

IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS
_____ DIVISION

BOARD OF TRUSTEES OF
ARKANSAS TECH UNIVERSITY

PLAINTIFF

v. Case No. _____

NATIONAL COLLEGIATE ATHLETIC
ASSOCIATION (a.k.a. the "NCAA")

DEFENDANT

COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF

Comes now the Plaintiff, the Board of Trustees of Arkansas Tech University, by and through its undersigned counsel, Thomas W. Pennington, and for its Complaint, alleges and states as follows:

PARTIES

1. The Board of Trustees is the governing board of Arkansas Tech University ("Arkansas Tech"), a public institution of higher education and an instrumentality of the State of Arkansas, organized and existing pursuant to the laws and Constitution of the State of Arkansas. Ark. Const., Amend. 33 and Ark. Code Ann. §6-65-301, *et seq.*
2. Pursuant to A.C.A. §6-65-302, the Board of Trustees of Arkansas Tech University is charged with the management and control of Arkansas Tech University.
3. The principal offices of Arkansas Tech are located in Pope County at 1509 N. Boulder Ave, Room 210, in Russellville, Arkansas.

4. Defendant National Collegiate Athletic Association (“NCAA”) is a voluntary unincorporated association of over 1,000 public and private university members, including Arkansas Tech University, with its principal place of business located in Indianapolis, Indiana. The NCAA promulgates and enforces eligibility standards and other rules on member institutions, as well as student-athletes who attend member institutions.

JURISDICTION AND VENUE

5. This action is a declaratory judgment action that is brought pursuant to Ark. Code Ann. §16-11-101, *et seq.*, and Ark. R. Civ. P. 57 for the purpose of determining a question of actual controversy between the parties regarding Arkansas Tech’s contractual and legal rights as a member institution of the NCAA; specifically, this action involves the imposition by the NCAA of a penalty on Arkansas Tech requiring the vacation of a combined 205 competition wins of the Arkansas Tech University men’s and women’s basketball teams.

6. In addition, Arkansas Tech seeks injunctive relief to enjoin the defendant from violating the Board of Trustee’s rights under the United States and Arkansas Constitutions, including without limitation, violating the Board of Trustees’ right to equal protection of the laws and substantive due process in violation of U.S. Const. Amend. 5 and 14 and Ark. Const. 2, §3.

7. In addition, the Arkansas Tech Board of Trustees seeks relief from the NCAA pursuant to 42 U.S.C. §1983 and the Arkansas Civil Rights Act of 1993, codified at Ark. Code Ann. §16-123-101, *et seq.*

8. This Court has jurisdiction pursuant to Ark. Const. Amend. 80 §6, Ark. Code Ann. §16-13-201, 42 U.S.C. §1983 and the Ex Parte Young doctrine, and the Arkansas Civil Rights Act of 1993.

9. Venue is proper in this Court pursuant to Ark. Code Ann. §16-4-101 and Ark. Code Ann. §16-60-104.

STATEMENT OF FACTS

10. NCAA member colleges and universities are divided into three major divisions: Division I, II, and III. Annually the member schools must meet membership criteria for their respective divisions. Each Division is governed by Articles adopted by the vote of the membership.

11. Arkansas Tech is a Division II member organization of the NCAA.

12. There exists between Arkansas Tech and the NCAA a legal relationship containing mutually enforceable promises and obligations which are contained in the Division II Manual (the "Contract").

13. Pursuant to A.R.C.P. 10(d), a copy of the Contract is attached as Exhibit A.

14. The Articles contained in the Contract are divided into three sub-categories: the Constitution, the Operating Bylaws, and the Administrative Bylaws. Each of these portions of the Contract serves a different function.

15. The NCAA Constitution sets forth the basic purposes of the NCAA.

16. The legislation passed and agreed to by the NCAA membership to promote those purposes and principles are set out in the Operating Bylaws.

17. The policies and procedures to implement and enforce the rules and regulations found in the Operating Bylaws are contained in the Administrative Bylaws.

18. The Constitution and Bylaws provide for a Board of Governors responsible for administering the general affairs of the NCAA as a whole.

19. A majority of the members of the NCAA Board of Governors are employees of public institutions of higher education. Exhibit B.

20. The Constitution and Bylaws for Division II also provide for a “Presidents Council” which may set forth the policies, rules and regulations for operating each division.

21. A majority of the members of the NCAA Division II Presidents Council are employees of public institutions of higher education. Exhibit C.

22. The NCAA Constitution has a dues paying requirement in Section 3.7.3.

23. Arkansas Tech has annually paid the NCAA membership dues each year since joining the NCAA in 1995.

24. Article 3.02.3.1 of the NCAA Constitution provides in relevant part, “Active members have the right to compete in NCAA championships, to vote on legislation and other issues before the Association, and to enjoy other privileges of membership designated in the constitution and bylaws of the Association.”

25. Article 3.3.2.1 of the NCAA constitution provides that, “Active members shall be entitled to all of the privileges of membership under the constitution and bylaws of the Association and all privileges incidental thereto.”

26. Bylaw 19.01.1 of the NCAA bylaws states as follows:

Mission of the NCAA Infractions Program. It shall be the mission of the NCAA infractions program to eliminate violations of the NCAA rules and prescribe appropriate penalties should violations occur. The program is committed to fairness of procedures and the timely and equitable resolution of infractions cases. The achievement of these objectives is essential to the conduct of a viable and effective infractions program. Further, an important consideration in prescribing penalties is to provide fairness to uninvolved student-athletes, coaches, administrators, competitors and other institutions.

NCAA Investigation at Arkansas Tech

27. In August, 2012, Arkansas Tech allowed the women’s basketball program, after consulting with and receiving permission from the Arkansas Tech NCAA compliance officer, as

well as the compliance officer of the Great American Conference, to pay the on-campus apartment housing security deposit for six women's basketball student-athletes.

28. It was subsequently determined that the Arkansas Tech compliance officer incorrectly gave the women's basketball program permission to pay the on-campus apartment housing security deposit ("deposit", and, as required by the NCAA bylaws, Arkansas Tech self-reported the secondary violation to the NCAA on August 27, 2013.

29. On January 23, 2014, the NCAA enforcement staff gave a verbal notice of inquiry to Arkansas Tech, and the NCAA enforcement staff conducted an investigation on the campus of Arkansas Tech University.

30. The investigation centered on Arkansas Tech providing impermissible benefits to student-athletes from 2009 to 2013.

31. The investigation culminated in the joint submission by Arkansas Tech and the NCAA enforcement staff of a Summary Disposition Report to the NCAA's Committee on Infractions on November 7, 2014 and was amended on January 29, 2015.

NCAA Committee on Infractions

32. Under the Contract, members of the NCAA are obligated to enforce legislation of the NCAA which is enacted by the members of the NCAA.

33. The membership of the NCAA previously adopted Article 19 of the Contract, which sets forth penalties for violation of the Bylaws and enforcement procedures.

34. NCAA Bylaw 32.8.1 establishes that the Committee on Infractions ("COI"), "shall hold a hearing to determine the existence of the alleged violation of NCAA legislation and to prescribe any appropriate penalties."

35. At all relevant times herein, the COI was acting as an agent of, and on behalf of, the NCAA.

36. The Summary Disposition Report (“SDR”) referenced in paragraph 31 above is an agreed upon set of facts that is jointly submitted by the Enforcement Division of the NCAA and the member institution under investigation to the COI. The use of an SDR is procedurally authorized by NCAA Bylaw 32.7 in the Enforcement Policies and Procedures section of the Contract.

37. The SDR that was considered by the COI reflected that a total of 57 prospective and enrolled student-athletes had their \$250 on-campus apartment housing security deposit waived or paid by Arkansas Tech and that Arkansas Tech reserved on-campus housing for an indeterminate number of student-athletes during the period 2009 to 2013, rendering them ineligible to participate in NCAA athletic contests.

38. The COI chose to not impose a penalty for student-athletes with reserved rooms.

39. The NCAA enforcement staff and Arkansas Tech agreed in the SDR that the scope and nature of the violations demonstrated that the institution failed to adequately monitor certain aspects of Arkansas Tech’s housing operations.

40. As part of the Summary Disposition Report referenced in paragraph 31 and submitted to the COI, Tech self-imposed penalties in the form of scholarship reductions, recruiting restrictions, and restrictions on countable athletically related activities. More specifically, Arkansas Tech self-imposed the following sanctions:

- a. A total reduction of 1.0 equivalency in Men’s Basketball for a two year period;
- b. A total reduction of 0.7 equivalency in Women’s Basketball for a two year period;

- c. A reduction of Men's Basketball recruiting calendar by two weeks in two subsequent recruiting cycles;
- d. A reduction of Women's Basketball recruiting calendar by three weeks in two subsequent recruiting cycles;
- e. A reduction of one official visit in Men's Basketball for two years;
- f. A reduction of one official visit in Women's Basketball for two years;
- g. A reduction in countable athletically related activity by two hours per week (from 20 hours to 18 hours) in Men's Basketball during each of the next two academic years; and
- h. A reduction in countable athletically related activity by two hours per week (from 20 hours to 18 hours) in Women's Basketball during each of the next two academic years.

41. The COI met on February 4, 2015 to consider the amended SDR and on February 5, 2015, issued a letter wherein the COI accepted the parties' proposed factual findings and violations as set forth and agreed to in the SDR, and also proposed additional penalties over and above Arkansas Tech's self-imposed penalties. A copy of the February 5, 2015 letter is attached as Exhibit D.

42. A summary of the proposed additional penalties is as follows:

- a. Public reprimand and censure;
- b. Two years probation;
- c. \$5,000 fine;
- d. Mandatory attendance by certain personnel at a NCAA Regional Rules Seminar; and
- e. "Pursuant to NCAA Bylaws 19.5.2-(g) and 31.2.2.4, the institution will vacate all wins in which student-athletes competed from the time they became ineligible through the time their eligibility was reinstated..."

43. No rationale was provided by the COI in its February 5, 2015 letter for why it proposed the additional penalties.

44. In the COI's February 5, 2015 letter, there was no finding of any intentional misconduct by any member of the Arkansas Tech coaching staff, nor was there a finding of loss of institutional control by Arkansas Tech.

45. Arkansas Tech has never been cited before by the NCAA for a major rules violation, and has been an NCAA member since 1995.

46. The effect of the "vacation of wins" penalty proposed by the COI was that Arkansas Tech would have to vacate 99 wins for men's basketball and vacate 106 wins for women's basketball, a total of 205 wins.

47. The COI committee members who issued the February 5, 2015 letter on behalf of the NCAA, and their place of employment at the time the letter was issued are as follows:

- Julie A. Rochester, Chair (Northern Michigan University)
- Douglas D. Blais (Southern New Hampshire University)
- John D. Lackey (attorney)
- Bridget Lyons (Barry University)
- Carey Snyder (East Stroudsburg University of Pennsylvania)
- Harry O. Stinson III (Kentucky State University)
- Jane Teixeira (Pacific West Conference)

48. A majority of the COI university-affiliated members were from public universities.

49. Arkansas Tech agreed to all of the additional penalties proposed by the COI except one - vacation of the 205 wins by the institution - and pursuant to NCAA Bylaw 32.10 of the Contract,

filed a timely request for an expedited hearing before the COI on the proposed penalty of vacation of wins.

50. On March 31, 2015, Arkansas Tech had an expedited penalty hearing before the COI to request that the COI reconsider its decision to propose the additional penalty of vacation of wins.

51. On June 4, 2015, the COI issued Infractions Decision No. 421, Case No. 00174 in which it denied Arkansas Tech's appeal and upheld its proposal to impose the additional penalty of vacation of wins. A copy the COI's decision is attached to Plaintiff's Complaint as Exhibit E.

52. In its June 4, 2015 decision, the COI ruled in part that, "In providing the impermissible benefits, the institution received a significant advantage not available to those institutions abiding by NCAA financial aid and extra benefit legislation."

53. The COI also stated in its June 4, 2015 decision:

NCAA Bylaw 19.5.2-(g) authorizes the committee to vacate contests in which ineligible student-athletes compete. The bylaw states that vacation is *particularly* appropriate when, among other things, the case includes a large number of violations and an accompanying failure to monitor. Both of those criteria exist in this case.

54. The June 4, 2015 decision letter issued by the COI does not explain why Arkansas Tech's self-imposed penalties plus the agreed upon additional COI penalties were insufficient punishment for the violations which were determined to exist.

55. In the COI's June 4, 2015 decision, it was noted that this was Arkansas Tech's first major infractions case.

NCAA Division II Infractions Appeals Committee

56. The Contract provides for an appeals process whereby a member institution can appeal a COI decision to the NCAA Division II Infractions Appeals Committee ("IAC").

57. At all relevant times herein, the IAC was acting as an agent of, and on behalf of, the NCAA.

58. Included with the COI's decision in Arkansas Tech's case was a Notice of Appeal form, which set forth the process to appeal the COI's decision to the IAC as well as the permissible possible grounds for appeal. A copy of this Notice of Appeal form is attached as Exhibit F.

59. Pursuant to NCAA Bylaw 32.10, the IAC hears appeals from member institutions of COI prescribed penalties.

60. To appeal a COI prescribed penalty to the IAC, the Notice of Appeal specifies the following grounds for appeal:

(1) GROUNDS FOR APPEAL

- a. Finding of violation. You may appeal the Committee on Infractions' determinations of fact and violations on any of the following grounds:
 - (1) The committee's finding is clearly contrary to the evidence presented to the committee;
 - (2) The facts found by the committee do not constitute a violation of NCAA rules; or
 - (3) There was a procedural error and but for the error, the Committee on Infractions would not have made the finding of violation.
- b. Penalty. You may appeal a penalty imposed by the Committee on Infractions on the grounds that the penalty is excessive such that it constitutes an abuse of discretion. *Please note that any penalties which are appealed are automatically stayed until the appeal is concluded. All other penalties remain in effect.*

61. Pursuant to NCAA Bylaw 32.10, Arkansas Tech appealed the COI's decision on the grounds that the COI's additionally imposed penalty of vacation of wins was excessive such that it constituted an abuse of discretion.

62. Arkansas Tech's appeal was timely made and presented to the NCAA IAC, whose members and place of employment at the time of the hearing were as follows:

- LaKeisha C. Marsh (attorney)
- Ann Jirkovsky (Bellarmine University)
- Richard D. Loosbrock (Adams State University)
- Gregory Moore (Southern Intercollegiate Athletic Conference)
- Morgan Walker (California State University, San Bernadino)

63. A majority of the IAC's university members were employees of public universities.

64. On December 14, 2015, Arkansas Tech orally presented its appeal to the IAC. The COI was represented by its chair, Julie Rochester, an employee of Northern Michigan University, a public institution of higher education.

65. On March 4, 2016, the IAC issued its decision on behalf of the NCAA. The IAC's decision was to deny Arkansas Tech's appeal and uphold the COI's decision to impose against Arkansas Tech the additional penalty of vacation of wins.

66. A copy of the IAC's decision (Report No. 421) is attached as Exhibit G.

67. The Contract does not define the term "excessive" or the phrase "abuse of discretion" as those terms and phrases are used in the available grounds for appeal or NCAA Bylaw 32.10.4.1.

68. There are no "sentencing guidelines" available for guiding COI punishment sanctions imposed upon NCAA Division II members, but upon information and belief, such sentencing guidelines do exist for when sanctions are imposed by the NCAA upon its Division I members.

69. The IAC in its March 4, 2016 decision does not cite any rationale of the COI for why Arkansas Tech's self-imposed, plus agreed upon additional penalties, were insufficient punishment.

70. In the IAC's March 4, 2016 decision, there was no finding of any intentional misconduct by any member of the Arkansas Tech coaching staff, nor was there a finding of loss of institutional control by Arkansas Tech.

71. The IAC focused its decision on a previously unknown test: whether the benefits gained by the violations were mitigated by Arkansas Tech's self-imposed penalties.

72. Upon information and belief, there is no NCAA bylaw or other provision in the Contract that sets forth a "benefit gained v. self-imposed penalty mitigation" criteria for member institutions to use when deciding upon appropriate self-imposed penalties.

73. The IAC does not state in its decision that it considered the COI's additional penalties that Arkansas Tech agreed to when determining whether or not the vacation of wins penalty was excessive punishment for Arkansas Tech. The IAC only cites that it considered Arkansas Tech's self-imposed penalties.

74. No evidence was presented by the COI nor was there any cited by the IAC that there was a direct causal relationship between the violations and the wins.

75. The IAC decision essentially holds that the Arkansas Tech men's and women's basketball teams won because some of the student-athletes on the team received a waiver of their on-campus apartment housing security deposit.

76. The IAC's March 4, 2016 decision acknowledged that the abuse of discretion standard set forth in NCAA Bylaw 32.10.4.1 is not defined by NCAA Division II legislation or interpretations.

77. In its March 4, 2016 decision, the IAC created an abuse of discretion standard and noted that the, "standard provides necessary assistance to member institutions, the Committee on Infractions, and this committee in future infractions appeals cases."

78. This abuse of discretion standard was not available to Arkansas Tech prior to either the COI or IAC decisions.

79. The Contract and the Bylaws contained therein do not allow or provide a procedural mechanism for Arkansas Tech to obtain a further appeal or other review of the IAC's March 4, 2016 decision.

80. On January 21, 2017, NCAA Division II unanimously approved and made effective immediately, proposal 2017-6. This proposal was sponsored by the Presidents Council and now allows an institution to waive, pay in advance or guarantee payment of any institutional pre-enrollment fee for a prospective student-athlete who has committed to the school. A copy of this proposal is attached as Exhibit H.

81. With the approval of proposal 2017-6, the NCAA has now made legal the action for which it sanctioned Arkansas Tech.

FIRST CLAIM FOR RELIEF
Breach of Contract

82. Plaintiff realleges and incorporates herein each and every allegation of Paragraphs 1 through 81 as though fully set forth herein.

83. The relationship between Arkansas Tech and the NCAA is a contractual one, governed by the NCAA Constitution and Bylaws, which constitute the Contract of the parties.

84. Pursuant to NCAA Bylaw 3.7, Arkansas Tech has paid its membership dues and the NCAA has accepted them.

85. Payment of dues by member institutions is an essential term of the Contract of the parties referenced in paragraph 13. Pursuant to NCAA Bylaw 3.7.4, the penalty for failure of a member to pay dues for one year is termination of membership.

86. In its March 4, 2016 decision, the NCAA breached an essential term of the Contract of the parties when the IAC failed to follow NCAA Bylaw 32.10.4.1 as it decided the Arkansas Tech case.

87. NCAA Bylaw 32.10.4.1 states as follows:

32.10.4.1 Penalties. A penalty prescribed by the Committee on Infractions shall not be set aside on appeal except on a showing by the appealing party that the penalty is excessive such that it constitutes an abuse of discretion.

88. The plain language of the Bylaw sets out that the penalty appealed from will not be set aside except on a showing that, “the penalty is excessive such that it constitutes an abuse of discretion.” Conversely, Arkansas Tech is contractually guaranteed that it will not be subject to penalties which are “excessive such that it constitutes an abuse of discretion.”

89. By disregarding the Contract, the IAC breached an essential term of the Contract. The IAC arbitrarily established an alternate and fundamentally different reading of NCAA Bylaw 32.10.4.1 that eliminated the need to determine if there had been an abuse of discretion by the COI. Arkansas Tech held a vested contractual right to the prior agreed standard. In its March 4, 2016 decision letter, the IAC wrote, “Stated another way, in order to set aside the penalty, the Infractions Appeals Committee is required to determine not only that the penalty is excessive, but that there was also an abuse of discretion.”

90. The IAC ruled only on whether or not it felt that the penalty was excessive. The IAC never considered or ruled whether there was an abuse of discretion by the COI as required by NCAA Bylaw 32.10.4.1.

91. Arkansas Tech held a vested contractual right to the prior, agreed standard of review. By unilaterally abrogating the agreement of the parties and discarding an important procedural and substantive right of Arkansas Tech, the NCAA breached the Contract of the parties.

92. The IAC's failure to follow NCAA Bylaw 32.10.4.1 was in violation of the NCAA handbook and therefore constitutes a material breach of contract by the NCAA.

93. The wins vacated by the NCAA were unique and were for a set period of time in history. Monetary damages are insufficient. Arkansas Tech does not have an adequate remedy at law, the balance of the equities is a greater hardship on Plaintiff, and irreparable harm would occur absent a grant of injunctive relief.

94. Plaintiffs request that this Court enter an Order declaring that Defendant violated the terms of the parties Contract, and grant Plaintiff a permanent injunction against Defendant NCAA that restrains and enjoins Defendant NCAA from requiring Arkansas Tech University to vacate the 205 wins.

SECOND CLAIM FOR RELIEF
Breach of Implied Duty of Good Faith and Fair Dealing

95. Plaintiff realleges and incorporates herein each and every allegation of Paragraphs 1 through 94 as though fully set forth herein.

96. The NCAA expressly agrees in Bylaw 19.01.1 that it will be fair and equitable in the operation of its Infractions program. Bylaw 19.01.1 of the NCAA bylaws states as follows:

Mission of the NCAA Infractions Program. It shall be the mission of the NCAA infractions program to eliminate violations of the NCAA rules and prescribe appropriate penalties should violations occur. The program is committed to fairness of procedures and the timely and equitable resolution of infractions cases. The achievement of these objectives is essential to the conduct of a viable and effective infractions program. Further, an important consideration in prescribing penalties is to provide fairness to uninvolved student-athletes, coaches, administrators, competitors and other institutions.

97. In addition, pursuant to AMI Civ. 2426 (2016), every contract is subject to a duty of good faith and fair dealing in its performance and its enforcement.

98. The implied covenant of good faith and fair dealing, which adheres in every contract, is part of this Contract and the NCAA owes such obligations to its member schools, including Arkansas Tech.

99. The NCAA has a duty to perform and exercise the duties and rights created by the Contract in good faith.

100. The NCAA has a duty to refrain from intentionally or purposely doing anything that would destroy or injure Arkansas Tech's right to receive the procedural and substantive rights agreed to in the Contract.

101. The NCAA has a contractual duty to ensure that its actions are reasonable, a contractual duty to do nothing to arbitrarily, capriciously, reckless or unreasonably impair the interest of member institutions, including Arkansas Tech.

102. The NCAA has a contractual duty to act consistently with the agreed common purpose and the contractual guarantees and expectations of all members, including Arkansas Tech.

103. The NCAA has a contractual duty to fulfill its fiduciary responsibilities and obligations by treating all member institutions including Arkansas Tech in a consistent manner in all matters impacting the benefits, rights and obligations that inure to each member by virtue of membership.

A. The IAC failed to follow Bylaw 32.10.4.1.

104. The NCAA IAC breached the covenant of good faith and fair dealing by failing to adhere to the essential terms of the Contract as set forth in NCAA Bylaw 32.10.4.1.

105. The plain language of the Bylaw provides that the penalty appealed from may be set aside on a showing that, "the penalty is excessive such that it constitutes an abuse of discretion."

106. The NCAA IAC failed to act fairly or in good faith by arbitrarily and capriciously deciding to not consider or decide whether an abuse of discretion by the COI occurred.

107. The IAC addressed only whether the penalty was excessive.

108. The IAC never considered whether there was an abuse of discretion by the COI as guaranteed to Arkansas Tech and as required by NCAA Bylaw 32.10.4.1.

109. The IAC's intentional parsing of NCAA Bylaw 32.10.4.1 to avoid reaching the contractually guaranteed determination of whether there was an abuse of discretion, the creation by the IAC out of whole cloth of a new definition of abuse of discretion, and the subsequent failure to apply it in the case where the definition was created demonstrates the lack of good faith and fair dealing toward Arkansas Tech which was committed by the NCAA.

B. No measure of what is excessive.

110. On March 4, 2016, the IAC determined that the COI's penalty was not "excessive."

111. The NCAA IAC breached the covenant of good faith and fair dealing by providing no objective measure of what "excessive" was measured against or how the lack of excessiveness was determined and consequently deprived Arkansas Tech of its rights under the Contract.

112. To this day, the NCAA has failed to announce a clear standard of how "excessive," as that term is used in NCAA Bylaw 32.10.4.1, is to be measured, or describe how it is to be applied.

113. The NCAA breached its contractual duty of good faith and fair dealing when the COI imposed an additional penalty which vacated Arkansas Tech athletic competition wins. Arkansas Tech was contractually entitled to a meaningful review of that determination on the grounds that the COI additional penalty was "excessive." In such a review, Arkansas Tech is contractually

entitled to an objective definition of the term “excessive.” The NCAA breached the Contract by declining to use an objective meaning of the term.

114. The NCAA has breached the covenant of good faith and fair dealing by failing to follow the essential terms of the Contract and by failing to delineate and apply a fair and consistent standard to all of its members in its application of the Bylaws.

C. Abuse of Discretion.

115. The IAC’s March 4, 2016 decision letter noted that they did not have a definition of “abuse of discretion,” then the IAC created one. The IAC then failed to apply that definition in Arkansas Tech’s case.

116. The NCAA IAC breached the covenant of good faith and fair dealing by failing to properly apply NCAA Bylaw 32.10.4.1.

117. The NCAA IAC ruling that the COI additional imposed penalty of vacation of wins was not an abuse of discretion is not possible in good faith or fair dealing because the IAC never considered whether an abuse of discretion occurred, then created an arbitrary definition of it, and then failed to apply the definition to Arkansas Tech’s case.

118. The NCAA has breached the covenant of good faith and fair dealing by failing to follow the terms of the Contract and by failing to delineate and apply a fair and consistent standard to all of its members in its application of the Bylaws.

D. Inconsistent application of precedent.

119. Infraction decisions of the COI are distributed publicly and are used by both the NCAA and its member institutions.

120. The NCAA uses the infractions decisions to make other member institutions as well as the general public aware of infractions by member institutions.

121. The COI relies upon past decisions as precedent in making current and/or future decisions.

122. Member institutions use past infractions decisions as precedent to aid in the self-imposition of sanctions when an infraction has, or is suspected to have, occurred.

123. In its July 20, 2014 Public Infractions report against Henderson State University, the NCAA COI stated that the case centered on recruiting violations, extra benefits, impermissible tryouts, impermissible countable athletically related activities, unethical conduct, failure to promote an atmosphere for compliance and failure to monitor by the institution.

124. The COI determined that eight major violations had occurred at Henderson State University, including unethical conduct by one of its head coaches.

125. The NCAA COI in the Henderson State University case did not impose the additional penalty of vacation of wins against Henderson State University. The only additional penalties imposed against the institution by the COI were: public reprimand and censure, two years of probation, \$2,500 fine, and four employees being required to attend an NCAA Regional Rules Seminar in 2015.

126. In its June 17, 2010 Public Infractions report against the University of San Francisco, the NCAA COI stated that this was the institutions fourth major infractions case. In this particular case there were three areas of NCAA violations: 1) violations of financial aid and extra benefit legislation due to impermissible purchases of items other than required text books at the institution's bookstore; 2) impermissible cost-free long-distance telephone calls placed by member of the men's basketball team and 3) an attendant failure to monitor by the institution relating to: a) the impermissible purchases by student-athletes at the bookstore and b) a failure to exercise proper oversight of long-distance telephone usage.

127. Specifically, 108 student athletes in 12 of the University of San Francisco's 14 varsity sports programs impermissibly purchased \$13,907.48 worth of materials from the university bookstore.

128. In contrast, in Arkansas Tech's case, 57 prospective and enrolled student-athletes had their \$250 on-campus apartment housing security deposit waived or paid by Arkansas Tech. The on-campus apartment housing security deposit, if paid by the student, is refunded by the university at the end of the lease if there is no damage to the apartment. The actual benefit to the 57 Arkansas Tech student-athletes that was gained by the waiver or payment of the on-campus apartment housing security deposit was only whatever interest would have accrued on the \$250 during the period of the lease.

129. The NCAA COI in the University of San Francisco case did not impose the additional penalty of vacation of wins against the University of San Francisco. The only additional penalties imposed against the institution by the COI were: public reprimand and censure, two years of probation, requiring the institution to donate \$27,814 to the charity of its choice, implementing and developing educational programs on NCAA legislation and submission of various reports.

130. Both the COI and IAC failed to apply applicable precedent from the University of San Francisco infractions decision to the Arkansas Tech case, despite the similarity in facts between that matter and the one involving Arkansas Tech.

131. This failure to correctly apply precedent was pointed out by Arkansas Tech University repeatedly to both the COI as well as the IAC, but they chose to ignore their own precedent, instead saying they were not bound by prior precedent.

132. The NCAA has breached the covenant of good faith and fair dealing by failing to follow the terms of the Contract and by failing to delineate and apply a fair and consistent standard to all of its members in its application of the Bylaws.

E. Arkansas Tech was punished for something that is no longer a violation.

133. Arkansas Tech was punished by the NCAA for waiving or paying a pre-enrollment university fee - a \$250 housing security deposit - for a total of 57 athletes over a period of four years.

134. Upon information and belief, NCAA Division I voted in January 2016, two months prior to the IAC issuing its decision in the Arkansas Tech case, that providing pre-enrollment deposits, like housing deposits, would no longer be a violation of NCAA bylaws.

135. On January 21, 2017, the NCAA adopted Division II Convention Legislation proposal 2017-6 (Exhibit H) which amends the NCAA Bylaws and, effective immediately, allows an institution to waive, pay in advance, or guarantee payment of any institutional pre-enrollment fee for a prospective student-athlete who has committed to the school. This rule change specifically permits the waiver or payment by the institution of prospective student-athlete room deposits and damage deposits for dormitory rooms.

136. The stated rationale behind Proposal 2017-6 was that waiver or payment of these fees does not create a recruiting advantage for the institution.

137. On March 4, 2016, the IAC issued its decision to uphold the COI's imposition of the vacation of wins penalty on the university. The central analysis of the NCAA in their determination that the vacation of wins penalty was not excessive and was fair was because of a determination by the IAC that the Arkansas Tech waiver/payment of the on-campus apartment housing security deposit did provide Arkansas Tech University with a benefit that resulted in

significant on-court success. Similarly, the COI stated in its June 4, 2015 decision that Arkansas Tech “received a significant advantage” when it waived or paid the on-campus apartment housing security deposit.

138. Arkansas Tech University was punished for an action that, by the NCAA’s own determination, does not create an impermissible benefit. Upon information and belief, this rule change by Division I on housing security deposits was known by the IAC at the time of the IAC’s ruling against Arkansas Tech.

139. The NCAA is estopped to defend the IAC ruling due to its adoption of Proposal 2017-6.

140. The wins vacated were unique to Arkansas Tech and were for a set period of time in history that will not occur again. Monetary damages are insufficient. Plaintiff does not have an adequate remedy at law, the balance of the equities is a greater hardship on Plaintiff, and irreparable harm would occur absent a grant of injunctive relief.

141. The NCAA has breached its contractual obligation of good faith and fair dealing by failing to apply a fair and consistent standard to all of its members, including Arkansas Tech. Enforcement of the punishment of vacation of wins against Arkansas Tech should be enjoined, and Plaintiff should be granted permanent injunctive relief allowing it to reclaim the wins that the NCAA has required Arkansas Tech to vacate.

F. No rationale given for why existing penalties were not enough.

142. Despite multiple opportunities, neither the NCAA COI nor the IAC could provide a rationale for the determination that the additional penalty of vacation of wins was legitimate in this case, or why the self-imposed and additional agreed upon penalties were not adequate.

143. As explained above, the NCAA has, by the actions of the COI and IAC, breached its contractual obligation of good faith and fair dealing owed to Arkansas Tech.

144. The enforcement of the punishment of vacation of wins against Arkansas Tech should be enjoined, and Plaintiff should be granted permanent injunctive relief allowing Arkansas Tech to reclaim the wins that the NCAA has required it to vacate.

145. Plaintiff requests that this Court enter a permanent injunction against Defendant NCAA restraining and enjoining Defendant NCAA from requiring Arkansas Tech University to vacate 205 wins and mandating that the NCAA restore all such competition wins to Arkansas Tech. Alternatively, Arkansas Tech is entitled to a new hearing with prior notice and an opportunity to be heard, with objective and valid standards.

THIRD CLAIM FOR RELIEF
Injunctive Relief Constitutional Violations

146. Plaintiff incorporates by reference all of the preceding paragraphs.

147. Upon information and belief, at all relevant times, the NCAA, the COI and the IAC were, and continue to be, engaged in state action and are state actors.

148. The regulatory activity of the NCAA constitutes state action due to the pervasive entwinement of the NCAA with the State of Arkansas and Arkansas public institutions of higher education.

149. The Equal Protection and Substantive Due Process Clauses of the United States Constitution and the Arkansas Constitution prohibit arbitrary or capricious conduct by state actors or state action.

150. The NCAA is a nationwide association that regulates intercollegiate athletic competition among public and private post-secondary institutions of higher education, including all public four year institutions in Arkansas.

151. The NCAA acts through representatives of its member colleges and universities.

152. The NCAA is entwined with governmental policy, as shown by their relocation of seven championship events from the State of North Carolina “because of the cumulative actions taken by the state concerning civil rights protection.” (Exhibit I)

153. Similarly, the government and state actors are entwined with the NCAA.

154. Public funds are used by Arkansas public higher education institutions to pay NCAA dues and other NCAA expenses.

155. 100% of the public four year institutions of higher education in Arkansas are members of the NCAA.

156. Public university employees make up a majority of the voting membership of the NCAA Division II President’s Council. Exhibit C.

157. On the COI hearing panel that heard the Arkansas Tech case and appeal, a majority of the university representatives on the panel were employees of public institutions.

158. On the IAC hearing panel that heard the Arkansas Tech appeal from the COI decision, a majority of the university representatives on the panel were employees of public institutions.

159. The NCAA is funded by membership dues from both its public and private member institutions of higher education.

160. Upon information and belief, the bulk of NCAA revenue is from Division I member institution basketball tournament revenue of which the majority of participants are public institutions.

161. The NCAA sets membership standards and student eligibility rules for member institutions and has the power to penalize any member universities, including public institutions and their student athletes that violate NCAA Bylaws.

162. For purposes of a NCAA member institution's official record, only competition against the team of another NCAA member institution counts toward its official record.

163. Upon information and belief, there is no regulation by the State of Arkansas of college and university intercollegiate athletic competition, or student-athlete eligibility. The State of Arkansas uses and adopts the NCAA as the regulatory body.

164. Upon information and belief, for at least the past decade, other than some financial oversight, the NCAA has historically been seen to regulate all facets of intercollegiate athletics of all public four year institutions in Arkansas in lieu of the Arkansas Department of Higher Education's exercise of its own authority.

165. All employees of Arkansas public university NCAA member institutions that attend NCAA meetings do so as part of the public employees regularly assigned duties. The public employees do not take personal leave or vacation time while engaged in NCAA matters, events or meetings.

166. The NCAA directs the actions of Arkansas public employees, such as having a requirement that the coaches of the public member institutions in Arkansas must pass certain NCAA rules tests and comply with certain NCAA educational requirements in order to be employed as a public institution of higher education coach.

167. As part of the sanctions against Arkansas Tech, the NCAA, through the COI, directed Arkansas Tech employees to attend certain meetings. These trips were taken by the public employees and paid for by public funds of the State of Arkansas.

168. The NCAA directs and regulates through its constitution, bylaws, and rules the actions of Arkansas member public institutions in the type, nature and amount of financial aid that may be awarded by the Arkansas public institutions to their student-athletes.

169. The NCAA directs and regulates through its constitution, bylaws, and rules the terms of eligibility of student-athletes at Arkansas member public institutions who play in the intercollegiate athletics contests.

170. The NCAA directs and regulates through its constitution, bylaws, and rules the minimum academic standards that student-athletes at Arkansas public member institutions must meet in order to be eligible for and participate in NCAA competition.

171. The NCAA directs and regulates the standards and imposes limits on employment of student-athletes attending Arkansas public higher education institutions, in order to be eligible for and participate in NCAA competition.

172. The Equal Protection and Substantive Due Process Clauses of the United States Constitution and the Arkansas Constitution prohibit arbitrary or capricious conduct by state actors.

173. Specifically, the NCAA actions which violated the Arkansas Tech Board of Trustees right to equal protection and substantive due process under the United States Constitution and the Arkansas Constitution include, but are not limited to:

a. NCAA Bylaws are void for vagueness.

174. The NCAA Bylaws at issue are so vague that they cannot be fairly enforced and member institutions cannot comply with them. They do not provide adequate notice of the regulated conduct to a person of ordinary intelligence.

175. NCAA Bylaw 19.5.2(g) provides as follows:

Vacation of records when a student-athlete(s) has competed while ineligible, particularly when a case involved academic misconduct, serious intentional violations, a large number of violations, direct or knowing involvement of a coach or a high-ranking administrator, competition while academically ineligible, ineligible competition when there is a finding or failure to monitor or lack of institutional control or when vacation or

a similar penalty would be prescribed if the underlying violation(s) were secondary. The penalties may include one or more of the following as applicable:

- (1) Vacation of individual records and performances in individual sports, including reconfiguration of the institution's team point totals after vacation of individuals records and performances;
- (2) Vacation of relay, doubles and similar team records in individual sports when one or more team members compete while ineligible, including reconfiguration of the institution's team point totals after vacation of relay, doubles or similar results;
- (3) Vacation of team records and performances in individual or team sports;
- (4) Vacation of records of head coaches; and
- (5) Return of individual or team awards to the Association.

176. At the IAC appeal, the NCAA COI argued that the penalty of vacation of wins was called for because Bylaw 19.5.2(g) permits it when there is a "large" number of violations.

177. The word "large" as it is used in NCAA Bylaw 19.5.2(g) is not defined by the NCAA Bylaws, and at the appeal hearing before the IAC, no definition of "large" or prescribed amount (ex. more than ten) that would constitute a "large" number was provided by the COI or the IAC to Arkansas Tech.

178. The NCAA failed to announce a clear standard or describe how it would be applied in determining whether a "large" number of violations has occurred under Bylaw 19.5.2(g).

179. The NCAA COI did not present any objective evidence that Arkansas Tech's number of violations was "large," particularly in light of other similar cases with similar fact patterns.

b. NCAA's actions were arbitrary and capricious.

i. Inconsistent imposition of penalties.

180. The NCAA determination that Arkansas Tech University must vacate wins while at the same time ignoring its own precedent was both arbitrary and capricious.

181. In the matter of the University of San Francisco, the COI ruled that the public institution was required to make a donation, but did not have to vacate wins.

182. One Arkansas Tech student-athlete who had received the waiver of the on-campus apartment housing security deposit was permitted by the NCAA Student-Athlete Reinstatement Committee to make a payment to a charity of his choice in the amount of the on-campus apartment housing security deposit and to continue to play while neither Arkansas Tech nor other student-athletes who received the same on-campus apartment housing security deposit waiver were given a similar opportunity to make such a payment in lieu of vacation of wins.

183. Upon information and belief, NCAA Division I has sentencing guidelines or grids for Division I members, but does not have sentencing guidelines or grids for Division II members. A sentencing guideline or grid is important because such information provides a person who is subject to the regulation with advance notice of a possible sanction under the circumstances described in the guideline. The absence of such notice results in arbitrary and capricious action and vests unfettered discretion in NCAA actors empowered to apply sanctions without adequate administrative control or oversight.

184. The NCAA reinstated to Penn State University the wins that it had initially forced them to vacate as a consequence of the sex abuse case by a Penn State athletic department employee upon a minor.

ii. Definition of “abuse of discretion” was made up in the IAC’s decision.

185. In its March 4, 2016 decision, the IAC created an abuse of discretion definition but then failed to apply it in Arkansas Tech’s case.

186. Creation of a standard, coupled with a failure to follow the standard, but an assertion to use it in future cases, is arbitrary and capricious.

iii. Cited infraction now being permitted.

187. Upon information and belief, at the time the IAC upheld the COI's penalty upon Arkansas Tech for payment of the on-campus apartment housing security deposit, the NCAA Bylaws for Division I permitted the practice.

188. Punishing Arkansas Tech for something that was at the time being permitted by the NCAA is arbitrary and capricious.

iv. Inability to explain why existing penalties were not enough.

189. The NCAA COI failed to explain why the substantial penalties that the university self-imposed in addition to the agreed upon additional COI penalties were insufficient punishment.

190. The NCAA IAC failed to explain why the Arkansas Tech self-imposed penalties as well as the COI additional penalties to which Arkansas Tech agreed, were insufficient punishment.

191. The acts of the NCAA COI and IAC to improperly apply the NCAA's Bylaws, failure to have adequate bylaws, and failure to act consistently was an abuse of discretion, was arbitrary, capricious and discriminatory, was without a rational basis, and constituted an unconstitutional denial of due process and equal protection to the Plaintiffs.

192. The NCAA actions are actionable in this Court pursuant to 42 U.S.C. §1983, and the Arkansas Civil Rights Act.

193. The actions of the NCAA continue to date.

194. By unlawfully imposing the sanction and then failing to reverse it and failing to provide a meaningful opportunity for a valid review after identifying the meaning of the term excessive, the NCAA has denied Plaintiff its rights under the substantive and procedural due process clauses and further, has treated Arkansas Tech differently than it has other similarly situated public institutions.

195. Plaintiff is entitled to an injunction prohibiting Defendant from continuing to violate Arkansas Tech's right to due process and equal protection.

196. Enforcement by the NCAA of the punishment of vacation of wins by Arkansas Tech should be enjoined and Plaintiff should be granted permanent injunctive relief allowing Arkansas Tech to reclaim the wins that the NCAA has required it to vacate, and enjoining the NCAA from further violating the rights of the Plaintiff.

AFFIRMATIVE RELIEF

197. Plaintiff requests that this Court review the terms of the contract with the NCAA and determine the rights and duties of the parties; in particular, Plaintiff requests this Court to review the unilateral actions of the NCAA and their various committees and agents and determine that those actions constitute a violation of the federal, state, contractual, and common law rights referenced above which are held by the Board of Trustees of Arkansas Tech.

198. Because the NCAA has refused to follow Arkansas law in violation of the vested contractual rights of Plaintiff, the NCAA actions have placed Arkansas Tech into a position of irreparable harm. The wins vacated were unique and were for a set period of time in history. Monetary damages are insufficient. Plaintiff does not have an adequate remedy at law and the balance of the equities is a greater hardship on Arkansas Tech.

199. Consequently, Plaintiff requests that the Court enter an order:

- a. Declaring that the inconsistent application of Bylaws 32.10.4.1 and 19.5.2(g) was a breach of the implied covenant of good faith and fair dealing, which adheres in the Contract;
- b. Declaring that the NCAA enforcement of Bylaws 32.10.4.1 and 19.5.2(g) was arbitrary and capricious;

- c. Requiring the NCAA to specifically perform its obligations under the Contract and reinstate and permit Arkansas Tech University to reinstate in their official records the 205 competition wins that were vacated;
- d. Restraining and enjoining the NCAA from requiring Arkansas Tech University to vacate the 205 competition wins.

200. Plaintiff requests that it be awarded its costs incurred in prosecuting this action in accordance with A.C.A. §16-111-110.

201. Plaintiff requests that it be awarded its costs and attorney's fees incurred in prosecution this action pursuant to 42 U.S.C. §1988.

202. Plaintiff Tech reserves the right to file such additional or amended pleadings as may be required upon further investigation and discovery including, but not limited to, an Amended Complaint for Declaratory Judgment.

WHEREFORE, premises considered, the Board of Trustees of Arkansas Tech University prays for the declaratory relief as set forth herein; for the injunctive relief set forth above; for an award of its attorney's fees and costs incurred in prosecuting this action as permitted by law; and for any and all other proper relief to which it may be justly entitled, whether specifically requested or not.

Respectfully submitted,

**BOARD OF TRUSTEES OF
ARKANSAS TECH
UNIVERSITY**

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