

AMERICAN ARBITRATION ASSOCIATION

Choice Foundation v. Mosaica Education, Inc.

Case No. 69 180 Y 01864 07

**POST-HEARING BRIEF OF
THE CHOICE FOUNDATION**

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Choice is worried that the arbitrator, given the truncated hearing, may fail to recognize what the Choice Board sees so clearly. The evidence, even in its condensed form, conclusively demonstrates that Mosaica promised much, but delivered little – doing an awful job running Lafayette Academy. In defense, Mosaica has offered an obvious big lie supported by the false testimony of its officers: that Choice, not Mosaica, operated the school and supervised the CAO, so Choice has only itself to blame for the school’s admittedly “unacceptable”¹ performance. Choice rebutted this preposterous contention with contemporaneous documentary evidence that conclusively demonstrated that it was false. Apparently unremorseful, these same Mosaica witnesses now offer, in post-hearing depositions, a different and even more unlikely factual scenario, gambling that the lack of a hearing transcript may provide sufficient leeway for them to change their story with impunity.

Make no mistake about it, if Mosaica is able to weather this case without paying a large monetary award, Mr. Connelly and Mr. Eidelman will be dancing at their Wall Street headquarters and will be emboldened to use their sales organization to sell this program to someone else, somewhere else, without regard for whether Mosaica can deliver on the promises it takes to make the sale.

Choice will continue to work hard and the school is already tangibly better in virtually every way than it was last year. But Choice needs and deserves substantial compensation to undo the damage caused during the 2006/2007 school year. If the evidence is there to support it, and Choice believes that it is, Choice requests that the arbitrator fashion an award that calls a spade a spade, reflects the gravity of Mosaica’s

¹ When confronted with an internal Mosaica report from April 2007, Ex. 97, Mr. Connelly acknowledged that the school was unacceptable by then but he placed the blame for this squarely on Choice.

cynical performance and fully redresses the damage to the innocent students of Lafayette Academy.

In this post-hearing brief, Choice will address:

- Mosaica’s argument that there is no contractual basis for a “for cause” termination;
- Mosaica’s blatantly false contention that Choice, not Mosaica, was running the school and supervising the CAO;
- Mosaica’s argument that, notwithstanding the other indicators of failure, the Iowa test scores mean that Mosaica did a good job;
- Mosaica’s factual contention that the Choice Board was unreasonably demanding and caused its own problems;
- The post-hearing state of the evidence on the contractual breaches claimed by Choice; and
- The amounts that Choice is entitled to be awarded.

1. Choice Has a Contractual Basis for Terminating the Contract For Cause.

Mosaica has argued that Choice cannot prove any breach that justifies termination “for cause” under the Management Agreement, Ex. 3. Choice disagrees. Choice brings its claims under Section 7.01(b):

(b) By Charter School. The Charter School may terminate this agreement . . . in the event MEI fails to remedy a material breach of this Agreement within 30 days after written notice from the Board. A material breach by MEI, includes but is not limited to: . . . (ii) MEI’s failure to substantially follow policies, procedures, rules, regulations or curriculum duly adopted by the Board . . . [or] (iv) the employment of teachers in violation of the Code or this Agreement. . . .

Like most of the rest of the Contract, this provision was part of the Mosaica “sample” agreement, “Mgmt Agmt Template Mueller.”² Under Section 7.01(b),³ Choice has terminated Mosaica for at least three valid reasons: (a) a material breach of Mosaica’s

² Compare Ex. 1 to Ex. 17 of the Mueller deposition.

³ See Ex. 3, para. 7.01(b).

obligations even if that breach does not fall into a category specifically enumerated in Section 7.01(b) of the Contract; (b) a failure to follow the Board’s policies or Mosaica’s curriculum; and (c) Mosaica’s employment of teachers in violation of the Code or the Management Agreement.

a. Non-Enumerated Material Breaches.

The Agreement does not limit “material breaches” to those specifically defined in Section 7.01(b). Although to be deemed “material,” a proposed breach must be significant, there is no other textual limit on its subject matter. The essential, overarching claim in this case is that Mosaica failed to institute the educational system and program that it promised in attachment 1 to the Charter and in Mosaica’s brochures and PowerPoint presentations.⁴ All of the many complaints proven at the hearing constitute significant failures to honor specific and essential promises found in the Charter that Choice was obligated to fulfill and, therefore, constitute “material breaches” of the Management Agreement.

b. “Policies” and “Curriculum.”

Section 7.01(b) also states that Choice can terminate Mosaica if Mosaica fails to “substantially follow policies, procedures, rules, regulations or curriculum duly adopted by the Board.” It does not limit the subject matter of these policies nor how Mosaica should be informed of them. The Board communicated policies to Mosaica by formally approving, twice, the program outlined in the Charter Application, by communicating individual policies to Mosaica in various e-mails and conversations, by preparing and providing to Mosaica an outline of the policies it expected Mosaica to follow and by

⁴ See Ex. 2 for the attachment to the Charter Application; Ex. 4 for the PowerPoint presentation; and Ex. 6 for the glossy brochure.

adopting and transmitting a proposed report card that set forth the policies in considerable detail.

The Charter Application Attachment, Ex. 2, spelled out exactly what the curriculum and educational program at Lafayette should be. It was drafted by Mosaica and was adopted by the Board twice, once when submitted to the State and again when the Charter was signed. Mosaica cannot dispute that it knew that the Board expected Mosaica to follow what was promised in the Charter Application because Mosaica knew that this Application defined Choice's contractual obligations to the State. There is no evidence that the Board ever agreed to any dilution of what was promised in the Application.

The Board also communicated that its e-mail correspondence constituted statements about its "policies." Specifically, in the first paragraph of the first default notice, Mr. Huger clearly stated that the e-mails the Board had sent to Mosaica communicated "policy and procedures, rules and regulations, and the curriculum duly adopted by the Board." *See* Ex. 17. In its response, Ex. 28, Mosaica never contended that these e-mails did not express policies, nor that the policies had not been adequately communicated.

The Board also transmitted its policies to Mosaica in November, 2006, in what Choice has called the "outline."⁵ And Mosaica plainly understood this outline contained the Board's policies because Mosaica used – verbatim – the policies from the outline as the foundation for the internal action plans it used to report to the Board.⁶

⁵ *See* Ex. 20.

⁶ *See* Ex. 24 for an example of a Mosaica "Action items tracking list" which directly quotes the Board's policies from the Outline.

Choice transmitted its Report Card form to Mosaica on February 1, 2007, after it was approved at the January 31, 2007 Board Meeting.⁷ This Report Card incorporates the policies previously contained in the Outline and expands on them.⁸ It makes it crystal clear that the Board expected Mosaica to fulfill Mosaica's promises about its curriculum and educational plan.⁹ The final completed Report Card, Ex. 42, is extremely important because it sets forth in one place both the Board's policies and the many ways in which Mosaica failed to follow those policies.¹⁰

c. Employing Teachers in Violation of the Code.

Finally, Section 7.01(b)(iv) specifically prohibits Mosaica from employing teachers "in violation of the Code or this Agreement." Paragraph 6.01 makes MEI responsible for conducting criminal background checks, and the Charter itself, Ex. 1, at p. 15, paragraph 4.4.4, requires a "criminal history review through [the appropriate agencies]." Mosaica's failure to conduct these background checks is a material breach of Mosaica's obligations that, in itself, is sufficient to sustain a "for cause" termination.

2. Choice Was Not Managing the School Nor Supervising the CAO.

Choice is frankly concerned that this absolutely meritless contention, now served up with two very different purported contractual negotiation chronologies, might somehow gain traction. So it will be refuted here in more detail than it deserves. The absurdity of Mosaica's contention is independently disproven any of four ways: (i) by the writings of the parties; (ii) by the conduct of the parties; (iii) by the circumstances and

⁷ Mosaica had the opportunity to comment on this Report Card, but never did so. See Ex. 35 for the Board's e-mail sending the draft Report Card to Mosaica and Mosaica's response that it would "review and respond with our suggestions"; Ex. 38 for another e-mail sending the final Report Card format; and Ex. 42 for the completed Report Card.

⁸ Compare Ex. 17 and 20 to Ex. 42.

⁹ See Ex. 35 and 38.

¹⁰ See Ex. 42. As will be summarized later, most of the specific factual findings of the Report Card were unrebutted at the hearing.

capabilities of the parties; and (iv) by the inconsistency and implausibility of Mosaica's obviously contrived testimony.

a. **Writings by Choice.**

As discussed in detail at the hearing, Mr. Huger wrote in his September 20 letter to the CAO copied to senior Mosaica personnel, the following:

The Choice Foundation is the official Charter holder of the school with the State of Louisiana, and *we have hired Mosaica Education to provide management services, in essence "run the school."* It is Mosaica's job to provide the first class educational experience we all envision, and have promised. *You [Ed, the CAO] are Mosaica's point person on the ground that must make this goal a reality. ...*

The role of The Choice Foundation is to set policy, not operate the school. We are an oversight board, not a management board.

See Ex. 9 (emphasis added).¹¹

Mr. Huger's letter was an unequivocal statement that Choice understood that Mosaica, not Choice, was running the school and supervising the CAO. These statements (and the others contained in fn. 11) were never refuted by Mosaica. If Mosaica really believed that Choice was supervising the CAO and running the school, presumably Mosaica would have responded adamantly to Mr. Huger's description of the working relationship. There are no writings whatsoever by Mosaica that even hint that Choice was responsible for day-to-day management of the school or that Choice, rather than Mosaica, was responsible for supervising and directing the CAO.

¹¹ Again on October 18, 2006, the Vice Chairman wrote to Mosaica's Lou Erste: "And most troubling is that the identification of critical issues is coming from an *inexperienced oversight board*, not from the school's administration." Ex. 15.

On November 4, 2006, Mr. Huger write Mr. Eidelman saying, in part:

We understand that in this environment things take time. But put yourselves in our shoes. I met with *your CAO* and your regional person two months after school started . . . Stephen [RVP] and Ed [CAO] came in and tell us that they cannot tell us when the technology is going to be put in, nor does every teacher have books or copies of books, nor do we have a plan on dealing with IEPs which are due in a month.

See Ex. 18.

b. Writings by Mosaica.

There is a writing, a proverbial “smoking gun” if there ever was one, by Mosaica’s COO, Mr. Erste, that directly refutes Mosaica’s contention that Choice was running the school. In a May 8, 2007 e-mail, after Mosaica had been placed in default the second time, Mr. Erste responded to Mr. Huger’s e-mail discussing plans for an administrative structure for the 2007/2008 school year as follows:

Regarding Mickey Landry and the Head of School position, *as you know per the Management Agreement, Mosaica has the sole responsibility and authority to select necessary personnel, including the CAO (Head of Schools), faculty and staff. . . .* Without the interviews we conduct, including our assessment of Mr. Landry’s ability to implement the Paragon Curriculum and Mosaica’s Educational Program, we will not be in a position to decide whether approval of his candidacy is warranted.

Regarding your introduction of ‘a structure’ to the school today . . . our belief that the arbitrator will decide in our favor—and the fact that we have a legally binding contract that is effective and in full force at this time—makes it clear that you are acting against this contract. *This interference in Mosaica’s operation of the school and our contractual relationships with our employees at the school must stop immediately.*¹²

Bear in mind Mr. Erste’s admission at the hearing that he never told anyone at Choice that Mosaica was expecting Choice to run the school or to supervise the CAO or anything at all like that. Mosaica’s response letter to the second notice of default also does not argue that Choice, not Mosaica was managing the school, Ex. 91. Apparently, desperate times call for desperate measures, but it should be readily apparent that Mosaica’s argument that Choice was running the school and managing the CAO are complete distortions of the clear “real time” understanding of the parties.

¹² See Ex. 53 (emphasis added).

c. The Contract.

The Management Agreement, Ex. 3, also makes it abundantly clear that Mosaica was responsible for day-to-day supervision and direction of all employees at the school, including the CAO.

With respect to these issues, the Agreement says:

MEI was established . . . to *manage* public schools.

This agreement is to govern the management of up to three schools . . .

1.01 Educational Services.

(a) . . . MEI will provide the Charter School and its students the following educational services:

(ii) Instruction. Oversight and coordination of the services to be provided by instructional personnel, including the Chief Administrative Officer and the rest of the Charter School's Leadership Team and its teachers and support staff . . .

1.02 Administrative Services.

(a) . . . MEI will provide the Charter School and its students the following educational services:

(i) Personnel Management. Management and professional development of all personnel providing Educational Services. . .

1.04 Authority. By this Agreement, the Charter School provides MEI all authority and power necessary and proper for MEI to undertake its responsibilities, duties and obligations provided for in this Agreement. . .

6.01 Personal Responsibility.

(a) . . . MEI will have sole responsibility and authority to determine staffing levels, and to select, evaluate, assign, discipline, supervise, manage and transfer personnel necessary to carry out [the various services] . . .

The only provision that Mosaica has pointed to that suggests that the Board had any role in the day-to-day operation of the school was Section 6.02, the CAO section. It states:

6.02 CAO. The Chief Administrative Officer of the school (“CAO”) will be an employee of the Charter School. The CAO will be the academic and administrative head of the Charter School, shall have full responsibility for its operation and shall be required to implement the Paragon™ Curriculum and MEI’s Educational Program. The Board will have the authority, consistent with the Code and other applicable laws and regulations, to supervise the CAO and to hold him or her accountable for the success of the Charter School. The CAO shall be a non-voting member, ex-officio, of the Board of the Charter School.

Although Mosaica’s witnesses testified falsely to the contrary, this provision was contained almost verbatim in the first draft of the Agreement, the “Mgmt Agmt Template Mueller,” with only slight modification thereafter. The only significant change to this quoted section from the “sample” Mosaica agreement was to make Choice the employer of the personnel. This change occurred because Mosaica’s Mr. Mueller thought at the time that this was to be required by the State’s form charter contract. Ex. 1, p. 15, Paragraph 4.1.¹³

Whether Mosaica or Choice was the employer of the employees at the school was a matter of indifference to Choice.¹⁴ Mr. Huger’s contemporaneous email shows this and verifies that Mr. Mueller changed the employment provision in the Agreement because he believed that employment by Choice, as opposed to Mosaica, was required by state law.¹⁵

The Agreement, when viewed as a whole, clearly supports the idea that Mosaica was operating the school and managing all personnel on a day-to-day basis. Mosaica was contractually obligated in Sections 1.01, 1.02 and 6.01(a) to provide management and oversight over the CAO and all other personnel. Choice had delegated all necessary power to Mosaica to operate and manage the school in Section 1.04. The CAO provision,

¹³ The deletion of the final sentence of Section 6.02 from the draft agreement did not change its meaning because Mosaica retained the right of recommendation and selection in Section 6.01.

¹⁴ See Mr. Huger’s e-mail, Ex. 18 to Eidelman deposition.

¹⁵ See *id.*

supplied by Mosaica, gave the Board the right, but not the obligation, to supervise the CAO. It certainly did not make Choice the exclusive supervisor nor change Mosaica's job from hands-on manager to consultant as Mosaica belatedly claims.

This reading of the Management Agreement is confirmed by the statements in the Charter Application, which was prepared contemporaneously with the Management Agreement and had to be and was executed before the Charter Application could be submitted. The Charter Application states: "Mosaica Education, Inc. will . . . provide *comprehensive education and management services.*" Ex. 2, p. 2 (emphasis added). It also says: "Under agreement with the Choice Foundation, *MEI will manage all employee matters and therefore school leaders and staff will report to MEI with oversight and ultimate policy control residing with the Board of Directors.*" Ex. 2, p. 29 (emphasis added).

d. The Conduct of the Parties.

Even though the provisions of the Management Agreement called for employees at the school, including the CAO, to be Choice employees, Mosaica, with the Board's acquiescence, employed everyone at the school, issued all of their paychecks and W-2s, and administered their retirement program. All of the job offer letters, including the offer letters to the CAO and the principal and to other prospective employees were sent by Mosaica and referenced employment by Mosaica, not by Choice.¹⁶ And Mosaica spent 15 days training all employees on Mosaica's curriculum, its employee procedures¹⁷ and its internal systems (hence the deceptive "200 days on the ground in New Orleans

¹⁶ See Ex. 19 to the Eidelman deposition for letter from Mosaica to the CAO offering him relocation reimbursement.

¹⁷ Mosaica's Employee Manual is Ex. 131.

testimony” by Mr. Erste which apparently includes well over one hundred days that the numerous Mosaica trainers spent at a hotel in New Orleans before school opened).

With respect to the CAO, Mosaica found him, did psychological testing on him and chose him, with Choice’s approval, over several other candidates that Mosaica had also identified. Mosaica was his employer, issued his paychecks, provided his benefits and generated his tax reporting. Mosaica supervised and directed his work,¹⁸ as evidenced by the fact that Mosaica trained him, gave him his daily instructions, and edited his correspondence directed to Choice.¹⁹ It was Mosaica, not Choice, who notified him of his pending transfer to another Mosaica school in the Middle East for the 2007/2008 year.²⁰ Finally, it was Mosaica who instructed him to resign his position as CAO after the TV incident and accepted this resignation, Ex. 41, and made all the severance arrangements and payments.

e. **The Relative Circumstances and Capacities of the Parties.**

Mosaica is a management company that holds itself out as providing comprehensive management of schools. Mosaica was paid \$723,000, over and above direct employee costs, to provide comprehensive management of the school. The Choice Board is made up largely of business people who had full-time jobs, did not have any particular curricular agenda and did not have children at the school.

f. **The Implausibility of Mosaica’s Changed Story.**

For the first time at the hearing, Mosaica contended that Section 6.02 was inserted into the standard Mosaica contract at Mr. Huger’s insistence and that no other Mosaica contract had ever contained the operative “supervision” sentence found in that section.

¹⁸ See, e.g., Exs. 14, 152, 164, 166.

¹⁹ See Exs. 158, 159.

²⁰ See, e.g., Ex. 184.

The arbitrator has already summarized the content of this testimony in his e-mail requiring post-hearing depositions:

I am allowing Messrs. Mueller, Connelly and Eidelman to be questioned to give them an opportunity to explain the apparent inconsistency between the document produced by Mr. Swanson after the hearing and these witnesses' testimony at the arbitration hearing that the provisions of Paragraph 6.02 of the Management Agreement between Choice and MEI that "the Board will have authority . . . to supervise the CAO and to hold him or her accountable for the success of the Charter School" is not found in MEI's standard contract, was not in the original draft sent by MEI to Choice, and was added later at Mr. Huger's insistence because of his desire that the Board control the CAO.

This post-hearing testimony was required because after the second day of the hearing, Mr. Huger searched his early e-mails and found the original draft of the Agreement, Ex. 1 to deposition of Mueller. This document, labeled "Mgmt Agmt Template Mueller," transmitted to Mr. Huger by Allen Mueller on March 13, 2006, contained the same operative "supervision" sentence.

Because this first draft, referred to as the "sample" Mosaica agreement in Mr. Mueller's e-mail, directly refuted the testimony of three of Mosaica's witnesses on a central point in the case, Choice brought this document to opposing counsel's attention to provide counsel with an opportunity to voluntarily correct the record. It quickly became clear that Mosaica's counsel had no intention of doing so and instead that Mosaica was backpedaling as fast as it could regarding the content of the untranscribed hearing testimony. As a result, undersigned counsel informed the arbitrator, who ordered the post-hearing depositions.

In their post-hearing explanatory testimony, which was anything but contrite, Messrs. Mueller, Eidelman and Connelly offered the following incredible explanation:

- The arbitrator's summary of their testimony was not accurate because the Mosaica witnesses really had not said that their contract originally did not

have the provision in it²¹ nor that it was added later at Mr. Huger's request²² nor that this provision was unique among all Mosaica contracts;²³

- The March 13, 2006 e-mail attachment might have been altered (presumably by Mr. Huger or Mr. Swanson), but Mr. Mueller could not tell that for sure because Mr. Mueller's computer had "crashed,"²⁴ and
- If the e-mail attachment was authentic (which was doubtful) and the arbitrator's summary of the hearing testimony is accurate (which they denied), then the operative sentence was nonetheless inserted at Mr. Huger's request based on discussions with Mr. Huger and the Board that were held before a contract draft was circulated.²⁵

When confronted with three other Mosaica contracts that contained the same supervision sentence (the only three such contracts counsel was able to obtain independently of Mosaica), Mr. Connelly attempted to turn the tables by calling Mr. Swanson a liar,²⁶ which seemed particularly bold given his prior adamant false testimony at the hearing.

The new story that Mr. Huger was already making additions to the Agreement before he ever saw it is obviously false. How Mr. Huger or the Choice Board would know what to propose as a specific CAO supervision clause without seeing a proposed contract simply cannot be explained.

3. The School's Poor Performance is Demonstrated by Many Independent Sources. The Iowa Test Scores Do Not Rebut That Performance.

Notwithstanding Mr. Connelly's glowing reviews of the school he never visited, there are at least seven objective indications that the school was grossly dysfunctional in addition to the testimony and numerous exhibits presented at the hearing. The LEAP scores, the i-Leap scores, Leslie Jacobs' comments, the BESE Board's decision to reject

²¹ Mueller depo. at pp. 19-26.

²² Mueller depo. at pp. 7-9.

²³ Connelly depo. at pp. 5-6; Mueller depo. at pp. 53-55.

²⁴ Mueller depo. at pp. 9-18.

²⁵ Mueller depo. pp. 52-56.

²⁶ Connelly depo. at pp. 14-26.

two new school applications, the PBS *Now* show aired in June 2007, the parent surveys and the first-week attendance all show that the school was in disarray.

Mr. Connelly was not even half correct when he said that the LEAP pass rate of 30 percent, without earlier or later LEAP scores for comparison, tells nothing about the school's performance for 2006/2007. Although the scores are not significant without context, there is available context that tells a story of failure. At the February Board meeting, the CAO told the Board to expect a 75 percent pass rate and that percentage was, it turns out, a fair target. Other similarly situated startup charter schools achieved a 75 percent or greater pass rate in 2006/2007. Lafayette's scores placed Lafayette second-to-last among similar Type-5 charter start-ups, Ex. 79. Sophie Wright, Martin Luther King and Nelson Elementary all started at the same time, had similar low-income student populations, but had pass rates at least twice as high as Lafayette.

The i-LEAP scores also tell a bleak tale. In third grade, Lafayette had the worst scores of any charter school in the City, Ex. 82. BESE Board Member Leslie Jacobs said she found the school to be in disarray and complained to Mr. Huger about it, as referenced in Ex. 30. Likewise, the BESE Board itself was plainly not impressed with the school since it denied Choice's application (prepared by Mosaica) for two new schools, Ex. 36.

PBS had film crews and its reporter, David Broncaccio in the school at various times during the year. Early in the year, PBS did a story that was full of hope for the students at the school and in the City, Ex. 167. Later, on June 22, 2007, it did a follow-

up story, Mosaica's Ex. 168,²⁷ comparing two charter schools in New Orleans that had two distinct trajectories. One, a KIPP school, received favorable reviews. Lafayette's performance, in contrast, was lambasted. Broncaccio noted:

by late fall, the staff was struggling to teach at a school that seemed to be falling apart . . . busses didn't run; copy machines were broken; phones had not yet been installed; most students didn't even have their text books . . . we found serious problems persisted throughout the school year . . . the school's first year has been a terrible mess . . . This one charter school lost a devastating twenty-plus teachers this past school year . . .

The only objective evidence that was not facially alarming was the Spring Iowa test scores (which were a part of teacher bonus calculations) and their purportedly favorable import was exaggerated. First, the most significant reported improvement was in Kindergarten, where most of the students had never had any formal schooling which made big individual improvements likely during their first year in any academic program. Likewise, but to a lesser degree, many of the students in other grades had not attended a full year of school in 2005/2006 because of Katrina. This lack of schooling in 2005/2006 made large Fall to Spring improvements in scores inevitable, irrespective of the quality of the programs. Even so, the improvement was not as dramatic as it should have been. In some grades and subject matter areas, such as Fifth Grade, students actually regressed. In addition, as Mr. Connelly conceded, it is unclear how much the demotions of students from higher grades in the Fall to lower grades in the Spring affected the scores. Demotions would necessarily improve the scores because when a Fourth Grader is demoted to Third Grade, his percentile necessarily goes up and the school-wide average goes up in both grades.

²⁷ This exhibit also rebuts Mr. Connelly's contention that Mosaica had a great track record around the country. The transcript states: "Mosaica's name does show up in a bunch of cases, Michigan and Pennsylvania and Delaware, where there's some quite unhappy school districts who have fired these people."

The parent survey scores, Ex. 169, although conducted with a flawed methodology that allowed teachers to cull bad reviews to get their bonuses, explaining why some classrooms have none or very few reviews while others had over 20, did not meet the Charter's minimum standard of an average satisfaction score of 8.0, Ex. 2, p. 10.²⁸ The first-week attendance this year is down by over 250 students.

4. The Choice Board and Mr. Huger Did Not Behave Unreasonably.

The Choice Board is a group of volunteers that has taken on an important and difficult civic project. It includes community leaders in commerce, fundraising and philanthropy. Mosaica suggests that the Board was unreasonably demanding.

The only way to get a sense of what it was like to be on the Choice Board is to carefully review the exhibits, especially those from Ex. 1 to about Ex. 50, covering the timeframe from the beginning of school to the second default letter on April 4, 2007. A review of these documents demonstrates that the Board's frustration built up incrementally. Initially, the tone of the correspondence was inquisitive and polite, with many compliments.²⁹ Later, in October and November, it becomes more insistent, but there is still a sense that the Board believed Mosaica could right the ship.³⁰ It is only

²⁸ The survey summary includes a number of specific negative comments that are consistent with the evidence:

Well I really cannot say anything about PE, Art, or Spanish because my children do not go much. I am not happy at all with the school my children are not getting the education that we were promised. The school is dirty and a lot of the children are out of control

This school should not have opened until the proper Learning Materials were provided. My child never come home with books because there aren't enough books to give the kids. As a matter of fact i understand that the 6th grade teachers all share the same book. My son has had 3 or 4 homeroom teachers along with others that were fired or simply quit. He is failing.

There is No Spanish Instruction which is what I was seeking. I was presented information relative to the high academic standards and classes being offered at Lafayette Academy. This was false information, and as a result, my child's education has greatly been impaired.

²⁹ See Exs. 12 and 107 for examples.

³⁰ See Exs. 19 and 23 for examples.

towards the very end, when the Board’s frustration was boiling over, that the overall tone became negative.

Mosaica’s Lou Erste often said that he believed that the Choice Board was the best Board he had ever worked with. He even committed this thought to writing on occasion, including in Ex. 27, dated November 29, where he said:

Thanks for your commitment to excellence. I sincerely appreciate working with you both [Mr. Huger and Mr. Swanson]. You are paragons of professionalism and passion for education. Your leadership is precisely what is needed to assure quality education in New Orleans and throughout the United States.

5. A Scorecard of the Alleged Deficiencies and the Defenses to Them Demonstrates That Mosaica Did Not Adequately Perform its Services.

As an attempt to summarize the complained-of deficiencies and Mosaica’s defenses to them, Choice offers the following summary.

<u>Alleged Breach</u>	<u>Attempt to Rebut Existence of Complained-of Condition</u>	<u>Gist of Defense</u>
No criminal background checks	No	No defense offered
School was dirty	No	Not as bad as complained of; CAO incompetence
Inadequate physical inventory	Yes	Adequate inventory performed
Faculty turnover unacceptably high	No	Caused by CAO and Board, not Mosaica
Faculty absenteeism too high	No	No defense offered
School discipline unacceptable	No	CAO incompetence
Discipline procedure not followed	No	Unknown
Transportation late and unresponsive to student needs	No	Board indecisiveness; Katrina conditions
Food service problems	Yes	Cold meals were not paid for; food service otherwise properly implemented
Insurance	No	Two-and-a-half month period without insurance reflects market un-availability; “15” vendors contacted
Playground safety unacceptable; over 5 broken bones	No	CAO incompetence
Curriculum alignment problems; no Louisiana History	No	No defense offered

Textbook and supply problems	No	RSD caused the problems, but exacerbated by CAO failures
Paragon materials late and not received	Yes	Problems not as bad as reported; computer setbacks and CAO incompetence
No Kaleidoscope implementation	Yes	Implementation in one classroom was sufficient
OASIS program lacked promised academic content	No	Board was running OASIS; Mosaica not involved
Basic Skills program cancelled	No	No defense offered
No implementation of Individualized Learning Plans or PSAPs	Yes	Program implemented and adequate
After-school tutoring program basically non-existent	Yes	Three-week program adequate; Katrina obstacles prevented deployment
Late and inadequate LEAP tutoring program	Yes	Program adequate; starting in February fully appropriate
Failure to have school-wide Paragon Nights	No	Three out of a promised eight Paragon Nights adequate
Failure to institute Parent volunteer activities	No	Unreasonable to expect in first-year startup school
Failure to institute A+ computer tutoring and assessments	No	Existing network insufficient to handle; LEAP interferes with implementation timing; RSD failures on hardware supply; internet delivery not feasible
Powerschool	No	Network insufficient and RSD problems; State prevented installation
Teacher laptop delivery	No	LEAP test required postponement of delivery
Website	No	No defense offered
No meaningful arts and enrichment programs	No	Not reasonable to expect in first year of operation
Teacher reimbursements delayed	No	CAO incompetence
Special Needs Identification and service delivery inadequate	Yes	Program working well and was properly implemented

A few comments may be helpful in assessing Mosaica’s proffered defenses. First, there are relatively few areas where Mosaica disputes the existence of the conditions described by Choice. Second, although there are several areas where Mosaica attempted to explain why the failures were inevitable, given the circumstances, there are many significant problems for which Mosaica has offered no excuse. Third, it is important to

remember that stating a rebuttal is different than proving one. For example, saying that the RSD prevented implementation of a working computer system for the whole school year does not mean that the arbitrator should conclude that Mosaica could not have provided at least some kind of temporary fix like was done at other similar schools. Particularly in this proceeding, where the information about the school's operation and management is within Mosaica's control and there was no discovery, the proffered excuses – like the self-serving testimony that 15 insurance vendors were contacted in September, but that no insurance was available until late November – or that the internet version of A+ software could not work at Lafayette – or the incredible lie that Choice, not Mosaica, was running the Pre-K and after-school OASIS programs at the school – should not be accepted at face value.

6. Choice is entitled to compensatory and punitive damages.

The pre-hearing brief, the testimony both at the hearing and afterwards, and the preceding sections of this brief demonstrate numerous instances of Mosaica's utter incompetence, broken promises and outright lies. Without an award of damages, Mosaica will be free to take the \$723,000 that it was paid to manage Lafayette and move on to its next sales job without any consequences for its complete failure to provide the promised education to Lafayette's students. The compensatory damage award Lafayette is requesting will do three things. First, it will return the portion of the management fee that Mosaica did not earn. Second, it will institute a remediation program, which will help the children of Lafayette Academy make up the scholastic ground they lost in the disastrous academic year that they suffered under Mosaica's leadership. Lastly, it will compensate Lafayette for the additional expenses it incurred because it was forced to

terminate Mosaica and reapply for a new school charter. The final calculation of these damages is:

Return of management fees as per pre-hearing brief:	\$510,208
Re-doing background checks not performed initially:	\$4,900
LA-4 materials (were supplied free if ordered in 2006):	\$200,550
Reapplication expenses for Charter Amendment:	\$50,000
Textbooks to replace Mosaica curriculum materials:	\$196,000
Remediation program:	<u>\$1,913,075</u>
Total:	\$2,874,733

These figures are based on the most current information available and, in some cases, substitute hard numbers for the estimated numbers that were testified to at the hearing. The remediation program, which is designed to make up for what Mosaica promised, but did not do last year, is already underway with remedial teacher hiring complete for the fourth grade and proceeding for other grades.³¹

Given the facts that Mosaica deceived the parents and children at Lafayette Academy with cynical promises of a first class education, that the school was severely harmed by Mosaica's conduct, that Mosaica has broken its promises to students in other parts of the country as well,³² and that Mosaica has presented a defense based on calculated lies, a long-term compensatory/punitive damage award of \$2 million is also warranted. Additionally, the arbitrator should award attorney fees in the amount of one-third of the total, plus all costs of the proceeding and all AAA and arbitrator fees.

September 6, 2007

Respectfully submitted,

James R. Swanson
for The Choice Foundation

³¹ This program costs \$76,523 per classroom and includes diagnostic testing (\$12,000 per classroom), remedial workbooks (\$750 per classroom), after-school tutoring (\$5,250 per classroom) and an additional teacher to provide individualized tutoring and instruction (\$45,000 per classroom).

³² See fn. 27.