No. 12-2292

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

THE SPIRIT LAKE TRIBE OF INDIANS, et al.,

Plaintiffs-Appellants,

v.

THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION,

Defendant-Appellee.

On Appeal from the United States District Court
For the District of North Dakota Northeastern Division
The Honorable Ralph R. Erickson
United States District Judge

BRIEF OF APPELLEE

Jonathan F. Duncan
William C. Odle
Spencer Fane Britt & Browne LLP
1000 Walnut Street, Suite 1400
Kansas City, MO 64106
Telephone: (816) 474-8100
Facsimile: (816) 474-3216

Douglas A. Christensen
Joseph E. Quinn
Pearson Christensen & Clapp, PLLP
24 North 4th Street
Grand Forks, ND 58206-5758
Telephone: (701) 755-0521

Counsel for Appellee

Dated: August 22, 2012

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

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, v. The National Collegiate Athletic Association, Defendant-Appellee.	Appeal No. 12-2292

BRIEF OF APPELLEE THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION

WA 3667953.1

SUMMARY OF THE CASE

This case concerns Plaintiffs' second court challenge to a policy of a private athletics association. Plaintiffs are not members of the association and the policy is not applicable to or directed at them. The policy prohibits the use of hostile or abusive nicknames, mascots and imagery by association member schools at championship events. In the district court, Plaintiffs asserted a patchwork of common law and statutory claims aimed at "voiding" the policy and a settlement agreement between Defendant and the State of North Dakota. Their claims were premised almost entirely on the allegation that Plaintiffs and another tribe not party to this case held ultimate authority over the use of a Native American nickname by a state university. The district court correctly dismissed Plaintiffs' complaint for lack of standing and failure to state a colorable federal claim.

On appeal, Plaintiffs attempt to raise for the first time a 42 U.S.C. § 1981 claim they never pled. Plaintiffs now contend that the policy was adopted with the specific intent to discriminate against the "Sioux people" and to infringe on their alleged contract rights under an oral agreement made during a 1969 religious ceremony. Even if Plaintiffs had pled and preserved this claim, it has no support in fact or law and is clearly time-barred. Oral argument is not warranted.

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JURISDICTIONAL STATEMENT

Defendant-Appellee the National Collegiate Athletic Association ("NCAA") adds the following that was omitted from Plaintiffs' jurisdictional statement: Statutes such as 42 U.S.C. § 1981 are not jurisdictional. Plaintiffs originally alleged jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1332, and do not appeal the district court's determination that it had lacked diversity jurisdiction over Plaintiffs' state law claims. The district court further held that it did not have federal question jurisdiction under 28 U.S.C. § 1331.

STATEMENT OF THE ISSUES

I. Whether the district court correctly held that Plaintiffs lacked standing.

Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992)
Delorme v. U.S., 354 F.3d 810 (8th Cir. 2004)
Ashley v. U.S. Dept. of Interior, 408 F.3d 997 (8th Cir. 2005)
Red River Freethinkers v. City of Fargo, 749 F.Supp.2d 940 (D.N.D. 2010)

II. Whether Plaintiffs pled or preserved for appeal any claim for violation of their right to contract under 42 U.S.C. § 1981.

Satcher v. Univ. of Arkansas at Pine Bluff Bd. of Tr., 558 F.3d 731 (8th Cir. 2009)
United States v. Paz, 411 F.3d 906 (8th Cir. 2005)
United States. v. Zavala, 427 F.3d 562, 556 (8th Cir. 2005)

III. Whether the district court correctly held that Plaintiffs failed to state a colorable federal claim.

Domino's Pizza, Inc. v. McDonald, 546 U.S. 470 (2006)
General Bldg. Contractors Ass'n, Inc. v. Pennsylvania, 458 U.S. 375 (1982)

IV. Whether Plaintiffs pled facts sufficient to state a claim under Section 1981 that would not be time-barred.

Jones v. R.R. Donnelley & Sons Co., 541 U.S. 369 (2004)
Goodman v. Lukens Steel Co., 482 U.S. 656 (1987)

STATEMENT OF THE CASE

Plaintiffs commenced this action on November 1, 2011. (Dkt. #1) Their complaint alleges a dozen claims, including state law tort, contract and statutory claims, as well as federal civil rights claims under 42 U.S.C. §§ 1981, 1983 and 2000d. ("Compl.") (App. 7-33) According to the complaint, these claims all arise from a policy adopted by the NCAA in 2005 prohibiting the display of hostile and abusive Native American nicknames, mascots or imagery by member schools at NCAA championship events (the "Policy"). (App. 29; Compl. ¶¶ 107-09) Plaintiffs are the Spirit Lake Tribe of Indians ("Spirit Lake"), by and through its Committee of Understanding and Respect (the "Committee"), and Archie Fool Bear, a member of the Standing Rock Sioux Tribe ("SRST"). (App. 8; Compl. ¶¶ 4-5) Plaintiffs challenge the Association's Policy both facially and as applied to the University of North Dakota ("UND"), which used the nickname "Fighting Sioux" and related imagery. (App. 32)

The NCAA moved to dismiss the complaint on December 22, 2011. (Dkt. #10) Plaintiffs filed their opposition on March 13, 2012. (Dkt. #18) On March 14, 2012, Plaintiffs moved for leave to file an amended complaint to make "minor changes" to their original allegations and add claims for "Bad Faith and Constructive Fraud" and "Treaty and Federal Common Law Rights" (Dkt. #19)

The district court denied Plaintiffs leave to amend on March 23, 2012. (App. 39-45) Plaintiffs have not appealed the district court's denial of that motion.

The district court heard oral argument on the NCAA's motion to dismiss on April 19, 2012. On May 1, 2012, the district court granted the NCAA's motion to dismiss, finding, among other grounds, that Plaintiffs lacked standing, failed to state a colorable claim under federal law and that it had no diversity jurisdiction over Plaintiffs' state law claims. (App. 46-68) Specifically, because the Policy was not directed at Plaintiffs, the district court held that they the lacked privity and standing to challenge it under any theory: "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." (App. 67)

The district court further held that, regardless of whether Plaintiffs had standing, their claim was precluded by *Davidson v. North Dakota State Bd. of Higher Ed.*, 2010 ND 68, 781 N.W. 2d 72 (N.D. 2010), in which they litigated and lost the same issue raised here; namely, that the tribes were "indispensable parties" to the Settlement Agreement between the NCAA and SBHE. The district court held as follows:

> 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*. The 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.

(App. 56)

The district court's order dismissed the entire complaint. The twelve counts dismissed included: (a) a claim the Settlement Agreement is void under state law for failure to include the tribes as "indispensable parties" (Count I); (b) a claim for breach of contract (Count II); (c) a claim for copyright infringement (Count III); (d) a claim alleging that the NCAA "lacked jurisdiction" to adopt its Policy (Count IV); (e) alleged violations of the Indian Religious Freedom Act (42 U.S.C. § 1996) and Indian Civil Rights Act (25 U.S.C. § 1301) (Counts V and VI); (f) an equal protection claim under 42 U.S.C. § 1983 (also asserting a violation of 42 U.S.C. § 2000d) (Count VII), (g) a defamation claim (Count VIII); (h) an unspecified cause of action for punitive damages (Count IX); (i) a claim for unlawful restraint of trade (Count X); and (j) conclusory allegations of intentional infliction of emotional distress to the Sioux people (Count XII). (App. 14-15, 25) On appeal, Plaintiffs do not argue that the district court erred in dismissing any of these claims and thereby abandoned all of them. *See Griffith v. City of Des Moines*, 387 F.3d 733, 739 (8th Cir. 2004) (claims not briefed on appeal deemed abandoned);

Etheridge v. United States, 241 F.3d 619, 622 (8th Cir. 2001) ("Claims not argued in the briefs are deemed abandoned on appeal.").

The clerk's judgment in favor of Appellee was entered on May 2, 2010. (Dkt #31) Plaintiffs filed a notice of appeal on May 31, 2012. (Dkt #32)

STATEMENT OF FACTS

A. The NCAA Policy and UND Lawsuit

The NCAA is a private unincorporated association of over 1250 member colleges and universities. (App. 8) In August 2005, the NCAA adopted the Policy, which prohibits the display of hostile and abusive Native American nicknames, mascots, or imagery at NCAA championship events. (App. 8-9) The Policy also restricts non-complying member schools from hosting certain championship events.[1] *Id*. UND, whose athletics teams competed as the "Fighting Sioux," was one of several NCAA members subject to the Policy. (App. 97-98)

This is the third court challenge to the Policy in North Dakota and the second by Plaintiffs. After exhausting UND's administrative remedies within the NCAA, in 2006, the State of North Dakota, by and through the SBHE and UND, brought suit challenging the Policy in state court. *See State of North Dakota v. NCAA*, Case No. 06-C-01333, in the District Court for the Northeast Central Judicial District. (App. 9) UND asserted a claim for breach of contract, alleging

[1]The Policy did not, as Plaintiffs erroneously assert, "declare[] the name 'Sioux' to be hostile and abusive . . . ." (Appellants' Brief ("Br.") at 4).

that the Policy was adopted in a manner not permitted by the NCAA Constitution and Bylaws. (App. 98)

On October 26, 2007, the case was dismissed with prejudice after the parties executed a Settlement Agreement and Mutual Release ("Settlement Agreement"). (App. 97-106) The Settlement Agreement permitted UND an additional three years to obtain namesake approval from the two nearest Sioux tribes, Spirit Lake and SRST. (App. 99-100) In return, the NCAA agreed that it would "not initiate contact with any Sioux Tribe for the purposes of attempting to persuade any tribal government entity to provide or not provide namesake approval to UND" during the approval period. (App. 100)

On September 18, 2009, the Spirit Lake Tribe passed a resolution granting UND the "perpetual use . . . of the 'Fighting Sioux' name and logo." (App. 16; Compl. ¶ 41) However, UND was unable to gain approval from the SRST, which Plaintiffs attribute to unlawful "stonewalling" by the SRST Tribal Council. (App. 12; Compl. ¶¶ 23-24) According to Plaintiffs, "SRST had no intent to make the settlement agreement a priority nor did it desire to be involved in the process of allowing enrolled SRST members to vote on the issue." (App. 18; Compl. ¶ 48) Plaintiffs maintain that the SRST Tribal Council's refusal to hold a vote violated the Tribal Constitution, but lament that they have no remedy against the Tribal Council because "the Doctrine of Sovereign Immunity of the SRST Tribe has

prevented any suit against the Tribe to force a vote of the people." (App. 13; Compl. ¶ 29) They further allege that, for purposes of namesake approval under the Settlement Agreement, the SRST had previously granted UND irrevocable consent to use the "Fighting Sioux" nickname at a 1969 religious ceremony conducted by SRST elders at which UND officials were present. (App. 14-15; Compl. ¶¶ 32-34). In exhausting its administrative remedies and prosecuting its lawsuit, UND never asserted that it had prior consent from the SRST. Resolutions by the SRST in 1992, 1998 and 2005 made clear that it in fact opposed use of "Fighting Sioux" nickname. (Appellee's App. 7-10)[2]

Although the SRST refused to give UND namesake approval, Plaintiffs allege that the SRST was nonetheless bound by an agreement it made with UND during a religious ceremony in 1969 conducted by SRST elders. (App. 14; Compl. ¶ 32) ("In 1969, SRST Tribal leaders carried out the sovereign dues of the Tribe by traveling to UND to formally give the name 'Fighting Sioux' to UND."). According to Plaintiffs, the 1969 ceremony represented irrevocable consent by the SRST to the use of the nickname by UND which Plaintiffs contend should have sufficed for purposes of the Settlement Agreement (App. 14-15; Compl. ¶¶ 32-35.

[2]As with other governmental bodies, the court may take judicial notice of such official tribal records and acts. *See North County Community Alliance, Inc. v. Salazar*, 573 F.3d 738, 746 n. 1 (9th Cir. 2009).

SRST is not a party here and its position on the nickname issue is clear in the official resolutions of 1992, 1998 and 2005.

B. Plaintiffs' Suit in *Davidson* to Enjoin Retirement of the "Fighting Sioux" Nickname

Because it could not obtain namesake approval from the SRST, the SBHE voted to retire the nickname, sparking Plaintiffs' first court challenge to the Policy and attempt to prevent UND from dropping the "Fighting Sioux" nickname and logo. On November 3, 2009, Plaintiffs sued the State and SBHE in *Davidson*, seeking to enjoin UND from abandoning the nickname on the theory that doing so prior to expiration of the three-year approval period was a breach of Settlement Agreement. *Davidson*, 781 N.W.2d at 76. Plaintiffs alleged that they were entitled to enforce the Settlement Agreement (the same agreement they claim is void in this case) as third-party beneficiaries. *Id*. Plaintiffs claimed the Settlement Agreement effectively conferred them with ultimately authority over whether UND would retain the nickname, contending they were "indispensable parties" to the UND suit. *Id*. Plaintiffs did not assert a claim based on alleged rights conferred by the 1969 ceremony, nor did they allege that UND was contractually bound to use the nickname.

The North Dakota Supreme Court rejected Plaintiffs' "indispensable parties" argument, holding that "the settlement agreement, when construed as a whole, does not delegate to the two tribes the ultimate authority to determine usage of the

Fighting Sioux nickname and logo, or limit the Board's authority to terminate the nickname or logo. . . ." *Id*. at 77. The court found that this constitutional and statutory authority rests solely with the SBHE. *Id*.

C. Plaintiffs' Legislative Initiative to Preserve the "Fighting Sioux"

On March 15, 2011, the North Dakota Legislature enacted a statute requiring that "the intercollegiate athletic teams sponsored by the university of North Dakota shall be known as the university of North Dakota fighting Sioux." N.D.C.C. §15-10-46. The statute was repealed effective December 1, 2011. *See* 2011 North Dakota Laws Ch. 580 (S.B. 2370). In addition to the present litigation, Plaintiffs initiated a referendum calling for a statewide vote to "repeal the repeal" of §15-10-46. On June 12, 2012, North Dakotans voted 67.34 percent to 32.66 percent in favor of the SBHE's decision to retire the nickname, s*ee* http://results.sos.nd.gov/resultsSW, a fact of which the Court may take judicial notice. *See Green Party of Arkansas v. Martin*, 649 F.3d 675, 678 (8th Cir. 2011).

SUMMARY OF ARGUMENT

1. The district court correctly held that Plaintiffs lack standing to challenge the Policy, which was not directed toward them, but solely to NCAA member institutions. Plaintiffs have abandoned this issue by failing to address it in their brief. Alternatively, the judgment below may be affirmed because Plaintiffs failed to plead facts showing they suffered any concrete injury-in-fact traceable to the NCAA and redressible by a favorable ruling. Because non-party SBHE is vested with the sole authority to determine UND's nickname as a matter of North Dakota law, Plaintiffs' request that the district court "strike" the Policy would not have redressed their alleged injury nor ensured that UND would forever remain the "Fighting Sioux."

2. Plaintiffs never pled and therefore waived the Section 1981 claim they advance for the first time on appeal. Scarcely referencing the record, Plaintiffs completely recharacterize their cause of action and avoid any mention of the twelve counts they actually pled. They now maintain that the NCAA infringed on a contract between with UND which allegedly resulted from the religious ceremony conducted by the SRST. (Br. 11-14) This claim appears nowhere in Plaintiffs' complaint. Plaintiffs never sought leave to amend their pleading to add it and they offer no reason for failing to do so. This is alone is grounds to affirm the district court's dismissal of Plaintiffs' action.

3. Even if Plaintiffs had actually alleged the Section 1981 claim argued in their brief, the judgment below should be affirmed. The district court correctly held that the religious ceremony on which Plaintiffs rely conferred no enforceable contract right capable of infringement. Assuming UND agreed to use the "Fighting Sioux" nickname, as the district court observed and as Plaintiffs admit, there is no indication it was obligated to do so in perpetuity. Moreover, even if the 1969 ceremony resulted in a *bona fide* contract, there is no factual or legal basis for concluding that the NCAA intentionally discriminated against Plaintiffs' nebulous contract rights by adopting a championships policy forty years later that does not pertain to them. Nor is there any allegation or evidence that the NCAA knew or should have known about this event, the very occurrence of which Plaintiffs must piece together through newspaper clippings and affidavits. Finally, there is no allegation or evidence that Plaintiffs were party to the alleged contract. Their complaint is clear that the agreement, if any, involved the SRST, not Plaintiffs. (App. 14-15; Compl. ¶¶ 32-34)

4. Plaintiffs' entire line of argument concerning the preclusive effect of *Davidson* has no apparent relevance to their Section 1981 claim, nor any other identifiable federal law claim. (Br. 17-22) Rather, plaintiffs aimlessly attempt to distinguish *Davidson* by arguing they were "indispensable parties" to the UND suit under the North Dakota Rules of Civil Procedure. To the extent Plaintiffs intend to

rely in some way on their allegation they were "indispensable" to the UND Settlement Agreement in support of their Section 1981 claim, the district court correctly held that the decision in *Davidson* precludes relitigation of the issue. Likewise, ignoring Plaintiffs' failure to identify which counts of their complaint they appeal, if they intend to appeal dismissal of the state law claim in Count I of their complaint based on this theory, *Davidson* would foreclose that claim.

5. The district court's order may also be affirmed because there are no facts in the complaint that could support any claim under Section 1981 that would not be time-barred as a matter of law. Plaintiffs' allegation that the Policy is *facially* discriminatory necessarily means that their claim accrued when the Policy was adopted in 2005. Plaintiffs filed this action on November 1, 2011 and are well outside the two-year statute of limitations governing claims under Section 1981(a).

ARGUMENT

Because the district court considered matters outside the pleadings, it decided the NCAA's motion to dismiss under the summary judgment standard of Fed. R. Civ. P. 56. *See* Fed. R. Civ. P. 12(d). A district court's grant of summary judgment is reviewed *de novo*, viewing "the facts in the light most favorable to the non-moving party and applying the same standard as the district court." *Fercello v. Cnty. of Ramsey*, 612 F.3d 1069, 1077 (8th Cir. 2010). "Where there is no dispute of material fact and reasonable fact finders could not find in favor of the

nonmoving party, summary judgment is appropriate." *Id.* Dismissal for lack of standing is reviewed *de novo*, accepting as true the material allegations of the complaint and construing the complaint in favor of the plaintiff. *American Ass'n. of Orthodontists v. Yellow Book USA, Inc*. 434 F.3d 1100, 1101 (8th Cir. 2006). The Court "may affirm the district court's ruling for any reason that the record supports." *Quinn v. St. Louis County*, 653 F.3d 745, 750 (8th Cir. 2011).

II. THE DISTRICT COURT CORRECTLY DISMISSED PLAINTIFFS' COMPLAINT FOR LACK OF STANDING AND SUBJECT MATTER JURISDICTION

The doctrine of standing limits federal jurisdiction to actual "cases and controversies" as required by Article III of the United States Constitution. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559–60 (1992). Plaintiffs bore the burden of "alleging and eventually proving [they] suffered an injury-in-fact traceable to the defendant's challenged action and redressible by the court's favorable decision." *Shain v. Veneman*, 376 F.3d 815, 818 (8th Cir. 2004). Article III standing is an analytically distinct and separate inquiry from whether a plaintiff has statutory or common law standing to assert a particular cause of action. *See Roberts v. Hamer*, 655 F.3d 578, 581 (6th Cir. 2011).[3] Here, the district court found that Plaintiffs are "totally unable to allege how [they] were injured" by a policy that was not directed

[3] *See Davis v. Passman*, 442 U.S. 228, 239 n. 18 (1979) (distinguishing the concepts of Article III standing and cause of action and noting that "[w]hether petitioner has asserted a cause of action ... depends not on the quality or extent of her injury," as does the inquiry under Article III standing, "but on whether the class of litigants of which petitioner is a member may use the courts to enforce the right at issue").

toward them and that "lack of standing is a fatal flaw in nearly every count dismissed in this order." (App. 66-67) Because Plaintiffs did not plead sufficient facts showing standing, the district court's ruling was correct and Plaintiffs' failure to contend otherwise waives this issue.

A. The District Court's Order Dismissing Plaintiffs' Complaint for Lack of Standing Should be Affirmed Because Plaintiffs Failed to Preserve this Issue

In opposing dismissal, Plaintiffs failed to address the NCAA's argument that they lack Article III standing, thus abandoning the issue in the trial court. *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."). Plaintiffs have now twice waived this issue by failing to appeal the district court's ruling that they lack standing and failing to meaningfully address the question in their brief. Plaintiffs' only mention of standing is buried at the end of their brief in another context. Amid Plaintiffs' argument that the NCAA lacked authority to adopt the Policy, Plaintiffs insert a non sequitur contention that they "have a real but undetermined pecuniary interest in the name and logo 'Fighting Sioux,' giving them standing." (Br. 22). This passing reference is insufficient to preserve the issue for appellate review. *See United States v. Paz*, 411 F.3d 906, 911 n. 4 (8th Cir. 2005) (defendant abandoned an argument on appeal by making only fleeting references to it in the context of a different issue in his brief).

Even construed charitably as an attempt to address standing, absent factual support, legal authority or the slightest analysis, Plaintiffs' naked assertion of standing is insufficient as a matter of law to preserve this issue. *See U.S. v. Zavala*, 427 F.3d 562, 556 (8th Cir. 2005).

B. The District Court's Order Dismissing Plaintiffs' Complaint for Lack of Standing Should be Affirmed Because Plaintiffs Failed to Plead or Present Facts Sufficient to Show Standing

Even if Plaintiffs had preserved a standing argument, it is clear from the pleadings and record below that they fall far short of meeting their burden to show standing. Plaintiffs allege no injury-in-fact. They claim only that retirement of "Fighting Sioux" nickname and imagery at UND would "damage racial harmony," diminish respect for "Sioux history and culture" and generally be "detrimental as whole to the Sioux people." (App. 17; Compl. ¶¶ 43-44) This alleged injury is neither "concrete" nor "particularized" to Plaintiffs. *See Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982) ("Art. III requires the [plaintiff] to 'show that he personally has suffered some actual or threatened injury. . . .'") (emphasis added) (*quoting Gladstone, Realtors v. Vill. of Bellwood*, 441 U.S. 91, 99 (1979)). Plaintiffs' mere disagreement with the Policy or belief that it is "anti-Sioux" presents no case or controversy—it is merely the kind of "generalized grievance" over which it is well-established that federal courts lack jurisdiction. *See United States v. Hays*,

515 U.S. 737, 743 (1995); *see also Red River Freethinkers v. City of Fargo*, 749 F.Supp.2d 940, 946 (D.N.D. 2010) (plaintiffs' subjective discomfort or emotional injury allegedly caused by city ordinance did not constitute an injury-in-fact).

Beyond omitting allegations of a plausible injury-in-fact, Plaintiffs' complaint is bereft of any non-conclusory allegations of an injury that is traceable to the NCAA. As the district court correctly found, the Policy and sanctions applied to only member schools and were "not in any way directed towards the Committee and the other plaintiffs." (App. 66) Plaintiffs do not contend otherwise or argue this determination was erroneous.

Even assuming Plaintiffs would suffer some non-abstract injury if UND does not remain the "Fighting Sioux" in perpetuity, they still lack standing because their claim cannot be redressed by a favorable ruling. Under North Dakota law, the SBHE has sole statutory and constitutional authority over determining UND's nickname. Because the SBHE is not and cannot be a party to this proceeding, the district court had no means to compel it to act. The specific relief requested by Plaintiffs—that the district court "void" the Settlement Agreement or invalidate the Policy—would not have ended the controversy nor assured that UND will re-adopt and permanently keep the "Fighting Sioux" nickname. Plaintiffs' recent and unsuccessful attempt to obtain voter repeal of N.D.C.C. §15-10-46 in June 2012

underscores the fact that Plaintiffs' ultimate objective is completely beyond the control of the parties and the reach of the district court.

Where, as here, "the relief sought depends in whole or in part on the actions of third-parties '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 1071, 1079 (D.S.D. 2009) (*quoting Ashley v. U.S. Dept. of Interior*, 408 F. 3d 997, 1003 (8th Cir. 2005)) (emphasis added). The district court correctly ruled that the NCAA has no such control and Plaintiffs do not argue this finding was error. (App. 60)

C. Plaintiffs Lack Standing to Litigate Claims on Behalf of the SRST or Other Third-Parties

The Committee and Plaintiff Fool Bear lack Article III standing to sue on their own behalf for the reasons discussed above. It is also axiomatic that, absent limited circumstances not present here, they lack standing to litigate the rights of non-parties. *Powers v. Ohio*, 499 U.S. 400, 410 (1991). Although far from clear from Plaintiffs complaint and brief, Plaintiffs apparently purport to represent interests beyond their own. The Committee claims to represent the sovereign and recognized "Spirit Lake Sioux Tribe," (Br. 3) yet elsewhere in their complaint and brief, Plaintiffs repeatedly say they are asserting the rights of the Sioux people generally. (Compl. ¶¶ 62-63, 83, 116; Br. 8-10, 12, 14, 17, 26). At other points, Plaintiffs refer to the "Sioux Tribes," "Tribes," and "tribe," interchangeably,

confusing matters still more. (Br. 19, 20, 22, 26) Plaintiffs cannot rest on bare allegations of standing, particularly ones that fail to identify who they claim to represent. *See Sisseton-Wahpeton Oyate,* 659 F.Supp.2d at 1077; *see also Lujan*, 504 U.S. at 559.

If Plaintiffs claim to act on behalf of the "Sioux People," outside the context of a class action, they lack standing to litigate on behalf of third-parties as a matter of law. *Powers*, 499 U.S. at 410. Likewise, the Committee has no standing to sue on behalf of the SRST. *Id*. Although Plaintiff Fool Bear purports to represent the interests of disenfranchised members of the SRST, individual tribe members or groups of members cannot act on behalf of the tribe or assert the tribe's sovereign rights. *Delorme*, 354 F.3d 810, 812 (8th Cir. 2004). Thus, neither the Committee nor Fool Bear has standing to litigate on behalf of the SRST or an unidentified group of its members. *See Delorme* 354 F.3d at 815-16. This is fatal to Plaintiffs' complaint because their claim turns entirely on a supposed agreement made during the 1969 ceremony which, according to the complaint, was conducted by *SRST elders* and UND officials (App. 14-15; Compl. ¶¶ 32-35). Any claim for infringement of contract rights allegedly conferred by that ceremony would belong to the SRST, not Plaintiffs. Tellingly, neither the SRST nor UND has ever argued that the ceremony created a contract right or that any promise has been breached. Indeed, prior to this appeal, neither did Plaintiffs.

III. THE COURT SHOULD AFFIRM DISMISSAL OF PLAINTIFFS' SECTION 1981 CLAIM BECAUSE THEY NEVER PLED THIS CLAIM IN THE DISTRICT COURT AND HAVE WAIVED IT

As reframed in their brief, Plaintiffs argue that the NCAA adopted the Policy to discriminate against them and tortiously interfere with an existing oral contract between Plaintiffs and UND made during the 1969 ceremony (presumably in violation of Section 1981(a)). (Br. 10) However, Plaintiffs never pled this theory or facts that could support it. As stated above, Plaintiffs plainly allege that the agreement, if any, was between the SRST and UND. Plaintiffs' own allegations and exhibits demonstrate that they were not parties to the alleged agreement. Furthermore, the term "tortious interference" appears nowhere in their complaint. Plaintiffs moved for leave to amend their complaint to add two causes of action, yet failed to include a tortious interference claim.

It is well-established that an appealing party may not amend pleadings on appeal by recharacterizing claims or asserting new theories. *See Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054. 1066 (9th Cir. 2002) ("Because [appellant] neither pled such a claim nor argued it before the district court, he cannot assert it for the first time on appeal"); *Chaiken v. VV Publ'g Corp.*, 119 F.3d 1018, 1035 (2d Cir. 1997) (rejecting attempt to recharacterize a claim for intentional infliction of emotional distress as claim for negligence on appeal).

The only substantive reference to Section 1981 in Plaintiffs' entire complaint is a lone citation in the last paragraph of Count I (denominated as "Indispensable Parties"). (App. 19; Compl. ¶ 53) Plaintiffs do not allege there, or anywhere else, that the NCAA induced UND to breach any agreement. Nor does Count I contain any allegation that the NCAA adopted the Policy for the purpose of intentionally discriminating against Plaintiffs on the basis of race, a threshold element under Section 1981. *See General Bldg. Contractors Ass'n, Inc. v. Pennsylvania*, 458 U.S. 375, 389 (1982).

To the extent Count I is even comprehensible, Plaintiffs' theory appears to be that the tribes were "indispensable parties" to the UND suit and that absent their participation, the Settlement Agreement was void under abrogated North Dakota case law. *See Schroeder v. Burleigh Cnty. Bd. of Comm'rs*, 252 N.W.2d 893 (N.D. 1977), overruled by *Brigham Oil & Gas, L.P. v. Lario Oil & Gas Co.*, 801 N.W.2d 677, 687 (N.D. 2011). This issue has nothing to do with Plaintiffs' theory on appeal concerning infringement of alleged rights conferred by the 1969 ceremony. Count I fails to state a federal cause of action of any kind and certainly not the one Plaintiffs assert in the appeal.

The only other cause of action in the complaint of even arguable relevance is Plaintiffs' "Breach of Contract" claim in Count II. (App. 19-20) Count II neither references Section 1981 nor alleges facts in any way related to racial

discrimination in the making or enforcement of contracts. It is on its face a state law claim alleging that the NCAA "breached" its Settlement Agreement with UND because "[t]he two Sioux Tribes were not consulted or contracted by the NCAA about making any contribution" to the settlement negotiations. (App. 19; Compl. ¶ 56) Count II does not purport to assert any federal cause of action, nor does it allege that the NCAA intentionally discriminated against them because of their race. As with Count I, there are no allegations that the NCAA Policy was intended to induce UND to breach existing obligations to the tribes.

Even if Plaintiffs had attempted to assert Count II under Section 1981, because it concerns an agreement to which they were not party, it would fail as matter of law. *Domino's Pizza, Inc. v. McDonald*, 546 U.S. 470, 476 (2006). In short, the Section 1981 claim Plaintiffs advance here appears nowhere in the four-corners of their complaint or their amended complaint and cannot be asserted for the first time on appeal.

IV. THIS COURT SHOULD AFFIRM DISMISSAL OF PLAINTIFFS' COMPLAINT FOR FAILURE TO PLEAD FACTS SUFFICIENT TO STATE A PLAUSIBLE CLAIM OF DISCRIMINATION UNDER SECTION 1981

While Section 1981 prohibits racial discrimination in "all phases and incidents" of a contractual relationship, *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 302 (1994), the statute "does not provide a general cause of action for race discrimination." *Youngblood v. Hy-Vee Food Stores, Inc.*, 266 F.3d 851, 855 (8th

Cir. 2001). "Any claim brought under § 1981, therefore, must initially identify an impaired 'contractual relationship' *under which the plaintiff has rights*." *McDonald*, 546 U.S. at 476 (2006) (emphasis added). The plaintiff must also show that the discrimination was intentional and directed at him personally. G*eneral Bldg. Contractors*, 458 U.S. at 389. Discrimination claims based on alleged disparate impact are thus not actionable under Section 1981. *Id*.

In this case, Plaintiffs failed to plead facts supporting a plausible claim under 1981, even under their tortious interference theory. The brief contains no authority and cites no portion of the record showing that: (a) Plaintiffs had an enforceable contract with UND as a result of the 1969 ceremony; (b) the NCAA Policy was adopted for the purpose of intentionally inducing UND to breach obligations owed to the Spirit Lake tribe under the alleged contract; (c) the NCAA knew or had reason to knew about the alleged contract; or (d) the NCAA acted without justification in adopting the Policy.

A. This Court Should Affirm the Judgment Below Because Plaintiffs Failed to Allege they Were Party to the Alleged 1969 Contract

Plaintiffs' Section 1981 claim fails on its face because they have not even alleged that they have rights attributable to the 1969 ceremony. At some points in their brief, Plaintiffs describe the ceremony as a contract between the "Sioux people" and the State. (Br. 13) ("The Sioux people conferred the "Fighting Sioux" name to UND indefinitely.") At the same time, they argue that "the NCAA

tortuously interfered with an existing contract *between Appellants and the State of North Dakota."* (*Id*.) (Emphasis added) As discussed above, Plaintiffs have no standing to sue on behalf of the "Sioux people."

Even assuming the 1969 ceremony was a contract, there is no evidence in the record that Plaintiffs or the Spirit Lake Tribe was a party. In fact, the complaint specifically alleges otherwise: that the ceremony was conducted by SRST elders. (App. 14-15; Compl. ¶¶ 32-34) Plaintiffs cannot state a Section 1981 claim based upon an agreement to which, according to their own allegations, they were not a party. *See McDonald*, 546 U.S. at 476 (2006) ("Section 1981 plaintiffs must identify injuries flowing from a racially motivated breach of their own contractual relationship, not of someone else's.").

B. The District Court Correctly Concluded Plaintiffs did not have an Enforceable Contract with UND based on the 1969 Sacred Pipe Ceremony

Placing aside the question of which tribe took part in the ceremony, the district court correctly held that it did not give rise to an enforceable contract. According to Plaintiffs, in 1969, "Sioux tribal leaders formally conferred the 'Fighting Sioux' name to the university in a sacred ceremony" and that a contract between Sioux people (at least SRST) and UND was formed as a result. (Br. 8) However, as the district court found, there is no indication of any reciprocal promise by UND, including any agreement it would use the "Fighting Sioux"

nickname in perpetuity. (App. 58) It is equally unclear that the tribes received any consideration other than the "pride, honor and respect" they allegedly derived from UND using the "Fighting Sioux" nickname. *Id.* Plaintiffs fail to allege any specific contractual obligations owed by either the tribes or UND, even describing the tribe's permission for UND to use the name as a "gift." (App 14: Compl. ¶ 32).

Plaintiffs' inability to identify any relevant contractual right is illustrated by their mutually exclusive allegations that the ceremony created a "legally binding agreement" with UND that "seal[ed] the bond of the Sioux word forever" (Br. 8), while at the same time admitting that no enforceable rights were conferred on the parties. (Br. 13) ("UND could drop the 'Fighting Sioux' name at any time, for any reason, without liability for breach."). Plaintiffs attempt to reconcile these conflicting allegations by arguing that, even though of indefinite duration and terminable at any time, the sacred pipe contract is analogous to an at-will employment agreement, which may be subject to tortious interference. (Br. 12) This strained comparison ignores obvious distinctions between an employment contract for which there are defined terms, mutual consideration and damages for breach, and the amorphous agreement described by Plaintiffs. *See, e.g., Koehler v. County of Grand Forks*, 658 N.W.2d 741, 747 (N.D. 2003) (in the context of at-will employment, "a plaintiff may only recover pecuniary loss resulting from the interference with contract.").

Whatever the ceremony's religious significance, Plaintiffs have not shown it had *any* legal significance even as to the Tribes themselves. SRST, which Plaintiffs allege conducted the ceremony, obviously does not regard it as a binding agreement. Similarly, if the Spirit Lake tribe had a pre-existing agreement with UND based on the ceremony, it would not have conducted its own referendum to grant UND namesake approval in September of 2009. (App. 16; Compl. ¶ 41) The fact that Plaintiffs never asserted rights under this agreement (or mention it) in *Davidson* also suggests that Plaintiffs themselves either failed to recognize it as an enforceable contract or were not aware of UND's allegedly binding promise. If the latter reason, Plaintiffs' argument that the NCAA should have known about the ceremony becomes even more implausible. If this agreement existed at all, it conferred at best a right that only UND could have properly asserted against the NCAA.

C. Plaintiffs Failed to Allege Facts Stating a Plausible Claim that the NCAA Intentionally Discriminated Against their Right to Contract

Even if Plaintiffs could identify an enforceable contract right conferred on them under the ceremony, their newly-minted tortious interference argument is not supported by the record, a single apposite legal authority or common sense. Citing no facts, Plaintiffs maintain that the Policy is "discriminatory" and "anti-Sioux" on its face, notwithstanding the fact that it applies to all NCAA member schools and

concerns any nickname or imagery associated with Native American culture, whether or not tied to a particular tribe. (Br. 8) Plaintiffs argue that the discriminatory animus behind the Policy can be inferred from the fact that UND was subject to the Policy and agreed to seek namesake approval "even though the 1969 ceremony granted approval indefinitely." (Br. 10)

This argument is illogical, circular and is all but irrelevant to the question of whether the NCAA adopted the Policy specifically to discriminate against the Plaintiffs. As the district court correctly found, the Policy is not even directed at Plaintiffs. (App. 66) It is therefore impossible for the Policy to have been designed to intentionally discriminate against the "Sioux people" generally or Plaintiffs in particular.

Nor is there any evidence that the NCAA knew or should have known about an oral "contract" Plaintiffs allege was made during a ceremony in 1969—an event which Plaintiffs themselves are only able to document through forty-year old photographs, assorted newspaper clippings and affidavits. More remote still is imputing knowledge to the NCAA of "rights" Plaintiffs' claim by virtue of the ceremony but which they are still unable to fully articulate (and have never asserted prior to this appeal).

Plaintiffs also make no meaningful attempt to argue that the NCAA lacked justification to adopt the Policy. They simply repeat accusations that the Policy is

"anti-Sioux" and, presumably, necessarily unjustified. (Br. 15-16). This argument is unsupported by any authority and unavailing. Courts have expressly recognized the NCAA's inarguable interest in adopting and enforcing its rules. *See, e.g.*, *NCAA v. Lasege*, 53 S.W.3d 77, 85-86 (Ky. 2001) ("The NCAA unquestionably has an interest in enforcing its regulations . . . .").

D. Plaintiffs' Argument Concerning Adoption of the Policy is Inapposite to any Issue on Appeal

Plaintiffs devote a considerable portion of their brief arguing that the NCAA adopted the Policy in contravention of its Constitution and Bylaws, but offer no explanation of how this is relevant to their Section 1981 tortious interference claim. (Br. 22-26)

The only reference to this theory in the complaint is found in Count IV (App. 15), where Plaintiffs allege that the NCAA "lacked jurisdiction" to adopt its own championships policy and that the Department of Education's Office of Civil Rights has primary and exclusive jurisdiction over whether UND's nickname is "hostile or abusive." On appeal, Plaintiffs have apparently jettisoned the OCR from their analysis and mount a direct attack on the NCAA's authority under the Association's Constitution and Bylaws. This claim has been doubly abandoned; Plaintiffs failed to plead it and failed to raise it in opposition to the NCAA's motion to dismiss. *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.")).

Even if not abandoned, Plaintiffs allege no facts or legal authority supporting their extraordinary request to the district court that it order the criteria for the conduct of NCAA Championship events to suit their liking. This is unprecedented relief that would violate the well-established doctrine against judicial interference in the affairs of voluntary associations. *See Hadler v. Northwest Agr., Live Stock, & Fair Ass'n*, 57 N.D. 872, 224 N.W. 193, 196-97 (N.D. 1929) (the state has no authority to regulate, control, or direct the policy of the a private association); *see also* C.J.S. Associations, § 13 ("courts will not interfere to control the administration of the constitution and bylaws of a voluntary association, or to enforce rights springing therefrom").

Alternatively, if Plaintiffs intend this argument as support for the NCAA's "lack of justification" for purposes of tortious interference, it is unavailing. As the district court correctly found, as a private association, the NCAA has wide latitude to govern its affairs. (App. 66-67) This latitude necessarily includes the authority and "jurisdiction" to regulate its own championship events, which is all the Policy affects.

V. THE TRIAL COURT CORRECTLY HELD THAT PLAINTIFFS' ACTION IS BARRED BY COLLATERAL ESTOPPEL

For their second point on appeal, Plaintiffs assert that the district court erred in finding they were collaterally estopped from litigating whether they "indispensable parties" to the UND lawsuit by the adverse ruling in *Davidson*. As a threshold matter, it is unclear what this argument has to do with a Section 1981 claim for infringement of alleged contract rights derived from the 1969 ceremony. In the district court, Plaintiffs raised their alleged "indispensability" to the UND litigation only as a ground for "voiding" the Settlement Agreement under state law (Count I). Plaintiffs have not appealed the district court's dismissal of this claim.

To the extent Plaintiffs believe this issue is relevant to their Section 1981 claim for tortious interference or somehow provides the basis for still another Section 1981 claim, the reason is not apparent from the brief. In either case, *Davidson* would preclude Plaintiffs from relitigating this issue.

In *Davidson*, all the Plaintiffs but Fool Bear[4] litigated and lost a claim arising from precisely the same nucleus of facts presented here. Noting that decisions of state courts are entitled to full faith and credit in the federal courts, the

[4]The addition of Fool Bear (who pled no basis to sue on behalf of others) does not change the fact that Plaintiffs are precluded from relitigating the issue here, regardless of the legal theory. *See Simpson v. Chicago Pneumatic Tool Co.*, 693 N.W.2d 612, 617 (N.D. 2005) (additional parties and reliance on different legal theories do not make the doctrines of *res judicata* and collateral estoppel inapplicable).

district court held Plaintiffs were given a full and fair opportunity to litigate the same issues through appeal to the North Dakota Supreme Court. (App. 55) The district court noted as follows:

> 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.

(App. at 55) (*citing Davidson*, 781 N.W.2d at 76).

The district court found that collateral estoppel precluded Plaintiffs from relitigating the same issue here. (App. 56) The court rejected as irrelevant any distinction between the issue confronted in *Davidson* (whether the SBHE could retire the nickname prior to the end of the approval period) and that raised here (whether the entire settlement agreement is void). *Id*. Finding that the "crux of both claims is an argument the tribes were indispensable parties to the settlement agreement," the district court concluded that the North Dakota Supreme Court definitively ruled they were not. *Id.*

Almost as if *Davidson* were a figment of the district court's imagination, Plaintiffs argue it "erred when it precluded the 'indispensable parties' argument from being asserted due to the Doctrine of Collateral Estoppel because the 'indispensable parties argument' has yet to be determined by any court."(Br. 19) The gist of Plaintiffs' argument appears to be that *Davidson* is distinguishable from

the present case because the North Dakota Supreme Court did not address whether the tribes were indispensable parties to the UND lawsuit under the criteria of N.D. R. Civ. P. 19. (Br. 20). This argument fails for any number of reasons.

Here, as in *Davidson*, Plaintiffs argued only that the tribes were given ultimate authority over determining UND's nickname *based on the Settlement Agreement*. They did not plead or allege that the tribes should have been joined in the UND litigation under North Dakota procedural rules and admit that sovereign immunity would have prevented joinder of either tribe in any event. (App. 13).

If given a full and fair opportunity to litigate, collateral estoppel precludes claims or issues that Plaintiffs *could have* raised. *Ripplin Shoals Land Co. v. U.S. Army Corps of Eng'rs*, 440 F.3d 1038, 1044 (8th Cir. 2006). Had Plaintiffs believed they were indispensable parties to the UND lawsuit under the North Dakota civil rules, they could have (1) sought to intervene in that action; or (2) raised this alternative "indispensable parties" argument in *Davidson*. Plaintiffs cannot avoid the application of collateral estoppel by recharacterizing the same issues. *See Simmons v. O'Brien*, 77 F.3d 1093, 1095 (8th Cir. 1996); *Robbins v. Clarke*, 946 F.2d 1331, 1334 (8th Cir. 1991) (issue preclusion is appropriate where the claim is "simply the same claim repackaged"). Even in the absence of collateral estoppel, *Davidson* establishes that, as a matter of law in North Dakota, Plaintiffs

were not in any sense "indispensable parties" to the Settlement Agreement, nor were they granted authority to determine UND's nickname.

VI. THE DISTRICT COURT'S ORDER MAY BE AFFIRMED BECAUSE PLAINTIFFS ALLEGE NO FACTS THAT COULD SUPPORT A TIMELY SECTION 1981 CLAIM

The district court's order may also be affirmed on the alternative ground that Plaintiffs are outside the statute of limitations to bring a Section 1981 claim in any incarnation. As argued on appeal, Plaintiffs' claim that they suffered infringement to their rights under an existing contract in violation of §1981(a) is governed by the two-year limitations period for tort claims under state law. *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 661–662 (1987); *Kessel v. Schaff*, 697 F.Supp. 1102, 1107 (N.D. 1987). This claim would be time-barred even if Plaintiffs had properly pled it.

Plaintiffs argue throughout their brief that the Policy is "anti-Sioux" and discriminatory on its face, alleging that "[t]he NCAA treated the Sioux people and their rituals as inferior since the onset of its anti-Sioux" policy." (Br. 10) This facial challenge to the Policy and allegations of injury from its "onset" necessarily means that Plaintiffs "knew or had reason to know" of the alleged discrimination when the Policy was adopted in 2005. *See Wallace v. Kato*, 549 U.S. 384, 388 (2007); *Powell v. Tordoff*, 911 F.Supp. 1184, 1194 (N.D.Iowa 1995). Alternatively, Plaintiffs' claim would be time barred even assuming the limitations period began

to run when the Policy was "applied" to UND in 2009, when Plaintiffs allege the "NCAA required the Sioux people to approve UND's use of the 'Fighting Sioux,' even though the 1969 ceremony granted approval indefinitely." (Br. 10)

There are no other possible accrual dates and Plaintiffs' complaint is time-barred as a matter of law.

Plaintiffs did not plead nor appeal a Section 1981 claim for discrimination in some way related to their "indispensable parties" theory or the UND Settlement Agreement. However, any claim that alleged exclusion of the tribes "from the table" during settlement negotiations violated their right to contract would be time-barred as well, even under the four-year federal limitations period governing Section 1981(b) claims. *See* 28 U.S.C. § 1658; s*ee Jones v. R.R. Donnelley & Sons Co.*, 541 U.S. 369 (2004). Any claim Plaintiffs might allege in relation to the Settlement Agreement accrued at the latest when it was signed on October 25, 2007 and their November 1, 2011 complaint is time-barred.

CONCLUSION

However sincere Plaintiffs' antipathy toward the NCAA or the Policy, as the district court correctly held, they lack standing to sue and fail to state a colorable claim of federal law. Plaintiffs have abandoned this argument, as well as the twelve counts actually pled in their complaint, by failing to appeal the dismissal of these claims. Plaintiffs' attempt to amend their pleadings on appeal to add a new Section

1981 claim based on alleged tortious interference is as procedurally improper as it is futile. There is no basis in the record or in the law supporting Plaintiffs' fanciful argument that the NCAA intentionally adopted the Policy as an "anti-Sioux" measure designed to cause UND to repudiate its obligation under a forty-year old oral agreement that Plaintiffs themselves never asserted before now. If these were not reasons enough to affirm the district court's dismissal of this ill-conceived action, it is clear as a matter of law that Plaintiffs cannot state a timely Section 1981 claim under any theory. The judgment below should be affirmed.

Respectfully submitted,

SPENCER FANE BRITT & BROWNE LLP

/s/ Jonathan F. Duncan
Jonathan F. Duncan MO #43659
jduncan@spencerfane.com
William C. Odle MO #38571
wodle@spencerfane.com
1000 Walnut Street, Suite 1400
Kansas City, MO 64106
Telephone: (816) 474-8100
Facsimile: (816) 474-3216

/s/ Douglas A. Christensen
Douglas A. Christensen ND #02991
dougc@grandforkslaw.com
Joseph E. Quinn ND #06538
jquinn@grandforkslaw.com
Pearson Christensen & Clapp, PLLP
24 North 4th Street
Grand Forks, ND 58206-5758
Telephone: (701) 755-0521
ATTORNEYS FOR APPELLEE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-form limitations of F.R.A.P. 32(a)(7)(B) in that it contains less than 14,000 words. This brief contains 9,685 words.

In preparing this document and counting the number of words, I relied on word count of Microsoft Word.

/s/ Jonathan F. Duncan
Attorney for Appellee

CERTIFICATE OF SERVICE

I hereby certify that the above and foregoing was filed via the Court's ECF system on the 22nd day of August, 2012, and served upon opposing counsel electronically as follows:

Reed A. Soderstrom
Pringle & Herigstad, P.C.
2525 Elk Drive
P.O. Box 1000
Minot, ND 58702
rsoderstrom1611@gmail.com
Attorneys for Appellants

/s/ Jonathan F. Duncan
Attorney for Appellee