UNITED STATES COURT OF APPEAL
FOR THE EIGHTH CIRCUIT

APPEAL NO. 12-2292

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-Appellants,	)
vs.	)
The National Collegiate Athletic Association, Defendant-Appellee.	)

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NORTH DAKOTA, NORTHEASTERN DIVISION

THE HONORABLE RALPH E. ERICKSON

APPELLANTS, THE SPIRIT LAKE 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'S BRIEF

PRINGLE & HERIGSTAD, P.C.

Reed A. Soderstrom (ND #04759)
Attorneys for Appellants
2525 Elk Drive
P.O. Box 1000
Minot, ND 58702
(701) 852-0381
rsoderstrom1611@gmail.com

SUMMARY OF THE CASE
(FOR ORAL ARGUMENT)

The Appellee, National Collegiate Athletic Association, ("NCAA") adopted a policy that deemed Native American imagery hostile and abusive leading to litigation over the University of North Dakota's (UND) use of the "Fighting Sioux" name. A settlement agreement with the State, the North Dakota State Board of Higher Education and the University of North Dakota ("UND") ultimately retired the name "Fighting Sioux" from use. Appellants brought suit against the NCAA for its failure to include the sovereign Sioux Tribes of North Dakota in any settlement discussions regarding the Fighting Sioux name. Appellants claim the Sioux Tribes are indispensable parties to any settlement based upon a 1969 traditional and solemn Sioux ceremony giving UND the right to use the name, "Fighting Sioux" and that the actions by the NCAA constitute tortious interference with a binding agreement between the Sioux and UND as well as a violation of their civil rights. The NCAA moved to dismiss the action asserting the Tribe lacked standing, that there was no recognized claim at law and that any claim was time barred. The district court agreed and dismissed the action.

This appeal presents vital issues to the recognition of traditional Indian ceremonies and sovereignty. Appellants request 20 minutes of oral argument.

CORPORATE DISCLOSURE STATEMENT

Appellants, 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, are a federally recognized Indian Tribe and not a private corporation and/or are members of a federally recognized Indian.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES:
U.S. Supreme Court:

U.S. Circuit Court of Appeals:

North Dakota Cases:

STATUTES

Federal Statutes:

North Dakota Statutes

Treatises and Secondary Sources :

JURISDICTIONAL STATEMENT

The United States District Court for the District of North Dakota Northeastern Division had subject matter jurisdiction over the Appellants federal civil rights claims based upon 42 U.S.C. § 1981. This Court of Appeals has jurisdiction based upon the entry of a final Order of Dismissal by the District Court of North Dakota on May 2, 2012. (See 28 U.S.C. 1291, "The Court of Appeals…shall have jurisdiction of appeals from all final decisions of the District Court of the United States."). A timely appeal was filed within 30 days on May 29, 2012.

STATEMENT OF THE ISSUES

I. Appellants have established a prima facie § 1981 claim.

1. *Bediako v. Stein Mart, Inc.*, 354 F.3d 835 (8th Cir. 2004).

A. The NCAA intentionally discriminated against Appellants on the basis of race.

1. *Perkins v. City of West Helena, Ark.*, 675 F.2d 201 (8th Cir. 1982).

B. The NCAA tortiously interfered with Appellants' existing contract with the State of North Dakota.

1. *Bismarck Realty Co. v. Folden*, 354 N.W.2d 636 (N.D. 1984).

II. The North Dakota Supreme Court had not ruled on indispensability warranting Full Faith and Credit to be applied.

1. *Davidson v. North Dakota State Board of Higher Education*, 781 N.W. 2d 72 (N.D. 2010).
2. *Confederated Tribes of Chehalis Indian Reservation v. Lujan*, 928 F. 2d 1496 (9th Cir. 1991).
3. *U.S. ex rel. Steele v. Turn Key Gaming, Inc.*, 135 F. 3d 1249 (8th Cir. 1998).

III. The NCAA has not acted in accordance with its own Constitution and by-laws in adopting and implementing its policy regarding the use of Native American names and imagery by member institutions.

1. There are no apposite cases for this section.

A. Even if the NCAA Executive Committee did not overstep its authority in enacting the policy, the policy is invalid because it discriminates against an entire race of people.

1. There are no apposite cases for this section.

STATEMENT OF THE CASE

This is an appeal from dismissal from the North Dakota Federal District Court Northeastern Division. The Appellants include the sovereign and federally recognized Spirit Lake Sioux Tribe, enrolled members of said tribe and Archie Fool Bear, an enrolled member of the Standing Rock Sioux Tribe.

These Appellants brought suit against the NCAA over the Fighting Sioux name once utilized by the University of North Dakota. The suit alleged several counts but all stemming from a traditional Sioux Tribal ceremony that took place in 1969 that gave the name to the university.

The subsequent retirement of the name has led to this civil suit. Appellants argue their rights as conferred through the 1969 ceremony were violated. Appellee's brought a Motion to Dismiss that was ultimately granted on May 2, 2012. This appeal is from that dismissal.

STATEMENT OF THE FACTS

Appellants are Sioux Tribal members of a protected class under 42 U.S.C. § 1981. Appellee/NCAA adopted a policy that declared the name "Sioux" to be hostile and abusive in its attempt to eradicate Native American imagery from intercollegiate athletics. The policy carried with it various sanctions against member schools. The NCAA in its attempt to implement its policy interfered with a protected activity as defined in § 1981. Namely a traditional Sioux ceremony that took place in 1969 between the Sioux and the University of North Dakota ("UND") whereby the Sioux gave the name "Fighting Sioux" to UND and UND promoted Indian Education through enrollment and curriculum. The NCAA's anti-Sioux policy and its discriminatory attempt to eradicate the name from inter-collegiate sports tortiously interfered with the traditional Sioux ceremony that is held binding and sacred by most traditional Sioux people.

SUMMARY OF THE ARGUMENT

Appellants assert they have met the prima facie elements of a 42 U.S.C. § 1981 claim in that they are members of a protected class (Sioux), and that Appellee/NCAA intended to discriminate against them through implementation of a policy that eradicates Native American imagery from intercollegiate sports. Appellants assert they were parties to and bound by traditional sacred Sioux ceremony to an agreement with the University of North Dakota allowing the university to use the name "Fighting Sioux" and that the NCAA has tortiously interfered with that agreement by implementing its anti-Sioux policy.

Appellants assert they remain indispensable parties to the settlement agreement between the NCAA and the university and that the Federal District Court erred in its reliance on a North Dakota Supreme Court case in dismissing Appellants suit because the case involved a different issue without a sovereign Sioux tribe as a Plaintiff.

Appellants asserts they have a pecuniary interest in the name "Fighting Sioux" and have benefitted from the name's honorable usage portrayed on a national stage thus giving them standing and to assert the NCAA's policy is ultra-vires its own constitution and by-laws.

ARGUMENT

I. Appellants have established a prima facie § 1981 claim.

Section 1981 protects the right of every citizen "to make and enforce contracts." This includes "the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." 42 U.S.C. § 1981. Private parties are subject to § 1981 liability under the "to make and enforce contracts" clause. *Cody v. Union Elec.*, 518 F.2d 978, 979 (8th Cir. 1975). A prima facie case for discrimination under §1981 has three elements: 1) the plaintiff is a member of a protected class, 2) the defendant intended to discriminate on the basis of race, and 3) the discrimination interfered with a protected activity as defined in § 1981. *Bediako v. Stein Mart, Inc.*, 354 F.3d 835, 839 (8th Cir. 2004).

In a civil rights action, pleadings must be liberally construed. *Frey v. City of Herculaneum*, 44 F.3d 667, 671 (8th Cir. 1995). The complaint "must contain facts which state a claim as a matter of law and must not be conclusory." *Id*. There is no dispute that Appellants, as Native Americans and members of a federally recognized Tribe, are members of a protected class and thus satisfy the first element. However, the District Court erred in dismissing Appellants' Complaint because Appellants have produced sufficient facts to state a prima facie § 1981

claim warranting de novo review. Simply stated, the NCAA's animus towards the American Indian, as demonstrated by its anti-Sioux policy designed to trample Indian sovereignty and contractual participation, caused the State of North Dakota to breach its contract with Appellants.

A. The NCAA intentionally discriminated against Appellants on the basis of race.

Intentional discrimination can be proved with either direct or circumstantial evidence. *Perkins v. City of West Helena*, Ark., 675 F.2d 201, 207 (8th Cir. 1982). "An invidious discriminatory purpose may often be inferred from the totality of the relevant facts… ." *Washington v. Davis*, 426 U.S. 229, 242 (1976). Purposeful discrimination requires "more than intent as volition or intent as awareness of consequences." *Personnel Adm'r of Mass. v. Freeny*, 442 U.S. 256, 258 (1979). A discriminatory course of action must be taken "at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Id.* Based on the facts alleged in the complaint, it must be plausible, not merely conceivable, that the defendant engaged in discrimination. *Ashcroft v. Iqbal*, 556 U.S. 662, 680 (2009).

Appellants have pled facts well beyond the minimum necessary to state a claim. That the NCAA acted with discriminatory intent is not only plausible, but likely, given the totality of the NCAA's conduct. On August 5, 2005 the NCAA initiated

a policy designed to eradicate Native American imagery and involvement in intercollegiate athletics. (Appellants Appx. pp. 69-72). The NCAA described UND's use of the "Fighting Sioux" name and logo as "hostile and abusive." *Id.* (Appellants Appx. pp. 69-72). To coerce UND to change the symbol of the university, the NCAA threatened sanctions against UND's athletic program unless the name was jettisoned. (Appellants Appx. pp. 73-75). Based on the intensity and self-righteousness of the NCAA's anti-Sioux crusade, one might think that the Sioux people supported the NCAA's efforts to abolish the "Fighting Sioux" name. Nothing could be further from the truth, for the anti-Sioux policy had its genesis among university elites and outsiders who did not consider the Sioux people worthy of consultation.

The Sioux people look upon UND's usage of "Fighting Sioux" with great pride. In 1969, Sioux tribal leaders formally conferred the "Fighting Sioux" name to the university in a sacred ceremony. (Appellants Appx. pp. 76-78). The sacred Pipe was lit to seal the bond of the Sioux Word forever. (Appellants Appx. pp. 85-96). This is why the Sioux people continue to view the ceremony as sacred, and believe that UND's usage of "Fighting Sioux" brings pride, honor, and respect. *Id*. To the Sioux people, abolishing the "Fighting Sioux" name would dishonor the sacred ceremony and violate their dignity. *Id.* Despite the pride the Sioux people had in

the "Fighting Sioux" name, the NCAA continued its brazen anti-Sioux policy. In October 2007, the NCAA and the State of North Dakota entered into a settlement agreement that would determine the fate of UND's use of "Fighting Sioux". (Appellants Appx pp. 97-115). The Sioux people were never consulted. In fact, when the Sioux people petitioned the NCAA to heed their objections to its anti-Sioux policy, the NCAA responded that their objections had to be brought through UND as a middleman. (Appellants Appx. p. 118). To stonewall Sioux input further, the NCAA convinced the Grand Forks District Court to seal the settlement proceedings from public view. (Appellants Appx. pp. 119). While the Settlement Agreement (Appellants Appx. pp. 97-115) recognized the Sioux peoples' "important contributions" in determining the future use of "Fighting Sioux," this attempt at deference was patronizing and superfluous because the Sioux people had already bestowed UND with the "Fighting Sioux" name indefinitely in the 1969 ceremony. (Appellants Appx. pp. 76-84). The NCAA arrogantly disregarded this ceremony even though North Dakota law gives Indian ceremonies and rituals binding effect. N.D.C.C. § 27-19-09. On August 1, 2010, the North Dakota State Board of Higher Education (SBHE) decided to abolish the "Fighting Sioux" name before the deadline in the settlement agreement and without a vote by the Standing Rock Tribe. If the NCAA truly had concerns about racial hostility regarding the

"Fighting Sioux" name, it would have consulted the Sioux people and proceeded accordingly. Instead, the NCAA's animus towards the Sioux people determined its course of action. The NCAA required the Sioux people to reapprove UND's use of "Fighting Sioux," even though the 1969 ceremony granted approval indefinitely. The NCAA had no reason to belittle this ceremony, unless the NCAA believed that it was inferior to Western norms. Likewise, the NCAA had no reason to pursue an anti-Sioux policy over objection from the Sioux people unless the NCAA intended to disgrace the Sioux people by eradicating "Fighting Sioux" from public memory. The NCAA treated the Sioux people and their rituals as inferior since the onset of its anti-Sioux policy. Discriminatory intent is well beyond "plausible" in this case. The NCAA's course of conduct evinces discriminatory intent that cannot be explained otherwise.

B. The NCAA tortiously interfered with Appellants' existing contract with the State of North Dakota.

The NCAA's discrimination interfered with Appellants' "enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." In North Dakota, parties to a contract have the right to be free from tortious interference. In pursuit of their discriminatory agenda, the NCAA tortiously interfered with an existing contract between Appellants and the State of North Dakota. The NCAA's tortious interference forced the State of North Dakota to

breach its contract with Appellants, and thus deprived them of a right protected by §1981.

In North Dakota, the Tort of Intentional Interference with Contract requires the following elements: 1) a contract existed, 2) the contract was breached, 3) the NCAA instigated the breach, and 4) the NCAA did so without justification. *Bismarck Realty Co. v. Folden*, 354 N.W.2d 636, 642 (N.D. 1984). Appellants have made out a prima facie claim under this tort. First, Appellants must prove that a contract existed under the tort. In North Dakota, a contract requires parties capable of contracting, consent of the parties, a lawful object, and sufficient cause or consideration. N.D.C.C. § 9-01-02. Courts may consider the conduct of the parties to determine mutual intent to create a legal obligation. *Mountrail Bethel Home v. Lovdahl*, 720 N.W.2d 630, 633 (N.D. 2006). Conduct may include tribal customs, which are preserved under North Dakota law. N.D.C.C. § 27-19-09. Moreover, all contracts created through tribal custom must be given "full force and effect in the determination of civil claims … ." *Id.* Consideration may consist of a benefit to the promisor or a detriment to the promisee. *First Nat. Bank and Trust Co. of Williston v. Brakken*, 468 N.W.2d 633, 638 (N.D. 1991). Detriment means "giving up something which the promisee was privileged to retain, or doing or refraining from doing something which he was privileged not to do, or not to

refrain from doing." *Id*. Appellants' contract with the State of North Dakota is cognizable as an "existing contract." Both parties were capable of contracting, and both parties consented to a legally binding agreement. Sioux tribal leaders lit the sacred Pipe to confer upon UND the name "Fighting Sioux" forever. (Appellants Appx. pp. 85-96). UND President Dr. George W. Starcher took the name "The Yankton Chief" and accepted and adorned an Indian Headdress. (Appellants Appx. pp. 79-84). The conduct on behalf of both parties suggests mutual intent to create a legally binding contract.

Also, the contract is supported by sufficient consideration. The Sioux people conferred the "Fighting Sioux" name to UND indefinitely. By doing so, the Sioux people released any right to contest UND's use of "Fighting Sioux." In exchange, UND promoted the history and culture of the Sioux people, and to continue efforts to support American Indian education. Since both parties incurred a detriment in exchange for a benefit, the contract had sufficient consideration and was an "existing contract." Second, Appellants must prove that the contract was breached. For purposes of this tort, breach includes the termination of an "at will" contract. *Hennum v. City of Medina*, 402 N.W.2d 327, 337 (N.D. 1987) (adopting the Restatement (Second) of Tort's view that terminable at will contracts are protected by the tort of intentional interference with contract.) An "at will"

contract exists when the promisor has the option to perform or not. *Id*. Courts recognize that until an "at will" contract is terminated, it is of value to the plaintiff, and it is presumed to have continuing effect. *Id*. (citing *Prosser and Keeton on Torts* § 129 (5th ed. 1984)). Therefore, if a defendant procures the termination of an "at will" contract, the plaintiff has suffered cognizable injury, even though the third party is not in technical breach. For example, in employment law, an "at will" employee may bring an intentional interference with existing contract claim against a defendant who instigated his firing, even though the third party employer could have fired him at any time and did not technically "breach" the contract. The employee still valued the contract, and there was an expectation that the contract would continue. Appellants satisfy the second element because UND breached its contract *for purposes of this tort*. The contract between Appellants and UND was a contract terminable "at will." UND could drop the "Fighting Sioux" name at any time, for any reason, and without liability for breach. However, this does not prevent Appellants from suing the NCAA since a technical breach by UND is not required under this tort. Rather, the NCAA's tortious acts must procure a contract termination. De novo review is required because the NCAA and the District Court failed to see that Appellants are not suing UND for breach, but suing the NCAA for intentional interference. (Appellants Add. p. 14). Just like an "at will"

employee, Appellants valued its contract with UND because UND's usage of "Fighting Sioux" brought pride, honor, and respect to the Sioux people. Moreover, Appellants anticipated that its contractual relationship with UND would continue. The NCAA caused UND to sever ties with Appellants, and thus procured a "breach" for the purposes of this tort. For this reason, Appellants met the second element of the tort of intentional interference with an existing contract.

Appellants satisfy the third and fourth elements of the tort because the NCAA intentionally instigated UND's breach without justification. Interference with an existing contract is intentional if the defendant "desires to bring it about or if he knows that the interference is certain or substantially certain to occur as a result of his action." *Id*. at 337 (quoting Restatement (Second) of Torts (1979) § 766A, comment e). However, "the intent element in tortious interference with contractual relations requires greater culpability than is required under basic tort principles." *Id*. at 338. This is because the interference must be "without justification." The defendant's motive is "highly determinative" of whether or not the defendant acted justifiably. *Blair v. Boulger*, 336 N.W. 2d 337, 341 (N.D. 1983). "The extent of liability … is fixed in part by the motive or purpose of the actor." *Hennum*, 402 N.W.2d at 338 (quoting *DeVoto v. Pacific Fidelity Life Ins* Co., 618 F.2d 1340, 1347 (9th Cir.)). "Where interference with contractual rights is done for the indirect

purpose of injuring the plaintiff or benefitting the defendant at the plaintiff's expense, it is unjustifiable." *Bismarck Realty Co.*, 354 N.W.2d at 642.

The NCAA intentionally instigated UND's breach for the *direct* purpose of injuring Appellants. The NCAA had knowledge, or should have had knowledge, of the contract between UND and Appellants. The 1969 ceremony received extensive media coverage, and Appellants have alerted the NCAA but the NCAA has ignored the ceremony since the onset of its anti-Sioux policy. (Appellants Appx. pp. 116-118, 120-123). In addition, the NCAA knowingly procured UND's breach, or at least acted with the knowledge that its interference would be substantially certain to procure UND's breach. The anti-Sioux policy threatened serious sanctions against UND unless the "Fighting Sioux" name was abandoned. (Appellants Appx. p. 73-75). In addition, the anti-Sioux policy urged NCAA member institutions to refrain from scheduling regular season games with UND. If UND wanted to participate in championships, host championships, and maintain a reputable athletic program, it had to terminate its contract with Appellants.

The District Court equated the anti-Sioux policy mandates to "modest sanctions," and noted that "there is no directive that the member schools must retire [Native American imagery]." (Appellant's Add. P. 14). However, if the District Court understood the importance of UND's athletic program to the

University, its Alumni, and the State of North Dakota, it would have recognized that the NCAA's "modest sanctions" amounted to palpable coercion. If UND wanted to attract talented recruits, slate a competitive schedule, and placate its fan base, then it had to pass under the NCAA's yoke. The NCAA recognizes that NCAA membership is the lifeblood of each member institution's athletic program. There stands nothing between NCAA competition and club sports. The NCAA knew that, upon pursuit of its anti-Sioux policy, UND would be forced to terminate its contract with Appellants in order to maintain the central benefits of NCAA membership.

The NCAA's conduct was also the *sine qua non* and proximate cause of UND's breach. The NCAA's anti-Sioux policy received a cold reception from UND as expressed in President Charles E. Kupchella's open letter to the NCAA. (Appellants Appx. pp. 69-72). Not until all administrative remedies were exhausted did UND capitulate to the NCAA's demands in order to salvage its athletic program. Absent the NCAA's anti-Sioux policy, UND would not have terminated its contract with Appellants. Moreover, Appellants' injury is well within the scope of foreseeable harms arising out of the NCAA's anti-Sioux policy.

The NCAA instigated UND's breach without justification. The NCAA instigated the breach for the purpose of eradicating Sioux culture, history, and

traditions from public memory. The NCAA's motive, therefore, was for the direct purpose of injuring Appellants. This renders the NCAA's instigation of breach unjustifiable.

Appellants have pled a prima facie § 1981 claim. The NCAA's refusal to consult with the Sioux people and recognize their contract with UND suggests a racial animus against Native Americans. (Appellants Appx. p. 118). The NCAA interfered with Appellants' right to be free from tortious interference with contract. The NCAA procured UND's termination of its contract with Appellants by denying UND the central benefits of NCAA membership. It used its cartel powers to eradicate Sioux history, culture, and traditions from public memory in violation of Appellants' civil rights.

II. The North Dakota Supreme Court has not ruled on indispensability warranting Full Faith and Credit to be applied.

In October 2006, the State Board of Higher Education (SBHE) and the University of North Dakota (UND) sued the National Collegiate Athletic Association's (NCAA), challenging the NCAA's promulgation of the policy prohibiting member institutions from using or displaying "hostile and abusive" racial and ethnic nicknames, mascots, or imagery at NCAA championship events and the NCAA's application of the policy to UND. In October of 2007, UND and the SBHE and the NCAA executed a settlement agreement in which the Board and

UND agreed to dismiss their claims against the NCAA pertaining to the policy, and the NCAA agreed to provide UND a period of time until November 30, 2010 (the approval period), to seek and obtain namesake approval for its nickname and related imagery. (Appellants Appx. pp. 97-115). If the Spirit Lake and Standing Rock Sioux tribes gave "clear and affirmative support" for the use of the nickname during the approval period, UND would be removed from the list of schools subject to sanctions under the NCAA's policy. *Id*. In April of 2009, the members of the Spirit Lake Tribe voted to grant UND perpetual use the Fighting Sioux nickname and logo. In May 2009, the SBHE passed a resolution to retire the Fighting Sioux nickname, effective October 2009. The Standing Rock Sioux Tribe never voted to approve or disapprove of UND's continued use.

In 2009, enrolled members of the Spirit Lake Tribe and the Committee sued the SBHE, alleging its proposed termination of the Fighting Sioux nickname and logo before November 30, 2010 violated the settlement agreement and seeking to enjoin the Board from terminating the nickname and logo before November 30, 2010. *Davidson v. North Dakota State Board of Higher Education*, 781 N.W. 2d 72 (N.D. 2010). The North Dakota Supreme Court held that the SBHE had the authority to retire the nickname before the end of the approval period. Thereafter, the Spirit Lake Sioux Tribe and others filed suit in Federal Court in the

Northeastern Division of North Dakota.

The District Court erred when it held *Davidson* was entitled to full faith and credit and dismissed Plaintiff's suit. (Appellants Add. p. 10). The District Court erred when it precluded the "indispensable parties" argument from being asserted due to the Doctrine of Collateral Estoppel because the "indispensable argument" has yet to be determined in any court. *Id.* *Davidson* involved an interpretation of the settlement agreement between the NCAA and UND. *Davidson* did not include the sovereign and federally recognized Spirit Lake Sioux Tribe as a Plaintiff. *Davidson* included different interpretations of the plain language of the settlement agreement. The misinterpretation of *Davidson* warrants de novo review.

UND and the North Dakota State Board of Higher Education ("SBHE") asserted that the settlement agreement did not require the SBHE to wait until November 30, 2010 to change UND's nickname and logo. The Board exercised its constitutional and statutory authority to terminate use of the nickname and logo before November 30, 2010. *Id*. The Committee for Understanding and Respect argued the plain language of the settlement agreement delegated the ultimate authority to determine usage of the Fighting Sioux nickname and logo to the two Indian Tribes. *Id*. The Committee also claimed that "the agreement gave the two tribes an opportunity to approve use of the nickname and logo until November 30,

2010. *Davidson* argued that the SBHE's decision to retire the nickname before November 30, 2010 constituted a breach of the settlement agreement." *Id*.

The Supreme Court of North Dakota ruled in favor of UND and the SBHE's interpretation of the settlement agreement, thus allowing UND and the SBHE to retire the Fighting Sioux nickname before the approval period had expired. It was error in this matter to determine that the North Dakota Sioux Tribes were not indispensable parties by citing to *Davidson* as recognition of Full Faith and Credit of a North Dakota Supreme Court decision. Rule 19 of the North Dakota Rules of Civil Procedure dictates who is an indispensable party and thus who must be joined as a party. The North Dakota rule mirrors Rule 19 of the Federal Rules of Civil Procedure. The spirit and purpose of Rule 19(a) and 19(b) are to protect the interest of parties who might be deprived of due process by the trial of an action in their absence and at the same time to protect those parties already before the court from the harassment and hardship of multiple litigation. *Nat'l Farmers Union Prop. & Cas. Co. v. Schmidt*, 219 N.W.2d 111, 114 (N.D. 1974).

Federal Rule of Civil Procedure 19 is identical to the North Dakota rule, stating a nonparty is indispensable to an action if:

> (1) the nonparty is necessary;
> (2) the nonparty cannot be joined; and
> (3) the action cannot continue in equity and good conscience without the nonparty.

U.S. ex rel. Steele v. Turn Key Gaming, Inc., 135 F.3d 1249, 1251 (8th Cir. 1998).

There is no precise formula for determining whether a particular non-party is necessary to an action. *Confederated Tribes of Chehalis Indian Reservation v. Lujan*, 928 F.2d 1496, 1498 (9th Cir. 1991). "The determination is heavily influenced by the facts and circumstances of each case." *Id*. Nevertheless, Rule 19(a) contemplates a two-part analysis to aid in determining if an absent party is necessary. First, the court must consider if complete relief is possible among those parties already in the action. Second, the court must consider whether the absent party has a legally protected interest in the outcome of the action. *Id*.

Once the court has determined that the party is necessary through the two part analysis above, the court must determine whether the party is an indispensable party. To determine whether a party is indispensable, courts use a four part analysis which Rule 19 provides to determine whether an action can continue in equity and good conscience. These guideposts are:

> (1) to what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties;
> (2) the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided;
> (3) whether a judgment rendered in the person's absence will be adequate;
> (4) whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

U.S. ex rel. Steele v. Turn Key Gaming, Inc., 135 F.3d 1249, 1251 (8th Cir. 1998).

In *Davidson*, the North Dakota Supreme Court did not reference nor perform the Rule 19(a) or 19(b) analysis to determine if the North Dakota Sioux Tribes were necessary indispensable parties. The North Dakota Supreme Court only ruled on the interpretation of the settlement agreement between UND and the NCAA. Therefore, Appellants must be allowed to proceed with its indispensable party argument in District Court.

III. The NCAA has not acted in accordance with its own Constitution and by-laws in adopting and implementing its policy regarding the use of Native American names and imagery by member institutions.

In its May 1, 2012 Order granting NCAA's Motion To Dismiss, the District Court recognized and accepted an NCAA policy against Native American imagery as having been enacted by the NCAA with the policy's severe sanctions. Because of the Spirit Lake Sioux Tribe's vested economic interests in relative close proximity to UND, including its casino resort and marina, Appellants have a real but undetermined pecuniary interest in the name and logo "Fighting Sioux," giving them Standing.

According to the NCAA's own Constitution, By-Laws, and body of law decisions, the NCAA and its Executive Committee do not have the legislative authority to unilaterally create policies stating that the use of logos and names depicting Native American Tribes are hostile and abusive. Further, the NCAA and

its Executive Committee do not have the authority to impose sanctions pursuant to such a policy. The NCAA Executive Committee overstepped its own constitutional boundaries and broke its own laws when it created and enacted such a policy.[1] The NCAA's Executive Committee policy against Native American names and imagery also includes a policy of severe sanctions against a member university if that policy is not followed. (Appellants Appx. pp.73-75). The NCAA Executive Committee has never produced a verbatim document. A verbatim document is a necessary proof of authoritative existence pursuant to NCAA Constitution Article 1, 1.2(h), and 1.3. While a settlement was reached between UND and the NCAA Executive Committee regarding UND's "Fighting Sioux" logo that may have discussed this policy, this settlement agreement remained sealed so that the policy, aside from the ambiguous "hostile and abusive" language, was never fully articulated. (Appellants Appx. p. 119). The NCAA Executive Committee claims that this policy, enacted by the Executive Committee, was created in accordance to the powers of the Executive Committee.

[1] *See* NCAA Constitution, Article 1, *Name, Purposes and Fundamental Policies*, Article 1.2 *Purposes*: "... (b) To uphold the principle of institutional control of, and responsibility for, all intercollegiate sports in conformity with the constitution and bylaws of this Association; ... (h) To legislate, through bylaws or by resolutions of a Convention, upon any subject of general concern to the members related to the administration of intercollegiate athletics; ..."(emphasis added); *See also* Article 2, *Principles for Conduct of Intercollegiate Athletics* .

The two proposed amendments that supposedly give the Executive Committee all reaching power are articulated in Article 4.1.2(e)[2] and Article 31.1.1[3] of the NCAA Constitution. These amendments contain no specific detail and purport to grant authority to the Executive Committee, authority that is already implicit and contrary to the NCAA Constitution. First, the Convention, the member's legislative body, has exclusive legislative authority to enact new policies if the legislation is upon a subject of general concern to the members. The Executive Committee or other association sub-committees or groups do not have this authority. Second, legislation must be in relation to the "administration of intercollegiate athletics". There are no known NCAA policy detail provisions or documents presented to the Convention members. Thus, the policy is invalid and non-existent until produced and adopted by the Convention. Any purported action

---

[2] "[the Executive Committee shall have the responsibility to] Act on behalf of the Association **by adopting and implementing policies** to resolve core issues and other Association-wide matters." (Change is bolded.)

[3] Authority of Championships/Competition Cabinet, **Management Council, Board of Directors and/or Executive Committee and Sports Committees**. As specified in Bylaw 18.1, all NCAA championships shall be conducted in accordance with the general policies established by the Championships/Competition Cabinet, **Management Council, Board of Directors and/or Executive Committee** and shall be under the control, direction, and supervision of the appropriate sports committees, subject to the standards and conditions set forth in these executive regulations. Additional policies of an administrative nature are set forth in the respective championships handbooks and are to be followed in the administration of NCAA championships." (Change is bolded.)

by the Executive Committee, contrary to Articles 1 and 2 of the NCAA Constitution, must be forwarded to the vote by all members of the convention.

Article 1, 1.2(h) of the NCAA Constitution specifies the Convention members to have the mandatory authority to legislate through by-laws or by resolutions of the Convention upon any subject of general concern to the members. The NCAA authority is limited to its Constitution. The NCAA Executive Committee has overstepped the boundaries of its power when it enacted a policy that ran contrary to its powers and abilities in its own constitution.

A. Even if the NCAA Executive Committee did not overstep its authority in enacting the policy, the policy is invalid because it discriminates against an entire race of people.

The NCAA By-Laws and Constitution provides that "The Association shall promote an atmosphere of respect for and sensitivity to the dignity of every person. It is the policy of the Association to reform from discrimination with respect to its governance policies, educational programs, activities, and employment policies, including on the basis of age, color, disability, gender, national origin, race, religion, creed or sexual orientation. It is the responsibility of each member institution to determine independently its own policy regarding nondiscrimination."

The NCAA was aware, or should have been aware, of the 1969 ceremony

between the Sioux Tribes and UND when the Sioux gifted their name to UND. The NCAA disrespected the Sacred Pipe Ceremony and discriminated against the Sioux people. Thus even if the policy were enacted lawfully according to the NCAA Constitution and by-laws, the policy would still be void because it discriminates against Native Americans, specifically the Sioux people. The policy, at its face, operates under the premise that Native American Tribe names are hostile and abusive," violating the very constitution under which the policy was created.

CONCLUSION

In this litigation, the NCAA has intentionally interjected itself against a race of people as well as against certain member institutions that have used Native American names and imagery in relation to athletic teams. The NCAA has attempted to adopt a "policy" in relation thereto, complete with severe restrictions, prohibitions, and sanctions and this policy was imposed upon the University of North Dakota ("UND"). However, the Spirit Lake Sioux Tribe had a pre-existing agreement with UND, granting perpetual use of the name "Fighting Sioux". In return Appellants received more educational opportunities, promotion and pecuniary gain from the national recognition of the name, "Fighting Sioux". The NCAA has tortiously and intentionally interfered with the agreement between UND and Appellants causing concrete damages and injury by calling their very name, "hostile and abusive."

Appellants were indispensable to any settlement agreement with the NCAA regarding the use of its name and the agreement it had with UND. The issue of indispensability has not been previously adjudicated in any Court.

The NCAA has not produced the Native American name and imagery policy verbatim publicly to its members or to the general public as required by the NCAA constitution. The NCAA's policy circumvents the NCAA by-laws to sanction

NCAA members and there is no known evidence that the NCAA Convention has adopted the policy as required under the NCAA Constitution's legislative provisions. The NCAA Executive Board did not have the authority to create the policy in question. Even if the Executive Board did have the authority to create the policy, it is void because it discriminates against an entire race of people, assuming their very name is "hostile and abusive."

The parties request this Court to reverse the District Court allowing Plaintiffs to proceed with its 42 U.S.C. § 1981 Claim and rule upon damages incurred by the tortuous interference of the pre-existing agreement between UND and Plaintiffs. Plaintiffs also request that the Court place the NCAA on its proof of existence of its claimed 'policy' pursuant to the NCAA Constitution Article 1, 1.2(h), 1.3, 1.3.1(h), and 1.3.2.

Dated this 23st day of July, 2012.

PRINGLE & HERIGSTAD, P.C.

/s/ Reed A. Soderstrom

Reed A. Soderstrom (ND #04579)
Attorney for Appellants
2525 Elk Drive
P.O. Box 1000
Minot, ND 58702-1000
(701) 852-0381

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(7)(B) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced type face using Word Perfect X3 for Windows 7.0 in 14 point font, Times New Roman. The brief contains 4,764 works, excluding the parts of the brief exempt by Fed. R. App. 32(a)(7)(B)(iii).

The undersigned further certifies that this brief and addendum complies with Eighth Cir. R. 28A(h) and has been scanned for viruses and are virus free.

Dated this 23st day of July, 2012.

/s/ Reed A. Soderstrom
Reed A. Soderstrom (ND #04579)
Attorney for Appellants

CERTIFICATE OF SERVICE

I hereby certify that on July 23, 2012, I electronically filed the foregoing with the Clerk of Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

/s / Reed A. Soderstrom
Reed A. Soderstrom #04579
Attorney for Appellants

ADDENDUM

TABLE OF CONTENTS