneficiary tribe who were denied payments. *Id*. at 813-814. Finding that the plaintiff lacked standing, the court made the observation—equally apt here—that "it is not at all clear in this case who suffered an injury, what the injury is, or who caused the injury alleged by Delorme." *Id.* at 815-816. The court held that Delorme "has not indicated with any specificity who suffered the alleged injury and whether he claims standing as the representative of a tribal government acting in its own interests, as the tribal government seeking *parens patriae* standing on behalf of its members, or as an individual." *Id*. at 816 (citation omitted).

In the present case, Plaintiffs have made no showing that either the Committee or Fool Bear has standing to assert any claim on behalf of third parties, let alone one to enforce the "sovereign rights" of any Tribe, and certainly not the Standing Rock Sioux Tribe or its individual members. Neither can Plaintiffs possibly have standing to assert claims arising from the various statewide legal activities related to the nickname dispute at UND (some of which are wholly unrelated to the NCAA Policy).

B. Plaintiffs Fail to Show an Injury-in-Fact to Alleged Treaty Rights.

Standing requires Plaintiffs to show a concrete and particularized injury to a legally protected right. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). Attempting to establish

this element, Plaintiffs offer a tortured argument that their lawsuit against the NCAA somehow "arises under" an 1867 Treaty between the federal government and the Spirit Lake Tribe. Resp. at 2-3, 5. *See also Sisseton and Wahpeton Bands of Sioux Indians v. U.S.*, 277 U.S. 424, 431 (1928) (describing the Treaty of February 19, 1867). While it may seem obvious that treaties were made for such purposes as allotting Indian lands or providing for riparian rights, rather than choosing collegiate nicknames, Plaintiffs nonetheless claim standing from the Treaty, albeit indirectly. Plaintiffs suggest that the 1969 "sacred pipe ceremony" between the Tribes and UND officials was performed "under treaty authority to give the 'Fighting Sioux' name to UND and seal the tie with the sacred pipe." Resp. at 4. Plaintiffs contend that the ceremony conferred a sovereign right (on which Tribe is unclear)[1] and that UND is essentially treaty-bound to remain the "Fighting Sioux," even though there is no allegation or evidence that UND agreed to use the nickname in perpetuity. Apart from being nearly incomprehensible, this argument fails for any number of reasons.

For example, whatever its alleged religious significance, Plaintiffs have not shown the ceremony had *any* legal significance, even as to the Tribes themselves (both of which have subsequently passed numerous resolutions regarding nickname approval). In addition, the ceremony could not have constituted a "treaty," since the United States ceased entering into treaties in 1871. *See* 25 U.S.C. § 75. Moreover, because the United States was not a "party" to the 1969 ceremony, it could not have conferred any "federal common law" right.

Even if the 1969 ceremony were "sympathetically construed" to confer something akin to a treaty right on Plaintiffs, it would not matter in the instant case because the NCAA was not a

[1] To the extent Plaintiffs claim the 1969 ceremony "relates" back to the 1867 Treaty, Plaintiffs' failure to consistently distinguish between Tribes is again evident, since the Standing Rock Sioux Tribe was not a party to the 1867 Treaty. *See* Treaty of Fort Laramie, 11 Stat. 749.

party. *See Skokomish Indian Tribe v. United States*, 410 F.3d 506, 512 (9th Cir. 2005) (finding that tribe could not recover monetary damages from city and public utility for alleged violation of treaty fishing rights, where city and utility were not contracting parties to treaty); *Klamath Tribes of Oregon v. Pacificorp*, No. Civ. 04-644-CO, 2005 WL 1661821 (D. Or. July 13, 2005) (same). Plaintiffs do not allege otherwise.

In any event, Plaintiffs fail to allege a violation of any treaty obligation by UND (or the NCAA). Rather, their Complaint simply asserts tort, contract and statutory claims under North Dakota and federal law, all of which are subject to applicable statutes of limitation. *See, e.g.*, *Corliss v. Levesque Auto Services, Inc.*, No. 04-10834-DPW, 2004 WL 2337019 * 4 (D. Mass. October 13, 2004). Accordingly, Plaintiffs can neither use their ersatz "treaty" rights as a basis for standing, nor to immunize their claims from the statute of limitations.

C. There is No Concrete and Redressible Injury Attributable to the NCAA.

Plaintiffs maintain that their injury-in-fact stems from continuing the strife and controversy over the "Fighting Sioux" issue, including lawsuits, legislative activity, internal tribal litigation and generic damage to the "Sioux" Tribe (again, which Tribe is not clear), as set out in affidavits of nickname supporters. Resp. at 12-13. Placing aside that this controversy predates the NCAA Policy, Plaintiffs offer no supporting authority and fail to establish they suffered a "distinct and palpable injury" that is unique to them. *See Warth v. Seldin*, 422 U.S. 4909 (1975). Under similar circumstances, courts have consistently found such generalized, abstract social harms are insufficient to confer individual standing. *See In re Navy Chaplaincy*, 534 F.3d 756 (D.C. Cir. 2008) (policy making plaintiffs "feel like second-class citizens" and devaluing their religious beliefs held insufficient to show concrete injury); *Red River Freethinkers v. City of Fargo*, 749 F.Supp.2d 940, 946 (D.N.D. 2010) (finding no injury-in-fact

where group members opposing Ten Commandments display experienced "feelings of exclusion, discomfort, and anger" and subjection to "ridicule and inflammatory, derogatory public comments.").

It is also unclear whether Plaintiffs even attempt to address redressibility.[2] They continue to ignore the holding in *Davidson v. North Dakota State Bd. of Higher Ed.*, 781 N.W.2d 72 (N.D. 2010) and the objective reality that the SBHE—a nonparty—has sole authority over determining UND's nickname and logo. As a result, the relief sought by Plaintiffs—either voiding the Settlement Agreement and/or invalidating the NCAA Policy—will not end the controversy, cause the alleged social turmoil to abate, nor assure that UND will permanently keep the nickname that Plaintiffs desire. In other words, Plaintiffs cannot make the showing necessary for standing where, as here, the relief sought depends in whole or in part on the actions of third-parties, in which case "the defendant *must* have control over the third party's (case-relevant) behavior.'" *Sisseton-Wahpeton Oyate v. U.S. Dept. of State*, 659 F.Supp.2d at 1079 (quoting *Ashley v. U.S. Dept. of Interior*, 408 F. 3d 997, 1003 (8th Cir. 2005)) (emphasis added). Contrary to Plaintiffs' argument that UND and the NCAA are somehow indistinguishable, it should be noted that the Settlement Agreement at issue was born out of costly and contentious litigation between the State and the Association. The NCAA controls neither UND nor the SBHE.

II. THE NCAA IS ENTITLED TO DISMISSAL OF THE CLAIMS PLAINTIFFS HAVE ABANDONED BY FAILING TO ADDRESS.

Plaintiffs fail to respond to or even mention NCAA's merits arguments that they have not stated a claim under Fed. R. Civ. P. 12(b)(6) on Count IV ("Lack of Jurisdiction"), Count V

[2] Plaintiffs may have intended to address this issue under the heading "Federal Authority for Immediate Relief," which consist of nothing more than a cite to a desegregation case to state the unremarkable proposition that federal courts have the authority to protect constitutional rights. Resp. at 14.

("Indian Religious Freedom Act"), Count VI ("Indian Civil Rights Act"), Count VII ("Section 1983" claim for violation of 42 U.S.C. 2000d), Count IX ("Punitive Damages"), Count X ("Equal Protection"), and Count XII ("Emotional Distress"). Accordingly, Plaintiffs have abandoned these claims and each should be dismissed. *See Satcher v. Univ. of Arkansas at Pine Bluff Bd. of Tr.*, 558 F.3d 731, 735 (8th Cir.2009) ("[F]ailure to oppose a basis for summary judgment constitutes waiver of that argument.")); *Small v. Federal Home Loan Mortg. Corp.*, No. 4:11–CV–0470–DGK, 2012 WL 715823 *2 (W.D.Mo. March 5, 2012) ("Because Plaintiff has not addressed the arguments raised in the motions, the arguments are conceded."); *Tatone v. SunTrust Mortg., Inc.*, No. 11–1862 (MJD/JSM), 2012 WL 787411 *11 (D.Minn. February 13, 2012) (dismissing with prejudice counts in multi-count complaint that plaintiff failed to address in response to Rule 12(b)(6) motion).

III. PLAINTIFFS' COMPLAINT FAILS TO STATE A CLAIM FOR RELIEF.

A. Plaintiffs Invoke the Incorrect Standard of Review.

Plaintiffs' Response opens with an inauspicious citation to the obsolete "no set of facts standard" of *Conley v. Gibson*, 355 U.S. 41 (1957), Resp. at 1, which was renounced in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 556 U.S. 662 (2009). Plaintiffs must now make the more rigorous showing that they have pled sufficient, non-conclusory facts that show their Complaint, when read as a whole and applying the Court's common sense, states a claim that is "plausible on its face." *Walker v. Barrett*, 650 F.3d 1198, 1203 (8th Cir. 2011) (quoting *Twombly*, 550 U.S. at 570). This test "demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Iqbal*, 129 S. Ct. at 1949. In the present case, the few Counts of their Complaint that Plaintiffs bother to address allege nothing

more than a generalized accusation of harm and none states a plausible claim for relief against the NCAA.

B. Plaintiff's "Indispensable Party" Claim Fails as a Matter of Law.

Count I is solely predicated on the rule in *Schroeder v. Burleigh Cnty. Bd. Of Comm'rs*, 252 N.W.2d 893 (N.D. 1977), which held that the absence of an indispensable party is a jurisdictional defect that renders a judgment or settlement void, and which was overruled by *Brigham Oil and Gas, L.P. v. Larios Oil & Gas Co.*, 801 N.W.2d 677 (N.D. 2011). Thus, regardless of whether one or both Tribes[3] were "necessary and indispensable" parties to the State's action against the NCAA, under N.D. R. Civ. P. 19, there is no basis for Plaintiffs' claim under North Dakota law. In any event, because the criteria for intervention under Rule 24(a) are the same, Plaintiffs fail to show why they could not have adequately protected their alleged interests by simply intervening. *See Brigham Oil*, 801 N.W.2d at 687 ("The only difference between intervention of right under Rule 24(a)(2) and joinder under Rule 19(a)(2)(i) is which party initiates the addition of the new party to the case.").

C. Plaintiffs' Claim for Breach of Contract Fails as a Matter of Law

Plaintiffs fail to address the NCAA's merits argument in the scant two paragraphs devoted to Count II. Resp. at 22. Instead, they repeat the conclusory allegation that the "NCAA made no effort to seek tribal opinion regarding the 'Fighting Sioux' name." *Id*. This naked contention is not argument and Plaintiffs continue to disregard the clear terms of the Settlement Agreement, under which NCAA agreed to *refrain* from contact with the Tribes. *See* Compl., Exhibit 1, §2(b) ("The NCAA agrees that during the Approval Period it will not imitate contact

[3] Plaintiffs' confusion over the identity of "parties" is problem here as well. Plaintiffs appear at times to assert that Spirit Lake alone was indispensable (since the Standing Rock Sioux Tribe had given its consent in the 1969 ceremony), Compl. ¶ 50, yet they also and inconsistently allege that "the participation and joinder of the two tribes was necessary to make any agreement valid." Compl.. ¶ 52.

with any Sioux Tribe for the purpose of attempting to persuade any tribal governmental entity to provide or not provide namesake approval to UND."). Any allegations that the NCAA did not sufficiently "take into account" Plaintiffs' wishes that predate the Settlement Agreement are irrelevant to showing a breach of contract. To the extent Plaintiffs complain that the NCAA did not confer with them following the execution of the Settlement Agreement, they allege contractual compliance, not a breach.

Plaintiffs' inflammatory argument that the NCAA ignored the wishes of the Tribes highlights the inter-tribal nature of this dispute. Specifically, it is clear from the Settlement Agreement and the remarks attributed to Dr. Bernard Franklin, Resp. at 20-21, that the NCAA would defer to the stated will of the Tribes. However, the NCAA could not and cannot compel Standing Rock to vote or hold a referendum to reverse the series of resolutions clearly condemning use of the "Fighting Sioux" nickname and logo. Plaintiffs' argument that the Standing Rock tribe was "too busy" to hold such a vote, Resp. at 27, does not demonstrate a breach of any contract by the NCAA.

D. Plaintiffs' Claim for Copyright Infringement Fails as a Matter of Law

As with Counts I and II, for their "Copyright" claim in Count III, Plaintiffs dodge the Rule 12(b)(6) arguments raised by the NCAA and simply fill the page with words unattached to a viable argument that they have a relevant intellectual property right, copyright or "federal common law" trademark claim. Resp. at 6. Because UND is the owner of the "Fighting Sioux" nickname and logo, and Plaintiffs have failed to plead the elements of either a timely copyright or trademark claim, including an infringement by Defendant, Count III fails as a matter of law. In addition, Plaintiffs' alleged general right in the "Sioux" name is directly at odds with their statement that the name is in the "public domain," which would be fatal to a legitimate trademark

claim in any case. *See Warner Bros. Ent. Inc., v. XOneX Prod.*, 644 F.3d 584, 595 (8th Cir. 2011).

IV. PLAINTIFFS IGNORE CONTROLLING AUTHORITY ON STATE ACTION AND THEIR FEDERAL CIVIL RIGHTS CLAIMS FAIL REGARDLESS OF WHETHER THE NCAA ACTED UNDER COLOR OF LAW.

Without reference to any specific claim, Plaintiffs argue generally that "NCAA Action Equates to State Action" because the NCAA "involved itself" in North Dakota. Resp. at 23. In support, they provide a string-cite discussion of cases on state action, but none decided under remotely similar facts. Critically, Plaintiffs fail to even mention the decision in *NCAA v. Tarkanian*, 488 U.S. 179 (1988), let alone explain why it does not control.

While Plaintiffs' state action argument is fatally weak, it is also immaterial, because they have abandoned the only claims where state action is even relevant. *See* Section II, *infra*. Even if Plaintiffs had made some effort to preserve their "Equal Protection" and Section 1983 claims, and assuming the NCAA acted under color of law, Plaintiffs' federal constitutional claims still fail since tribes are not "persons" for purposes of 42 U.S.C. § 1983. *See Inyo County v. Paiute-Shoshone Indians*, 538 U.S. 701, 708-12 (2003); *Skokomish Indian Tribe*, 410 F.3d at 515-16.

IV. PLAINTIFFS' CLAIMS ARE BARRED BY COLLATERAL ESTOPPEL.

Plaintiffs argue they should not be estopped from relitigating *Davidson* because that case presented "different" issues related to their alleged right to enforce the same Settlement Agreement, and because the NCAA was not party in that case. Resp. at 8. Neither argument has merit. With respect to identity of issues, Plaintiffs litigated and lost the same issue in *Davidson* they attempt to advance here—whether the Tribes or the SBHE has the ultimate authority over UND's use of the "Fighting Sioux" nickname and imagery. The adverse holding in *Davidson*

forecloses Plaintiffs' "Indispensable Party" and "Breach of Contract" claims, if not their entire action, which is predicated on the allegation that the Tribes possess this authority.

Whether the NCAA was a party in *Davidson* does not alter the result under the "'expanded' version of privity for claim preclusion." *Lucas v. Porter*, 2008 N.D. 160¶22, 755 N.W.2d 88, 98 (N.D. 2008); *see also Simpson v. Chicago Pneumatic Tool Co.*, 693 N.W.2d 612, 617 (N.D. 2005) (complete identity of parties in both actions not required for collateral estoppel). Given that the Settlement Agreement was effectively "merged into a judgment" resolving the suit between North Dakota and the NCAA, *see Davidson*, 781 N.W.2d at 75-76, Plaintiffs were nominally attempting to enforce a judgment to which the NCAA was party, which is a sufficient nexus for the expanded privity described in *Lucas*.

CONCLUSION

Plaintiffs have failed to offer any reason why their Complaint should not be dismissed in its entirety for lack of standing and failure to state a plausible claim. Accordingly, the Court should dismiss this action with prejudice.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the above and foregoing Memorandum in Support of Defendant's Motion to Suspend the Deadline for Filing a Reply in Support of Motion to Dismiss Plaintiff's Initial Complaint was filed via the Court's ECF system on the 30th day of March, 2012, and served upon opposing counsel electronically as follows:

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