STATE OF SOUTH DAKOTA COUNTY OF BROOKINGS	SS.	IN CIRCUIT COURT THIRD JUDICIAL CIRCUIT
THE STATE OF SOUTH DAKOTA and THE SOUTH DAKOTA BOARD OF REGENTS on behalf of SOUTH DAKOTA STATE UNIVERSITY and THE UNIVERSITY OF SOUTH DAKOTA, *Plaintiffs,* vs. NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, *Defendants.*		05 CIV 24-000320 **MOTION FOR PRELIMINARY INJUNCTION AND SUPPORTING BRIEF**

The State of South Dakota and the South Dakota Board of Regents, on behalf of South Dakota State University and the University of South Dakota, by and through their undersigned counsel, Marty J. Jackley, Attorney General for the State of South Dakota, and Paul S. Swedlund, Solicitor General, plaintiffs in the above-entitled matter, hereby bring this motion to preliminarily enjoin the National Collegiate Athletic Association (NCAA) from implementing its plan to withhold revenues due to South Dakota's universities and other similarly situated Division I, non-Power 4 schools in order to fund the costs of settlements in *House, et. al., v. NCAA, et al.*, 4:20-cv-03919-CW (N.D.Cal.), *Hubbard, et al., v. NCAA, et. al.*, 4:23-cv-01593 (N.D.Cal.), and *Carter et. al., v. NCAA, et. al.*, 4:23-cv-06325-RS (N.D.Cal.)(hereinafter collectively referred to as NIL litigation or NIL settlement). The NCAA's plan inequitably imposes costs of the settlement on schools who were not defendants in the NIL litigation and who did not cause the damages covered by the settlement, all in violation of NCAA rules governing revenue distributions. Plaintiffs accordingly seek to enjoin the plan and to enjoin the NCAA from withholding funds from South Dakota's universities and other similarly situated schools to pay for the settlement without holding a vote on the plan as required by the NCAA's constitution, rules and bylaws.

BACKGROUND

Three class action lawsuits challenged the NCAA's amateurism rules which for decades prohibited college athletes from being paid to play or profiting from their name, image or likeness (NIL) while participating in Division I athletics. Under its amateurism model, players labored for nothing while the NCAA professionalized every other facet of college athletics and made itself and select members richer than Croesus. College athletes got fed up and sued. The plaintiff athletes named the NCAA and the Power 4 collegiate athletic conferences (Big 10, Big 12, ACC, SEC) as defendants (collectively referred to hereafter as NCAA) because these marquee conferences have reaped the lion's share of profits from college athletics over the years. South Dakota's universities are not members of a Power 4 conference and were not named as defendants in any of the NIL litigation.

The NCAA has settled the lawsuits for $2.8 billion and has obtained preliminary approval of the settlement from the California federal court overseeing the cases. See *In re College Athlete NIL Litigation,* 20-3919 (N.D.Cal.). The California court has set a fairness hearing on April 7, 2025, and is expected to grant final approval at the hearing or soon thereafter.

The NCAA's plan to pay for the settlement is grossly unfair to non-Power 4 schools. Power 4 schools are responsible for 90% (if not 100%) of the damages covered by the settlement yet the NCAA is sticking non-Power 4 schools with 50% or more of the cost. Of the $2.8 billion, $1.15 billion will be paid from the NCAA's reserves and expense reductions while $1.65 billion will be paid "by reducing disbursements it makes to conferences from its Final Four Men's Basketball revenues by an average of 20 percent over the next ten years." See EXECUTIVE SUMMARY, Exhibit 1. Of the $1.15 billion, the NCAA plans to impose cutbacks on grants and services to non-Power 4 conferences ordinarily paid from the NCAA's reserves out of proportion to any damages caused by these schools. Of the $1.65 billion, Power 4 conferences "will pay 40 percent . . . and the remaining Division I conferences, none of which were named defendants in any of the three lawsuits, will pay 60 percent." See EXECUTIVE SUMMARY, Exhibit 1. The net result is that non-Power 4 schools alone will directly shoulder at least $1 billion and, after factoring in cutbacks to the non-Power 4's share of the NCAA's reserves, potentially more than 50% of the overall $2.8 billion award. Meanwhile Power 4 schools will pay damages on only 24% of the total direct cost of the settlement.

Under the NCAA's plan, South Dakota's estimated share of that figure is $8 million over the term of the settlement. ECONOMIC REPORT, Exhibit 14. This allocation of damages to South Dakota is in excess of and disproportionate to any NIL revenue realized by its universities or NIL damages to athletes who played at South Dakota's schools during the period covered by the settlement. The costs and revenue shortfalls imposed on South Dakota's schools and similarly situated Division I, non-Power 4 schools by the settlement will cause undue financial hardship and will ultimately require them to increase costs and/or decrease services or require the legislature to appropriate taxpayer funds to make up the difference. See WYOMING ARTICLE, Exhibit 2.

As alleged in the complaint herein, the NCAA's damages allocation plan, which neither South Dakota nor any non-Power 4 school was given a voice in or permitted to vote on, is a breach of contract, breach of fiduciary duty, inequitable and a violation of the NCAA's constitution, rules and bylaws. South Dakota, for its universities and other similarly universities in other states, seeks to enjoin the NCAA's damages allocation plan unless and until the plan is put to a vote of the Division I membership as required by the NCAA's constitution, rules and bylaws and/or the plan is judicially determined to comply with the NCAA's contractual and fiduciary obligations to its members.

THE NCAA'S CONSTITUTION, RULES AND BYLAWS

The NCAA's damages allocation plan requires Division I schools to "provide their student athletes with previously prohibited direct benefits." NCAA MOTION FOR PRELIMINARY APPROVAL, Exhibit 3. Such direct payments are prohibited under Article 1.B of the NCAA Constitution (and several other provisions of the bylaws).[1] NCAA CONSTITUTION EXCERPTS, Exhibit 4. In order to amend Article 1.B (and other rules and bylaws) to permit such payments, the NCAA must put the matter to a vote of the membership, which must approve the amendment by a ⅔ majority.[2] Plaintiffs are not opposed to the direct payments provided by the

[1] **NCAA Constitution, Article 1.B The Collegiate Student-Athlete Model** states that "Student-athletes may not be compensated by a member institution for participating in a sport but may receive educational and other benefits in accordance with guidelines established by the NCAA division." Excerpts attached as Exhibit 3.

[2] **Section III. Voting Requirements for Manual** provides that "Provisions in the constitution, Articles 1 through 6, require a *two-thirds majority* vote of the total membership (present and voting) for adoption or amendment." Exhibit 3.

NCAA Constitution, Article 5.A Amendments to the Constitution provides that "Provisions of the NCAA constitution may be amended only at a special or annual Convention. The membership shall receive reasonable notice of proposed amendments. An amendment may be sponsored only the Board of Governors or by a two-thirds vote of a divisional leadership body. A sponsored amendment shall require a *two-thirds majority* vote of all delegates present and voting." Exhibit 3.

settlement (the pay-for-play horse has escaped the barn), but the NCAA has announced that it intends to put only the amateurism question to a vote of the membership. NCAA Q&A, Exhibit 5.

As reflected in the NCAA's Q&A document, the NCAA intends to go about these rule changes in ways that deny the non-Power 4 schools their right to be heard on the damages allocation plan. The NCAA is letting Power 4-dominated boards decide what rule changes will be proposed and voted on. NCAA Q&A, Exhibit 5 at Questions 19, 20. As a result, the NCAA is limiting its rule changes to policies concerning "amateurism and athletics eligibility," "academic eligibility," "financial aid," "recruiting," "awards, benefits and expenses," and "name, image and likeness." NCAA Q&A, Exhibit 5 at Question 20. The NCAA is not addressing the fact that its plan for paying for the settlement violates the NCAA constitution's revenue distribution policy and plan. NCAA Q&A, Exhibit 5 at Questions 18-21.

The NCAA intends to take action to approve these rule changes after final approval in April and before "the effective date of the settlement" on July 1, 2025. NCAA Q&A, Exhibit 5 at Questions 19, 21. In other words, the NCAA is forcing the rule changes into a tight timeline that it expects will prevent a vote on the damages allocation plan alone or in connection with action necessary to "comply with the settlement." NCAA Q&A, Exhibit at Question 18. The NCAA Q&A reveals that it has no intention putting its plan to fund the settlement to a vote of the Division I membership before the effective date of the settlement, or ever. NCAA Q&A, Exhibit 5 at Question 18.

As noted above, the NCAA's damages allocation plan calls for payment of a significant portion of the settlement by reducing every Division I schools' revenue distributions by 20% per year for 10 years. BAKER MESSAGE, Exhibit 6. It is important to bear in mind that the lion's share of damages covered by the settlement were caused by the Power 4 class defendant schools. In its notice provided pursuant to 28 U.S.C. § 1715, the NCAA has disclosed that there are 422 total claimants in South Dakota. 1715 NOTICE, Exhibit 11. Of these claimants, 252 attended USD, 116 attended SDSU, and 54 attended universities outside of South Dakota. Together, USD

NCAA Constitution, Article 2.A.3.d.xi The Association requires the NCAA Board of Governors to "Monitor adherence by the divisions to the principles of Article 1. Call for a vote of the entire membership on the action of any division that it determines to be contrary to the basic purposes and principles set forth in the Association's constitution. This action may be overridden by the Association's entire membership by a *two-thirds majority* vote of those institutions voting." Exhibit 3.

and SDSU have 346 *House* claimants and 65 *Hubbard* claimants. According to the NCAA, the estimated share of damages due the total population of claimants is 0.08% of the *House* settlement and 0.33% of the *Hubbard* settlement. Subtracting out the 54 out-of-state claimants, it would appear that, based on the NCAA's own numbers, South Dakota's share of the damages for both settlements is approximately $1.76M. ECONOMIC REPORT, Exhibit 14 at 11. This represents a significant discrepancy from the $8M that the NCAA proposes to bill South Dakota under the across-the-board 20% revenue reductions of the NCAA's announced damages allocation plan. The $1.76M figure assumes that the NCAA's formula produces an accurate estimate of the NIL value of USD/SDSU athletes during the time in question. More likely, the NCAA's formula overstates the NIL damages attributable to South Dakota schools (and understates the NIL damages attributable to Power 4 schools). But even assuming the NCAA's formula does not inflate South Dakota's share of the damages, the NCAA wants South Dakota to pay $8M toward the settlements when its actual share of damages according to the NCAA's own numbers is in the area of only $1.76M. ECONOMIC REPORT, Exhibit 14 at 11.

Instead of reducing South Dakota's and other schools' share of revenues by their respective percentage share of the damages, the NCAA intends to impose an arbitrary 20% across-the-board reduction in revenues on all non-Power 4 Division I schools regardless of whether or not that number is proportionate to NIL damages caused by those schools. EXECUTIVE SUMMARY, Exhibit 1. However, these revenue reductions cannot be imposed without a plenary vote by Division I member schools to change the revenue distribution formula.

Per its constitution and bylaws, the NCAA's revenue distribution formula is classified as a "division dominant provision." Division dominant provisions can be changed only by a ⅔ majority vote of the Division membership.[3] The provisions of the NCAA constitution and bylaws entitling Division I members to a proportionate distribution of revenues are all "division dominant."[4] The

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[3] **Section III. Voting Requirements for Manual** provides that "A division dominant provision is one that applies to all members of Division I and is of sufficient importance to the division that it requires a two-thirds majority vote of all delegates present and voting at an annual or special Convention. Division dominant provisions are identified [in the bylaws] by a diamond symbol [♦] in brackets and bold font immediately after the title of the provision." Exhibit 3.

[4] **NCAA Constitution, Article 20.01.3 Revenue Guarantee [♦]** provides that "All member institutions and conferences in good standing with Division I membership requirements shall receive revenues from all gross revenue sources received by the Association, unless specifically excluded through the division's revenue distribution formulas." Exhibit 3.

NCAA Constitution, Article 20.01.3.2 Revenue Distribution Formula [♦] provides that "As used in this section, the components of the division's revenue distribution formulas as they existed at the time of the adoption of this

NCAA's damages allocation plan radically alters the revenue distribution formula but the NCAA has not received approval to do so from ⅔ of the Division I members. It simply obtained the approval of select Power 4-dominated Division I and NCAA boards.

While the NCAA has characterized the damages allocation plan as simply a "reduction of distribution" (which it seems to believe does not require a vote of the membership) rather than a "change [to] the revenue distribution policy" (which does), plaintiffs beg to differ. BAKER LETTER, Exhibit 7. A new revenue distribution formula, policy or plan that allows the Power 4 to skim 20% off the top of non-Power 4 revenues to pay damages caused by Power 4 schools is certainly *not* what was approved by the Division I Board of Directors as of January 20, 2022, or as of January 15, 2025.[5] And if Articles 20.01.3.2.1 and 20.01.3.2.2 are to be amended to provide for a different distribution formula, policy or plan than the one approved on January 20, 2022, or January 15, 2025, then the Division must put that change to a vote and obtain approval of the change by a ⅔ majority of the voting members. The fact that the NCAA did not make provision for revenue reductions in the policy and plan recently approved by the Division I membership at the January 2025 convention shows that the NCAA has no intention of holding this vote and its failure to do so is a breach of its contracts, fiduciary duties and duties of good faith and fair dealing with and to every non-Power 4 Division I school.[6]

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legislation include the Academic Enhancement, Academic Performance, Basketball Performance, Basketball Equal Conference, Conference Grant, Grants-in-Aid, Student Assistance, and Sports Sponsorship funds, and the supplemental and reserve funds intended for distribution to the membership." Exhibit 3.

NCAA Constitution, Article 20.01.3.2.1 Proportion of Revenue [♦] provides that "The revenue distributed through these funds shall be allocated among the funds pursuant to the revenue distribution policy and plan in existence and approved by the [Division I] Board of Directors as of January 20, 2022." Exhibit 3.

NCAA Constitution, Article 20.01.3.2.2 Formula for Allocation [♦] provides that "The formula for allocating each such fund among the members shall be pursuant to the revenue distribution policy and plan in existence and approved by the [Division I] Board of Directors as of January 20, 2022." Exhibit 3.

[5] At its 2025 convention, the Division I membership approved changes to **Articles 20.01.3.2.1** and **20.01.3.2.2** to reference a "revenue distribution policy and plan in existence and approved by the [Division I] Board of Directors as of January 15, 2025." This new plan is not materially different than the 2022 plan and, like the 2022 plan, does not allow the NCAA to unilaterally reduce revenue distributions to pay the cost of a settlement of litigation to which most Division I schools were not a party to pay damages most Division I schools did not cause.

[6] **NCAA Constitution, Article 2.A.3.d.i Duties and Responsibilities** imposes on the Board of Governors the duty and responsibility to "Provide final approval and oversight of the Association's budget, internal and external audits, enterprise risk management, strategic planning, allocation of assets and establish policies related to *fiduciary responsibilities*.

NCAA Constitution, Article 20.01.4 Obligations to Meet Division Criteria provides that "Division membership criteria constitute *enforceable legislation*. Each member institution shall comply with all applicable criteria of its division, and an institution that fails to do so shall be subject to the infraction process and to possible reclassification."

Within the NCAA's governing structure, the votes required by the constitution, bylaws and agreements are instrumental and indispensable to preventing the interests of the dominant Power 4 members from *completely* overbearing the rights of non-Power 4 members. Matters which are meant to be put to a vote under the NCAA's rules have instead been addressed by self-serving "votes" in closed-door meetings of NCAA boards dominated by Power 4 member schools and conferences, generating controversy and discontent:

- 22 executives of non-Power 4 conferences representing scores of non-Power 4 schools have complained to the NCAA that they were not allowed to be "involved in the settlement negotiations or damage allocation modeling" with the result that the plan is "disproportionate" and "unjust." 22 CONFERENCE EXECUTIVES LETTER, Exhibit 8. The NCAA and the Power 4 bypassed a vote because they knew that the damages allocation plan would never pass with 22 of 32 conferences opposed.
- The Presidents of Oakland, Bucknell and Yale Universities criticized the manner in which the damages allocation plan was summarily adopted by the Power 4-dominated Division I Finance Committee and Board of Directors and pointed out that a vote of the membership is required for any change to the revenue distribution formula. OAKLAND, BUCKNELL AND YALE UNIVERSITIES LETTER, Exhibit 9.
- The Governors of five western Division I states objected to the damages allocation plan as "unfair" to non-Power 4 schools in their states and urged the NCAA to restructure how the damages are allocated between the Power 4 and non-Power 4 member schools. WESTERN GOVERNORS' LETTER, Exhibit 10.

But these protests have fallen on deaf ears. By not putting settlement matters to a vote, Power 4 schools have stripped non-Power 4 schools of all leverage in the settlement and damages allocation plan adoption process. The result is a damages allocation plan that sticks the non-Power 4 schools with a big bill for damages caused disproportionately by Power 4 schools.

PRELIMINARY INJUNCTION STANDARDS

To qualify for a preliminary injunction, South Dakota must demonstrate (1) a threat of irreparable harm to its universities, (2) that the balance between this harm and the injury that granting the injunction will inflict on the NCAA weighs in South Dakota's favor, (3) the

probability that South Dakota will succeed on the merits, and (4) that the injunction is in the public interest. *Strong v. Atlas Hydraulics*, 2014 SD 69, ¶11. *Dataphase Systems v. C.L. Systems*, 640 F.2d 109 (8th Cir. 1981). Each of these factors readily weigh in South Dakota's favor.

A. Irreparable Harm

The NCAA's damages allocation plan is set to inflict imminent and irreparable damage on the athletic programs of South Dakota's and all non-Power 4 Division I schools. South Dakota schools did not cause $8 million in damages to the class plaintiffs. There was no economic market for the name, image and likeness of South Dakota athletes (or other non-Power 4 Division I athletes) anywhere comparable to the millions Power 4 athletes could have commanded during the period covered by the settlement. But, instead of reducing South Dakota's revenues in proportion to its (alleged) share of damages, the NCAA has levied the same 20% revenue reduction on South Dakota's (and other non-Power 4 states') schools that it has on Power 4 schools. The Power 4 schools are named defendants in the NIL litigation because they caused the damages alleged in the lawsuit. But the NCAA wants small schools that did not cause the damages in question to pick up the tab for the schools that did. Which is why the NCAA is not holding the required votes on the settlement and its damages allocation plan.

You cannot cut athletic department revenues as drastically as the NCAA proposes without consequences. Case in point, Wyoming. A recent article reports how Wyoming, like South Dakota, will see a 20% reduction in NCAA revenues and a significant reduction of grants from NCAA reserves under the damages allocation plan, as well as "immense" increases in costs to fund enhanced health care coverage required by the settlement. WYOMING ARTICLE, Exhibit 2 at 3. These revenue reductions and unfunded insurance mandates will "result in substantial cuts in the athletics program," including "sport elimination" and "some very Draconian cuts." WYOMING ARTICLE, Exhibit 2 at 2. To make up these shortfalls, Wyoming is seeking a legislative appropriation and is looking to increase the prices of tickets to sporting events. WYOMING ARTICLE, Exhibit 2 at 3.

The settlement will impact South Dakota in the same ways. Once the settlement becomes effective in July 2025, the NCAA will withhold revenues needed to fund athletic programs for the coming school year. As a result, South Dakota's universities and their students will suffer irreparable harm. USD and SDSU are each facing $318,000 and $356,000 per year in revenue reductions respectively (in current dollars) for the next ten years or about $8 million total as well

as reductions in grants from NCAA reserves. ECONOMIC REPORT at 6-7, Exhibit 14. The budget constraints caused by these reductions will be aggravated by the cost of insurance mandates imposed by the settlement that will increase premiums at each school approximately $155,000 per year. ECONOMIC REPORT at 7, Exhibit 14. As a result, schools will have to reduce rosters and eliminate scholarships, causing students to lose opportunities for athletic competition and scholarships. "College students suffer irreparable harm when they are denied the opportunity to play sports." *S.A. v. Sioux Falls School Dist.*, 2023 WL 6794207, *3 (D.S.D); *D.M. by Bao Xiong v. Minnesota High School League*, 917 F.3d 994, 1003 (8th Cir. 2019). Schools in turn will suffer irreparable harm from a loss of enrollment caused by students who cannot secure roster spots. If each school has to eliminate 50 roster spots and those students elect to attend other schools that offer them roster spots, each school stands to lose $950,000 in tuition each year. ECONOMIC REPORT at 7-8, Exhibit 14. Roster and scholarship reductions will place each school and their athletic departments at a disadvantage in recruiting the best athletic talent, and their programs will suffer a loss of competitiveness and prestige, which will further negatively impact enrollments. ECONOMIC REPORT at 8-9, Exhibit 14.

When denied athletic opportunities neither students nor schools can "get that season back." *D.M.*, 917 F.3d at 1003; *Sioux Falls School Dist.* 2023 WL 6794207 at *3. Likewise, neither the schools nor students can get back the programs and scholarship opportunities that will be cut if the NCAA withholds the revenues necessary to fund them. *D.M.*, 917 F.3d at 1003; *Sioux Falls School Dist.* 2023 WL 6794207 at *3. "These sorts of injuries, *i.e.* deprivations of temporarily isolated opportunities, are exactly what preliminary injunctions are intended to relieve." *D.M.*, 917 F.3d at 1003. Thus, the element of irreparable harm weighs decisively in plaintiffs' favor.

B. Balance of Harms

The balance of harms component requires a comparison of the harm to South Dakota's schools and student athletes to "the harm to [the NCAA] from the granting of the injunction." *Tennessee v. NCAA*, 718 F.Supp.3d 756, 765 (E.D.Tenn. 2024); *Sioux Falls School Dist.*, 2023 WL 6794207 at *4. In other words, does the NCAA's interest in its unfair damages allocation plan outweigh the irreparable harm it will inflict on South Dakota's schools and their students. This component of the injunction calculus weighs decidedly against the NCAA. It is the Power 4 schools that caused the damages covered by the settlement, not Division I schools at large. The plan causes financial harm to non-Power 4 Division I schools out of proportion to their share of

NIL injuries to non-Power 4 athletes relative to Power 4 athletes. It cannot be said that the NCAA's interest in evading a vote on its facially inequitable plan outweighs the irreparable harm it will inflict on schools who were not even named in the lawsuits being settled and their students.

The Power 4 schools generate more in revenues than non-Power 4 schools by several orders of magnitude. The Power 4 conferences "each generate hundreds of millions of dollars in revenues per year, in addition to the money that the NCAA distributes to them." *Ohio v. NCAA*, 706 F.Supp.3d 583, 589 (N.D.W.V. 2023). These stratospheric revenues are a function of the marquee athletic talent who play for them. Just one Power 4 conference, the SEC, "made more than $409 million in revenues from television contracts alone in 2017, with its total conference revenues exceeding $650 million that year." *Ohio*, 706 F.Supp.3d at 589. By comparison, USD and SDSU respectively made $280,000 and $426,700 from media rights contracts in fiscal year 2024. ECONOMIC REPORT at 8, Exhibit 14. The SEC and other Power 4 conference schools can afford to pay their fair share of the settlement without mooching off small schools. Imposing a revenue burden grossly disproportionate to the non-Power 4 school's responsibility for the NIL litigation damages harms them far, far more than proportional revenue reductions will harm the NCAA and Power 4 schools.

On a revenue basis, there is a "breathtaking disparity" between damages allocated to Power 4 schools and non-Power 4 schools:

- Between 2016 and 2021, the 65 Power 4 schools received $441 million from revenue sources subject to the *House* settlement in comparison to $17.5 million by non-Power 4 schools, or approximately 25 times more than non-Power 4 schools. Since the damages in question are a function of revenues, it follows that Power 4 schools caused 25 times the damages caused by non-Power 4 schools.
- On a revenue basis, the Power 4 share of the settlement should be $29.2 million per school. But by forcing non-Power 4 schools to absorb a disproportionate share of the cost the Power 4's share of the settlement will drop to $16.9 million per school.
- On a revenue basis, the average non-Power 4 school's share of revenue reductions would be around $1.16 million but the 40/60 split in favor of Power 4 schools increases that share to around $3.25 million, which is about ⅓ of the $9.92 million in revenue reductions that will be levied on Power 4 schools. Each South Dakota school's share will be around $4

million or $8 million total. So, though Power 4 schools' revenues exceeded those of South Dakota's schools by a factor of 25, their revenues will only be reduced by a factor of three.

- The NCAA is paying 42% of the cost of the settlement from its reserves, though the share of revenues it retained for itself during the subject time period was 19% (60% of which was passed on to schools and conferences). In gross dollars, Power 4 conferences will pay $645 million compared to $967 million by the rest of Division I, so non-Power 4 schools are paying for 66% of the share paid from NCAA reserves compared to only 34% by the Power 4 schools. If the NCAA's share of settlement damages was proportional to the amount of revenue it realized for itself, it would be $211 million instead of the $1.17 billion it has assumed. The NCAA's assumption of a share of the damages far out of proportion to the revenues it retained for itself is another scheme for allocating a disproportionate share of the cost of the settlement to non-Power 4 schools because grants to those schools historically paid from these reserve funds will be "gutted."

THE NCAA SETTLEMENT IN DOLLARS AND SENSE, Exhibit 12 at 2, 3 4, 6.

So, as grossly disparate as the revenue allocation plan is, it still *understates* the "breathtaking disparity" between the damages caused by Power 4 and non-Power 4 schools covered by the settlement. South Dakota's proportional share of the settlement ($1.16M x 2) should be even less if calculated on the basis of damages its schools caused to class members – $1.76M using the NCAA's own (likely inflated) numbers. "It's difficult to imagine a less fair outcome." THE NCAA SETTLEMENT IN DOLLARS AND SENSE, Exhibit 12 at 7.

"The NCAA's own justification for such a disproportionate settlement is almost certainly the desire to retain the [Power 4] conferences within its umbrella, and these conferences have not been afraid to use the threat of secession to secure favorable treatment in the past." THE NCAA SETTLEMENT IN DOLLARS AND SENSE, Exhibit 12 at 7. But the fact that "the NCAA has . . . decided it must placate [the Power 4] at any cost in order to keep them within the organization's umbrella" is not a harm that weighs heavy in comparison to the financial harm that non-Power 4 Division I schools and their student athletes will experience. THE NCAA SETTLEMENT IN DOLLARS AND SENSE, Exhibit 12 at 1.

Everyone, including the NCAA, benefits from a swift adjudication of the questions surrounding the damages allocation plan. If, as plaintiffs believe and the NCAA's constitution, rules and bylaws hold, votes are required, then the sooner those votes are held the better for all

concerned. It is within the NCAA's power to end this litigation by holding the required vote; however, South Dakota (and other similarly situated states) will be at the NCAA's mercy without an injunction. The NCAA cannot persuasively argue that the harm in simply holding this vote outweighs the irreparable loss of opportunities and financial harm that hundreds of non-Power 4 schools and thousands of student athletes will experience in the coming year if its damages allocation plan goes into effect in June. The balance of harms element weighs decisively against the NCAA here.

C. Likelihood of Success on the Merits

To satisfy this component of the injunction standard, plaintiffs need only demonstrate a "fair chance of prevailing." *Planned Parenthood v. Rounds,* 530 F.3d 724 (8th Cir. 2008). It is not necessary for plaintiffs to show "a greater than fifty percent likelihood that [they] will prevail on the merits." *Rounds,* 530 F.3d at 731. When, as here, the balance of equities between the parties is facially unequal, "it is not required at [the preliminary injunction stage] to conduct a mathematical analysis of the merits of the case." *Sioux Falls School Dist.,* 2023 WL 6794207 at *3. Consequently, this component weighs heavily in plaintiffs' favor because it seeks enforcement of obligations that are plainly spelled out in the NCAA's own constitution, rules and bylaws in order to prevent the imposition of a facially inequitable damages allocation model on non-Power 4 Division I schools like plaintiffs.

"NCAA member institutions have a contractual relationship." *NCAA v. Miller*, 795 F.Supp. 1476 (D.Nev. 1992). There is a "duty of good faith and fair dealing that is implied in the contractual relationship between the NCAA and its members." *Bloom v. NCAA*, 93 P.3d 621 (Col.App.5 2004). As discussed above, the NCAA's contractual obligation to its members with respect to changes in revenue distributions is clear: any such changes may only be approved by a ⅔ affirmative vote of the Division I members. The NCAA has not held that vote.

The NCAA's failure to hold the required vote is consistent with "its draconian, heavy-handed, 'my-way-or-the-highway'" manner of managing its membership stemming from its monopoly over intercollegiate athletic competition. *Ohio,* 706 F.Supp.3d at 595. But the NCAA's constitution, rules and bylaws are not dead letters and the extraordinary circumstances of this settlement do not warrant a departure from the obligations to members spelled out therein. If anything, the NCAA's inequitable damages allocation model demonstrates why enforcement of the NCAA's obligations to its members here is more important than ever. Because the NCAA's

damages allocation model is facially non-compliant with its duty to put revenue reduction measures to a vote of the Division I membership, plaintiffs have more than "a fair chance of prevailing" on the merits. *Rounds,* 530 F.3d at 731.

D. Public Interest

"[C]ourts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction." *Winter v. Nat. Res. Def. Council,* 555 U.S. 7, 24 (2008). Here, the consequences to the public of denying an injunction are tangible and meaningful. The public has an interest in robust, competitive athletic opportunities for students at state universities. *Tennessee,* 718 F.Supp.3d at 766 (finding public interest in "encouraging free and fair price competition in the NIL market"). It is very clearly not in the public interest for public universities to be forced either to make "substantial cuts in the athletics program," including "sport elimination," or have the taxpayers pick up the tab for damages their schools did not cause. WYOMING ARTICLE, Exhibit 2 at 2; *Mayerova v. Eastern Michigan University,* 346 F.Supp.3d 983 (E.D.Mich. 2018)("public interest is generally served by allowing public universities to determine how to allocate financial resources"); *Ohio,* 706 F.Supp.3d at 600 (citing public interest in maintaining free and fair competition in the market to recruit college athletes). It is just as clearly not in the public interest for South Dakota (or other public universities) to pay more than four times its percentage share of alleged damages to the NCAA. ECONOMIC REPORT at 11, Exhibit 14.

There is no conceivable argument that it is in the public's interest for non-Power 4 Division I schools and the taxpayers who support them to subsidize the NCAA's campaign to "placate" the Power 4. Having profited handsomely from their student athletes for decades, the Power 4 schools can better afford their proportionate share of the damages than publicly funded state universities like the University of South Dakota, South Dakota State University and hundreds of other state schools.

CONCLUSION

"[T]he fundamental question when considering a preliminary injunction is 'whether the balance of equities so favors the movant that justice requires the court to intervene to preserve the *status quo* until the merits are determined.'" *Sioux Falls School Dist.,* 2023 WL 6794207 at *2. Here, the rank injustice of the NCAA's damages allocation model practically demands an injunction in order to maintain the *status quo* and prevent irreparable harm to non-Power 4

Division I schools and their student athletes in the coming school year. Contrary to the NCAA's dismissive mischaracterization of plaintiffs' opposition to the NCAA's exploitive, one-sided damages allocation plan, South Dakota has not sued because it is "unhappy with a federal court's pending approval of [the] settlement." NCAA REPLY IN SUPPORT OF MOTION TO STAY at 7. Like other states, South Dakota is "unhappy" not with the settlement but with how the NCAA proposes to pay for it. South Dakota is "unhappy" because "the NCAA has . . . decided it must placate [the Power 4] at any cost in order to keep them within the organization's umbrella." THE NCAA SETTLEMENT IN DOLLARS AND SENSE, Exhibit 12 at 1. South Dakota is "unhappy" that "[t]he NCAA's own justification for such a disproportionate settlement is almost certainly the desire to retain the [Power 4] conferences within its umbrella, and these conferences have not been afraid to use the threat of secession to secure favorable treatment in the past." THE NCAA SETTLEMENT IN DOLLARS AND SENSE, Exhibit 12 at 7. South Dakota is especially "unhappy" that the NCAA blithely expects taxpayers to pick up the tab for the cost of damages that South Dakota schools and other non-Power 4 Division I schools did not cause in order to "placate" the Power 4. Does the NCAA expect South Dakota and other non-Power 4 schools to be "happy" with a grossly disproportionate settlement structured around "retaining [the Power 4's] membership regardless of the fiduciary duty owed to other member institutions?" THE NCAA SETTLEMENT IN DOLLARS AND SENSE, Exhibit 12 at 7.

As described in a letter by an anonymous collegiate athlete objecting to the settlement, the settlement terms alone will burden college athletic programs with roster cuts and sport elimination; an inequitable damages allocation model will disproportionately exacerbate the settlement's adverse impacts on non-Power 4 schools. ANONYMOUS LETTER, Exhibit 13. As few as 40,000 student athletes out of the 570,000 athletes who participated in college sports during the period covered by the settlement have filed a claim on the settlement. Of these claimants, the bulk of the settlement will be paid to the "one-percenters," the elite college athletes for whom there was an economic market for their NIL. ANONYMOUS LETTER at 1-2, Exhibit 13. These one-percenters were competing at Power 4 conference schools. ANONYMOUS LETTER at 2, Exhibit 13. Thus, the damages the NCAA seeks to impose on non-Power 4 schools will be paid to a "tiny percentage of class members" who did not play at or benefit non-Power 4 schools. ANONYMOUS LETTER at 3, Exhibit 13. As a result, the other 99% of current and former student athletes "will lose . . . benefits and suffer very real losses." ANONYMOUS LETTER at 3, Exhibit 13.

An injunction must be "strictly tailored to accomplish only what the situation specifically requires." *Tennessee,* 718 F.Supp.3d at 766. Here the situation requires no more and no less than an injunction upon the NCAA's damages allocation plan unless and until the required vote is held and/or it is judicially determined that the plan is consistent with the NCAA's contractual and fiduciary obligations to its members. Accordingly, plaintiffs request that the NCAA be enjoined to put its damages allocation plan to a vote of the Division I membership and to neither withhold nor reduce revenue distributions to any Division I school that is not a party to the NIL litigation lawsuits and settlement unless and until such a plan for paying the NIL litigation damages is approved by a proper vote of the Division I membership or judicially determined to conform to the NCAA's contractual and fiduciary duties to its membership.

Dated this 31st day of March 2025.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 31st day of March 2025, a true and correct copy of the *Motion for Preliminary Injunction and Supporting Brief* was served electronically through Odyssey File and Serve, upon Jason R. Sutton at jrsutton@boycelaw.com; Paul W. Tschetter at pwtschetter@boycelaw.com and David J. Hieb at djhieb@boycelaw.com.

Dated this 31st day of March 2025.

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