UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

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,	*	CIV 24-4189-KES
v.	*	
NATIONAL COLLEGIATE ATHLETIC ASSOCIATION,	*	
Defendant.	*	

BRIEF IN SUPPORT OF MOTION FOR REMAND TO STATE COURT

Plaintiffs 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 counsel, Paul S. Swedlund, hereby file this brief in support of their motion to remand this matter to state court for lack of subject matter jurisdiction. There being no federal question or other basis for federal jurisdiction, this matter must be remanded to the state court.

BACKGROUND

Three class action lawsuits challenged the NCAA's amateurism rule 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. 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 the aforementioned NCAA lawsuits.

The NCAA has settled the lawsuits for $2.8 billion and has sought 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 granted preliminary approval and set a fairness hearing in April.

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.

South Dakota's estimated share of that figure is in excess of $7 million over the term of the settlement. This allocation of damages to South Dakota is far in excess of and grossly disproportionate to any 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 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.

South Dakota filed suit in state court alleging that this damages allocation model, 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 rules, bylaws and constitution. The NCAA has removed the case to this court, allegedly because South Dakota is "directly attacking" the class action settlement in ways which "implicate . . . significant federal issues." The NCAA is wrong, and there is no better evidence of the fact than a ruling from the California court denying a Texas non-Power 4 school's motion to intervene in the settlement

approval proceedings which raised the same objections to the settlement process that South Dakota has raised in its state complaint.

ARGUMENT

1. Removal Standards

A case may be removed to federal court only where it would have had original jurisdiction in the first place. *James Valley Cooperative Telephone Co. v. South Dakota Network, LLC,* 292 F.Supp.3d 938, 944 (D.S.D. 2017). Because federal courts have limited jurisdiction, and because of the principles of comity and federalism that bear upon removing a state-law case from the jurisdiction of state courts, there is a presumption against removal jurisdiction. *Kokkonen v. Guardian Life Ins. Co.,* 511 U.S. 375, 377 (1994); *Shamrock Oil & Gas Corp. v. Sheets,* 313 U.S. 100, 108-109 (1941). As a result, removal statutes are strictly construed and any doubt as to the existence of federal jurisdiction is resolved in favor of remand. *Shamrock,* 313 U.S. at 109; *Bates v. Missouri & Northern Arkansas Railroad Co.,* 548 F.3d 634, 638 (8th Cir. 2008).

In determining whether a claim arises under a federal law, district courts examine the allegations of the complaint and ignore potential defenses. *James Valley,* 292 F.Supp.3d at 944. "[A] case will not be removable if the complaint does not affirmatively allege a federal claim." *James Valley*, 292 F.Supp.3d at 944, quoting *Beneficial National Bank v. Anderson,* 539 U.S. 1, 6 (2003). Defendants are not permitted to "inject a federal question into an otherwise state law claim and thereby transform the action into one arising under federal law." *James Valley,* 292 F.Supp.3d at 944, quoting *Central Iowa Power Coop. v. Midwest Indep. Transmission Sys. Operator,* 561 F.3d 904, 912 (8th Cir. 2009).

The removing defendant bears the burden of proving that removal is proper and that federal subject matter jurisdiction exists. *James Valley*, 292 F.Supp.3d at 944, quoting *In re Businessmen's Assurance Co.,* 992 F.2d 181, 183 (8th Cir. 1993). "Federal courts are to 'resolve all doubts about federal jurisdiction in favor of remand.'" *Dahl v. R.J. Reynolds Tobacco Co.,* 478 F.3d 965, 968 (8th Cir. 2007). Defendant NCAA cannot meet its burden of demonstrating subject matter jurisdiction over South Dakota's claims.

2. This Case Does Not Implicate Significant Federal Issues

The NCAA justifies its removal because South Dakota is allegedly "directly attacking" the California class action settlement in ways which "implicate . . . significant federal issues." The NCAA is trying to inject a federal issue where none exists. The best evidence that South Dakota's

complaint does not implicate any federal question before the California court comes from the California court itself when it rejected a Texas non-Power 4 school's effort to inject the state law questions raised by South Dakota's complaint into the settlement approval process.

Like South Dakota's universities, Houston Christian College is non-Power 4 school participating in Division I NCAA athletic competitions. Like South Dakota's universities, Houston Christian is being stuck with a disproportionate share of the NIL litigation settlement. Houston Christian moved to intervene in the settlement approval process raising, like South Dakota's state law complaint, objections based on the NCAA's failure to abide by its rules, bylaws, constitution and other obligations to its members.

The California court's order denying Houston Christian's motion to intervene is crystal clear that the court's only concern is the settlement's fairness to the class plaintiffs, not the settlement's unfairness to NCAA members. The only issue before the California court is the gross amount of the settlement and how that amount will be distributed to class plaintiffs, not how the NCAA comes up with the money to pay the settlement or how it allocates shares of the damages among its members.

The California court bluntly ruled that Houston Christian could not show that its allegations of "violations of the NCAA's constitution, bylaws and rules" raised "a question of law or a question of fact in common with [the California] action." CALIFORNIA RULING, Exhibit 2 at 6. The California court observed that Houston Christian had "other means," such as a state court lawsuit against the NCAA, to challenge how the NCAA allocated payment of the settlement's damages among its members. CALIFORNIA RULING, Exhibit 2 at 4. Thus, the California court's order denying Houston Christian's motion to intervene makes clear that the disproportionate financial impact of the settlement on certain NCAA members is not its concern.

South Dakota was itself hours away from filing a motion to intervene in the California case when the court entered the Houston Christian order. Mindful of the California court's order, South Dakota accepted that its claims against the NCAA "share[d] no common factual proof" with the questions before the California court and sought "other means" to challenge the NCAA's settlement payment allocation model by suing the NCAA in state court. CALIFORNIA RULING, Exhibit 2 at 6.

Unmindful of the California court's order, the NCAA removed South Dakota's complaint because, although it only asserts state law claims, it allegedly "necessarily raise[s]" a "significant

federal issue" connected to the California settlement, though the NCAA's removal notice does not identify what that issue is. But, on its face, South Dakota's complaint raises purely state law causes of action which do not "affirmatively allege a federal claim" or require the interpretation or application of any federal law for their adjudication. *James Valley*, 292 F.Supp.3d at 944. The South Dakota complaint seeks only to compel the NCAA to perform its obligations to South Dakota (and similarly situated members) under its rules, bylaws and constitution and to enjoin the NCAA from allocating an unjust proportion of the settlement to South Dakota. The South Dakota complaint does not directly attack or seek to enjoin the NCAA from entering the California settlement. As the California court ruled, how the NCAA pays for the settlement is not its concern.

CONCLUSION

The NCAA's conclusory allegation that South Dakota's complaint "implicate[s] . . . significant federal issues" does not come within a country mile of meeting its burden of showing federal subject matter jurisdiction over this case. If, as the NCAA alleges, South Dakota's claims are intertwined with federal questions before the California court, then South Dakota, Houston Christian and any other similarly situated Division I schools should be allowed to intervene in that action. But the California court has already ruled that there is no common question of law or fact between the settlement approval and the NCAA's allocation model under its rules, bylaws or constitution. Because South Dakota's claims do not implicate any legal or factual questions before the California court, there is no incidental federal question here vesting this court with subject matter jurisdiction over the case. Plaintiffs accordingly request that this matter be remanded to the state court.

Dated this 15th day of October 2024.

Respectfully submitted,

MARTY J. JACKLEY
ATTORNEY GENERAL

Paul S. Swedlund

Paul S. Swedlund
Solicitor General
State of South Dakota
1302 East Highway 14, Suite 1
Pierre, SD 57501
605-773-3215
paul.swedlund@state.sd.us