

**AMERICAN ARBITRATION ASSOCIATION**

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***Choice Foundation v. Mosaica Education, Inc.***

**Case No. 69 180 Y 01864 07**

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

James R. Swanson, 18455  
Joseph C. Peiffer, 26459  
Lance C. McCardle, 29971  
CORRERO FISHMAN HAYGOOD PHELPS  
WALMSLEY & CASTEIX, L.L.P.  
201 St. Charles Avenue, 46<sup>th</sup> Floor  
New Orleans, LA 70170-4600  
Telephone: (504) 586-5252  
Facsimile: (504) 586-5250

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*Attorneys for The Choice Foundation*

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## **I. Overview.**

For a substantial fee, Mosaica, a private entity that runs schools for a profit, promised that it would operate a superior quality school at the Lafayette Academy. In the words of one of its own PowerPoint presentations to parents, it promised to provide, “a classical education worthy of the finest private schools in the nation.”<sup>1</sup> The Choice Foundation (“Choice”) and its unpaid, all-volunteer board relied on this promise and Mosaica’s other promises when they decided to employ Mosaica to manage the day-to-day operations of the school in exchange for over \$723,000 per year. More importantly, over 750 students and their parents chose Lafayette Academy based on Mosaica’s promise of a tuition-free, private-school-quality education. But after a year under Mosaica’s leadership, it is crystal clear that Mosaica made many promises, but kept almost none. After it became apparent that Mosaica would not honor its promises to Lafayette Academy’s students and parents, Choice terminated Mosaica’s management contract.

This is an important case not so much because it involves a great deal of money – although it does – but because the outcome will affect the future of 750 students and their parents who trusted Choice and Mosaica with their educations and, to a significant degree, their futures. This situation is a tragedy that never would have occurred if Mosaica had only done what it promised. This dispute has and will direct needed focus and resources away from the urgent educational needs of lower income children who were supposed to be the beneficiaries of a wonderful new era of education in New

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<sup>1</sup> See Ex. 4 for PowerPoint presentation shown to parents who were deciding whether to send their children to Lafayette Academy. The exhibit numbers in this brief correspond to the numbered exhibit binder that was delivered to Mosaica on August 10, 2007 and is being delivered to the arbitrator with this brief.

Orleans. The last thing that Choice wanted was to see Mosaica fail and the Choice Board to be forced to step in and manage the school itself. But, because the Board bears a fiduciary responsibility to its students, and is taking that responsibility seriously, it was required to fire Mosaica for its woefully inadequate performance during the 2006/2007 school year. This action should have come as no surprise to Mosaica since Choice repeatedly warned Mosaica in writing and in person that its performance was substandard in a myriad of ways. As a result, the resolution of this dispute is not a close call necessitating soul searching, compromise, or half-measures; rather, it is a case that cries out for definitive, conclusive action.

In this arbitration, Choice is asking for three things. First, it seeks a declaration that it is justified in terminating the Mosaica Management Agreement. Although that outcome is critical to the school's future success, it does not alone remedy the problems Mosaica caused last year. Second, Choice is asking that Mosaica be called to account fully in money damages for its cavalier approach to fulfilling its promises. The evidence in this case will prove, beyond any doubt, not only that termination of Mosaica's contract is absolutely required, but also that the consequences of Mosaica's non-delivery are enormous and warrant a return of a portion of the over \$723,000 paid to Mosaica plus all additional costs occasioned by Mosaica's defaults. The school should also be awarded the cost of a remedial program for the 2007/2008 school year to make an effort to return the students to the academic place where they should now be. All of the elements of this compensatory monetary award are critical to the future success of the students at the school because, with this money, Choice will be able to jumpstart the kind of enduring, productive programs that Mosaica had promised to provide. Finally, Choice suggests that

the arbitrator should seriously consider an award of punitive or exemplary damages to punish Mosaica's callous and intentional disregard for the interests of the innocent children that it purports to serve and its cynical approach to fulfilling the promises that it made.

## **II. Pertinent Background of the Parties and Their Relationship With Each Other.**

Mr. Jim Huger formed Choice in 2004 to advocate the cause of parental choice in education as a possible solution to the many seemingly intractable problems in urban school districts like New Orleans. Mr. Huger is a proponent of school choice and the charter school movement. Choice was formed primarily to lobby governmental decision-makers to support school choice initiatives that would provide choices to parents.

It is common knowledge that the New Orleans Parish School System was a disgraceful failure even before Hurricane Katrina. It was characterized by a dysfunctional and corrupt school board, a bloated and ineffective bureaucracy, and poorly maintained and grossly disorganized schools. What this meant for a whole generation of children here in New Orleans was that they had little effective hope of emerging from their neighborhood school with the tools that they needed to fulfill their potential and become productive citizens. Mr. Huger, among many others, believed that this system needed radical change if the city was ever to hope to provide a brighter future and better opportunities for its young citizens.

After Katrina, the State of Louisiana took control of most of the Orleans Parish Schools away from the Orleans Parish School Board. In the judgment of the Louisiana legislature, the School Board's long track record of corruption and mismanagement meant that it was not up to the challenge of fixing this badly dysfunctional system. The

Recovery School District was formed under the supervision of the Louisiana Board of Elementary and Secondary Education (“the BESE board”). After considerable debate, it was ultimately decided that New Orleans would be an appropriate site, given its wrecked system, to implement a fairly wide open charter school system. This is a very exciting experiment with significant potential for positive change and ramifications for future national education policy, perhaps providing a source of hope to millions of underserved youngsters who languish in inefficient, bureaucratically burdened, continuously failing schools.

Shortly after the charter initiative was announced, Mr. Huger spoke with Jeanne Allen at the Center for Education Reform, who told him that a private education manager, Mosaica, would be a good candidate to run one or more charters in New Orleans.

Mosaica is a profit-seeking, private company that operates schools for a fee. The business idea is that Mosaica will provide “soup to nuts” school management in exchange for a percentage of state and federal revenue – 12.5 percent in this case. This amounted to over \$723,000 in Mosaica’s first year of running Lafayette Academy. Mosaica promised that its management would deliver an established, well-respected academic and administrative program – a “private school education for free” – that it had supposedly employed successfully in similar markets serving similar schools.<sup>2</sup> Mr. Huger met with Mosaica’s founder, Gene Eidelman. In that meeting, Mr. Eidelman represented that Mosaica had developed a replicable, highly successful system of school management that worked like clockwork where implemented.

It was apparent from Mr. Huger’s meeting with Mr. Eidelman that Mosaica wanted to run a charter school of New Orleans. Because Mr. Huger was impressed by

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<sup>2</sup> See Ex. 4 for Mosaica’s PowerPoint presentation.

Mosaica's presentation, he agreed to assist Mosaica in looking into how Mosaica could apply for a charter. At this point, Choice, which was not formed to run a charter school, did not contemplate applying for its own charter. Rather, it was planning to support Mosaica's bid for a charter. Ultimately, though, the State chose to exclude private profit-seeking businesses, like Mosaica, from applying for charters and made it plain that it wanted local stakeholding boards to serve as charter holders. After Mosaica was excluded from the charter school application process, Mosaica began soliciting Choice to apply for a charter on its behalf. Mr. Huger, who had heard Mosaica touting the benefits of its program, agreed to consider it.

Many people express skepticism about the propriety of a for-profit corporation running a school to make a profit, but simple economics suggests that a profit motive can fuel innovation and performance, and Choice had no philosophical problem with the idea that Mosaica could stand to make a significant fee. Mr. Huger and some of the others on the Choice Board are businessmen who are well aware that the difference between success and failure is often execution. Mosaica promised that it had a good idea, but, more importantly, that it had the resources and established procedures necessary to execute it. It certainly seemed that a large, for-profit management company that had significant experience opening and running many schools in the past would have a substantial advantage in opening and running a brand new school. Choice has never had any problem with the idea that Mosaica was in business to make a profit or that its profit here could be quite large, but Choice did expect that the children would receive the

“finest private school education” promised by Mosaica<sup>3</sup> in return for the very substantial amount of money that Mosaica would be paid.

Mosaica did not show signs of skimping on service during its solicitation of Choice. Mosaica’s Allan Mueller came to New Orleans several times to meet with Mr. Huger and other putative board members of Choice in order to tout the Mosaica program. He discussed what made Mosaica’s program so special and why Choice would want to partner with Mosaica.

At those meetings, Mosaica sold its program to the Choice Board, emphasizing what great benefits Choice would be offering to the children of New Orleans. The gist of the sales pitch was that Mosaica would do everything necessary to run and manage the day-to-day operations of the school.<sup>4</sup> To do this, it said that it would use its well-developed procedures, curriculum protocols, and evaluation tools to ensure the school’s academic and administrative success. Mosaica promised a well-organized school that was clean and safe. It said it would employ a high-quality proven curriculum, procure an appropriate state-of-the-art technology, create an environment that encouraged parental involvement, and offer rich extracurricular choices. The Choice Board, like a typical board, was supposed to function as an oversight board, meeting once a month – not to manage the school’s day-to-day affairs – but to consider broad policymaking issues.

Since many Board members had children who had attended or were personally familiar with schools such as Isidore Newman, Jesuit, Ben Franklin, Trinity Episcopal, Lusher and Metairie Park Country Day, the Board discussed with Mueller and others at

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<sup>3</sup> See Ex. 4 for Mosaica’s PowerPoint shown to parents of prospective students.

<sup>4</sup> The Charter Application, which was written by Mosaica (the “Application”), states that Mosaica will “provide comprehensive education and management services to Lafayette Academy.” See Application, Ex. 2, p. 2.

Mosaica that the school would be characterized by a comparable sense of purpose and enthusiasm, a systematic, problem-solving organization, and many of the same sorts of course offerings and extra-curricular programs. Certainly, Mosaica’s promotional spiel suggested that the school would achieve these aspirations and that underprivileged children of the city would really have the opportunity of receiving a first-class education.<sup>5</sup> It was a great sales pitch – an innovative academic program executed by an experienced paid professional education company – and, ultimately, the Board was very enthusiastic about the project. There was a great deal of discussion about what considerable advantages a Mosaica-run school would have over other potential operators, who would not have the tried and true experience of opening many new schools. Mosaica drafted the charter application, which contains detailed attachments specifying the promises that it had made to the Board.<sup>6</sup> Based on Mosaica’s promises, Choice ultimately agreed to seek the charter for Mosaica, believing that the school would provide a great public service by providing a level of education not previously available in an open enrollment public school in New Orleans. In the Spring of 2006, Choice was notified that it had been awarded a charter for the former Lafayette School on Carrollton Avenue.

### **III. The Choice Board’s Decision to Terminate the Contract.**

As will be evident below, this brief draws heavily on questions from Mosaica’s concrete written promises so there can be no doubt that the promises were made. The Board and the parents were entitled to expect Mosaica to deliver fully on those promises. Mosaica cannot claim that the Board did not make clear that it expected Mosaica to

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<sup>5</sup> In the words of Mosaica’s glossy brochure given to parents to entice them to enroll their children at Lafayette: “At Lafayette Academy it’s not about ‘if’ a child is going to college... It’s about preparing them for the college of their choice.” See Ex. 6 for Mosaica’s glossy brochure (ellipses in original).

<sup>6</sup> The Application is attached as Ex. 2.

deliver the promised performance because Choice explicitly and unequivocally conveyed in writing to Mosaica, in several different forms, the policies, procedures, rules and curriculum that it expected Mosaica to follow. Under Mosaica's Management Agreement, Mosaica was contractually required to follow the Board's policies and rules. The Board conveyed its policies in three ways: first, in various e-mails starting in September, October, and November of 2006, culminating in the first notice of default on November 3, 2006; second, in an evolving written outline provided to Mosaica on November 14, 2006 that Mosaica used to track its own progress; and third, in the Report Card format that was given to Mosaica on January 31, 2007 and that described in even greater detail the Board's concrete expectations for every aspect of the school's operations. It was Mosaica's low grade on the Report Card as of the end of March<sup>7</sup> that drove the final nail in Mosaica's coffin.

A word about how the Report Card came into being may be helpful in understanding why it is clear that the final notice of default, sent on April 4, 2007, was the product of Mosaica's repeated and consistent failure to follow board policies. As discussed above, in an effort to try to get Mosaica to perform, the Board prepared, approved and delivered to Mosaica on November 14, 2006 a fairly detailed outline of the policies that the Board expected Mosaica to adhere to in many areas.<sup>8</sup> This outline was used to track Mosaica's progress after the first notice of default in November 2006.<sup>9</sup> Mosaica cannot say that it did not agree to follow the plans, policies and rules contained

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<sup>7</sup> The final Report Card is Ex. 42.

<sup>8</sup> See Ex. 20 for this outline.

<sup>9</sup> The Board's frustration at Mosaica's lack of effort was boiling over by November. In a November 14, 2006 e-mail, the Board Chairman writes: "Gene, you keep downplaying our concerns which is not productive. You are only seeing a fraction of the incompetence, because I have not bored you with every detail. Get to New Orleans, not for a day, for a week, and watch, and you will see what I am talking about." See Ex. 21 for this e-mail.

in the outline because Mosaica's Chief Operating Officer Lou Erste used the outline himself to track the school's progress and commented verbally and in writing on how valuable he believed this outline was.<sup>10</sup> On November 30, 2006,<sup>11</sup> after Choice had agreed to withdraw their first notice of default, Mr. Erste wrote: "Your reworking of the Action Plan into the 'list of items to be monitored,' which you emailed to me on November 13, was helpful in organizing the items and to focus and prioritize everyone's attention."

In January of 2007, the Board Chairman, Mr. Huger, who was initially a great Mosaica cheerleader and was still hoping that Mosaica would bring the resources to New Orleans to do what it had promised to do, suggested that the Board needed an objective tool to measure the school's progress in complying with the policies set forth in the outline. As a result, the Board worked, using the outline as a source, on what it believed were the specific characteristics of the first class school program promised by Mosaica. The resulting document was the Report Card. When the Board finished the Report Card format and approved it on January 31, 2007, it provided it to Mosaica for Mosaica's comments.<sup>12</sup> Mosaica knew that the Board was judging it by the specific criteria contained in the Report Card and did not quibble with the Board's use of this Report Card.<sup>13</sup>

In February and March of 2007, the Board Members divided up the areas to be graded on the Report Card and each member visited the school to check how the school

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<sup>10</sup> See Ex. 23 for Mr. Erste's letter calling the outline "helpful."

<sup>11</sup> See Ex. 28 for this November 30, 2006 letter from Mr. Erste.

<sup>12</sup> See Ex. 35 for the transmittal of the Report Card to Mosaica.

<sup>13</sup> See Ex. 38 for Board Chairman, Mr. Huger's February 28, 2007 e-mail to Mosaica attaching the Report Card and telling Mosaica that the Board "will be implementing the attached Report Card at the school over the next several weeks." Mosaica never objected to this Report Card format.

was doing in the area assigned to that member. The results of the individual assessments were compiled in the final Report Card document, which was presented to the Board and became a significant consideration in the Board's decision to place Mosaica in default. The results shown in this Report Card demonstrate the state of the school on March 26, 2007.<sup>14</sup> The Report Card represents a snapshot of Mosaica's performance, late in the year, at a time when the kinks should have been worked out. It demonstrates that in almost no area was Mosaica doing an excellent job and that in most areas Mosaica was doing a terrible job. The details contained in the Report Card demonstrate why the Board had no option but to terminate Mosaica's contract.<sup>15</sup>

As a result, on April 4, 2007, Choice wrote Mosaica to notify Mosaica of its default under the Management Agreement.<sup>16</sup> Once Mosaica received this letter, it made almost no efforts to cure the defaults.<sup>17</sup> Instead, Mosaica wrote a response letter in which

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<sup>14</sup> See Ex. 42 for this Report Card.

<sup>15</sup> See Ex. 42 for this Report Card.

<sup>16</sup> See Ex. 52 for Mr. Huger's May 4, 2007 e-mail to Mosaica noting that Mosaica failed to remedy "the items in [the Board's] default notice" and observing that Mosaica's "lack of effort" during the cure period was "puzzling."

<sup>17</sup> Even after the default letter, there are several communications from the Board to Mosaica that show that, rather than attempting to cure the defaults, Mosaica's management effectively abandoned the school.

- I am still waiting on answers to all of my e-mail questions. Your response time is unacceptable. Are you still our [Executive Vice-President]? (Ex. 47 for April 17, 2007 e-mail from Board Chairman, Mr. Huger to Mosaica Executive Vice-President Lou Erste.)
- I have been trying to reach Lou all week. He is our [Executive Vice-President], but I cannot get my phone calls returned. What is going on? (Ex. 50)
- [W]hat is my expectation for a return call from my [Executive Vice-President]? What are your standards? (Ex. 54 for Board Chairman's May 8, 2007 e-mail to Mosaica founder, Gene Eidelman.)
- I would like to request that for the next two months Mosaica please do what it takes to run our school properly . . . We are paying you over \$2,000 per day. . . We have had no Executive Vice-President at the school. (Ex. 69 for Board Chairman's May 23, 2007 e-mail to Mosaica.)
- We have waited long enough. We need action at our school. (Ex. 71 for Board Chairman's May 25, 2007 e-mail to Mosaica.)
- We are still paying you about \$2,000 per day. Do we get anything at all for that. (Ex. 73 for Board Vice-Chairman's May 26, 2007 e-mail to Mosaica.)

it claimed that its performance had been adequate.<sup>18</sup> Mosaica never suggested that the Board judged Mosaica by the wrong standards or that these standards were unreasonable. Instead, incredibly, Mosaica claimed that it was actually doing a good job. Indeed, Mr. Eidelman personally attended Choice's June 6 board meeting to tell the Board that he was "proud" of Mosaica's performance.<sup>19</sup>

After the 30-day period following the notice of default had expired, Choice's Board met again on May 15, 2007 to consider Mosaica's response letter and to listen to Mosaica's oral presentation to the Board and the Choice Chairman's recommendations. Shortly before that meeting, the school received the Fourth Grade LEAP scores which confirmed that the obvious operational failures were taking a toll on student performance. Only 33 percent of the Fourth Graders passed<sup>20</sup> the test; not the 75 to 80 percent forecasted by Mosaica's CAO at the February 28, 2007 Board Meeting. Ultimately, the Board voted unanimously to terminate the Management Contract and adopted, with modifications to take into account Mosaica's rebuttal, the Chairman's Summary of why termination was Choice's only reasonable course of action.<sup>21</sup>

#### **IV. The Mosaica Promises Form Part of its Contract.**

There is no question that Mosaica's promises form a part of Choice's contract with Mosaica and that Mosaica's failure to live up to these promises are material

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- Is your company abandoning the school. We have recent requests for services, and phone calls with no reply. I asked Lou Erste if he was coming to town, he told me 'he would let me know.' It is only fair to the kids that we run this school properly at the end of the school year. (Ex. 74 for May 30, 2007 e-mail from Board Chairman to Mosaica.

<sup>18</sup> See Ex. 91 for this.

<sup>19</sup> See Ex. 76 for the minutes of this meeting.

<sup>20</sup> There are five categories of performance on the LEAP test: Advanced, Mastery, Basic, Approaching Basic and Unsatisfactory. The requirements to pass the LEAP test are not rigorous. Students that score "approaching basic understanding" or above on Math or English and "basic" or above on the other section pass the test. At Lafayette, 67 percent of the students failed because they scored "approaching basic" or below on both the Math and English portion of the LEAP test.

<sup>21</sup> See Ex. 61 for Chairman's Summary of Reasons to Terminate.

breaches. Mosaica and Choice are parties to a Management Agreement dated March 20, 2006. The Management Agreement requires Mosaica to comply with the terms of the Charter from the State of Louisiana. This Charter includes the many promises Mosaica made in the Charter Application, an application that Mosaica itself prepared.

The Management Agreement gives Choice the right to terminate the contract if Mosaica fails to remedy a material breach of the contract.<sup>22</sup> The contract does not define what constitutes a “material breach,” but it does indicate that the “failure to substantially follow policies, procedures, rules, regulations or curriculum duly adopted by the board” is a material breach.<sup>23</sup> In this case, Mosaica’s many promises, which will be extensively quoted in this brief, were adopted as the Board’s policies when it applied for and agreed to the Charter.<sup>24</sup> Those promises were egregiously and repeatedly breached by Mosaica.

#### **V. Summary of Mosaica’s Promises and Breaches.**

This case centers around Mosaica’s wholesale failure to deliver on its promises. Mosaica promised that it was an expert manager with a proven program that it would implement fully, without the need for day-to-day supervision or involvement by the Board. As this brief will demonstrate, Mosaica simply did not deliver on its promises and the results of its mismanagement were devastating to the school and the children that it served. Some of the most obvious of Mosaica’s failures were:

- Mosaica recommended and hired an incompetent CAO whom the Board ultimately fired after discovering that the CAO’s bedroom contained a TV and a DVD player that was donated to the school and had been reported stolen.

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<sup>22</sup> See Ex. 3, p. 10 for the portion of this Agreement which gives the Board the right to terminate the agreement if Mosaica fails to remedy a material breach of this Agreement within 30 days after written notice from the Board.

<sup>23</sup> See *id.*

<sup>24</sup> See Exs. 1 and 2 for the Charter Contract and the Application.

- Mosaica’s vice-president intentionally concealed the CAO’s wrongdoing regarding the television incident from the Board.
- Despite knowing that Louisiana History would be on the LEAP test, Mosaica failed to teach this subject to the students entrusted to its care.
- Mosaica never obtained the state-required LA-4 materials for its Pre-Kindergarten program.
- After Mosaica’s CAO predicted a 75 to 80 percent pass rate on the LEAP test, the pass rate was only 33 percent because of the school’s poor preparation and education of its students.
- Mosaica did not conduct state-required background checks, failed to maintain such records on file at the school as required by law, and allowed a homeless person to teach and live at the school.
- Mosaica failed to procure school books for the students for many months after the school opened.
- Mosaica was unable to obtain a working photocopier for the school for months, which made the school book and supply shortages even more of a problem.
- Under Mosaica’s management, the school smelled strongly of urine, the floors were filthy and its playground was littered with trash.
- Mosaica failed to procure basic physical education equipment for months after the school year began.
- Mosaica promised to install numerous software programs that would help the students learn and assist teachers and administrators to track student progress. This software was never installed and, in some cases, still sits in its packaging.
- Although required by its charter to provide transportation to its students, it was months before Mosaica provided transportation.
- Mosaica did not obtain any insurance until November 17, 2006 and the school’s movables are still uninsured today.

These failures are illustrative only; there were many, many more of them – some big and some small. A representative selection of these failures is contained in the next section.

## **VI. A Detailed Discussion of Mosaica’s Poor Performance.**

What follows is a more detailed discussion of Mosaica’s promises and its performance in eight particular areas: overall administration of the school’s operations; the academic program; parental involvement; the preparation of individual learning plans; technology; the Spanish “immersion;” individual tutoring; extracurricular and arts

activities. The discussion of what happened in these areas provides a flavor of why the Board concluded that it was absolutely essential to the school's future success that Mosaica's contract be terminated. There will be other areas of failure discussed at the hearing.

**A. Mosaica Promised to Provide All Management Services Needed for the School to Run Smoothly, But the School Never Ran Smoothly.**

Especially in meetings with the Board, Mosaica represented that its "soup to nuts" program, replete with numerous checklists and procedures and staffed by a deep bench of specialized Mosaica personnel, would ensure that the Board would not be mired in decision-making about the day-to-day operations of the school. Mosaica represented that there was no problem, no matter how obscure, that a Mosaica specialist would not be able to solve efficiently.

It bears mentioning here that the salaries and expenses of the employees at Lafayette were paid by Choice in addition to Mosaica's 12.5 percent fee. In other words, the 12.5 percent fee bought only Mosaica's allegedly substantial organizational resources, including its curriculum and its managerial expertise, Choice paid the employees on the ground at the school separately. 12.5 percent is a big number for Lafayette because the school's budget is slightly under \$8 million per year.

Mosaica was supposed to provide a robust organizational structure that would provide a well-trained expert school CAO (paid for by Choice) as well as a capable, involved Executive Vice-President who supervised the CAO and who was responsible for devoting considerable attention to ensuring that Mosaica's program was fully implemented at Lafayette. Mosaica repeatedly assured Board members that the Board would not be day-to-day managers; Mosaica, not the Board, would ensure that the phones

were connected and answered,<sup>25</sup> that appropriate supplies were ordered, that liability and property insurance was in place and the like:

- Mosaica Education Inc. will be contracted by the Choice Foundation to provide comprehensive education and management services at Lafayette Academy. This relationship was formed to provide excellent education options to New Orleans students based on a sound business and education plan driven by experienced leaders.<sup>26</sup>
- Mosaica develops and manages schools, all of which are characterized by a rigorous, innovative curriculum and high student achievement.<sup>27</sup>
- Mosaica provides “comprehensive education and management services.”<sup>28</sup>
- Mosaica Education’s capacity as a comprehensive provider of business, management and education services with responsive staff at the corporate and regional levels.<sup>29</sup>
- The proposed Academy will partner with Mosaica Education, Inc. to provide comprehensive education and management services.

One of the challenges of this case is to present a reasonably comprehensive picture of just how poor Mosaica’s day-to-day management of the school was. This is challenging because Mosaica’s defaults are spread across so many areas and Choice has, by necessity, only a day in which to present its case. This case could be presented for weeks and weeks, with every problem addressed in detail. But, finality is critical to Choice as a new school year is set to begin. The Board must know before school starts at the beginning of September where it stands with respect to Mosaica in order to manage, budget, and plan. So, on balance, completeness of presentation must yield to speed.

One way to measure the quality of the performance is to review the individual performance of the three vice presidents assigned to supervise the CAO. The first,

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<sup>25</sup> To this day, the only telephone system in place at Lafayette is a very basic system installed by the State. Mosaica never installed the full, school-wide telephone system that it promised, and the classrooms and many other areas never had telephones. See Ex. 42 for the Board’s Report Card on Mosaica’s performance.

<sup>26</sup> See Ex. 2, p. 2 for the Application.

<sup>27</sup> See Ex. 2 for the Application.

<sup>28</sup> See Ex. 2, p. 2 for the Application.

<sup>29</sup> See Ex. 2, p. 3 for the Application.

Patricia Hoffman-Miller was relieved of her day-to-day responsibilities at the school after she fabricated an elaborate, but wholly untrue, tale about why the school was not collecting revenue for the lunches that were being served. She claimed that the food service company had agreed not to charge the school for the lunches that they were serving because they were not hot so the school was not collecting for them from the students. This was completely untrue, but this kind of prevarication was surprisingly commonplace in Mosaica's reports to the Board throughout.

The second Vice-President, Mr. Combs, was relatively newly hired by Mosaica and was unfamiliar with Mosaica's program to a large degree as evidenced by the fact that he did not know many of the acronyms Mosaica used to describe its programs. For example, he did not know that ILS was the instructional software or that a PSAP was an individual learning plan. It was hard for him to implement what he did not understand, and he was not particularly effective in doing so. As noted below, he was relieved of his duties because he concealed possibly criminal wrongdoing by the school's CAO.

Finally, after these two failures, Mosaica's operations chief, Lou Erste, took over. Unfortunately, his duties as supervisor of the 50 or so other Mosaica schools seemed to interfere with his focus on Lafayette. This appeared especially to be true because, by this time, Mosaica had been put into default, which apparently caused Mr. Erste (and Mosaica) to assume that there was no point in trying to fix problems at a school where there might not be future profits to reap. He rarely showed up in New Orleans and his tenure was similarly unproductive.<sup>30</sup> It was characterized by repeatedly promising to provide something later and then not providing it.

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<sup>30</sup> Not only did he not show up in New Orleans, Mr. Erste also stopped returning phone calls in May 2007. *See* Ex. 47 (Mr. Erste's "response time is unacceptable."); Ex. 50 (Board chair noting that he

In the following subsections, Choice will summarize some of the more memorable defaults in the areas of faculty management and *esprit de corps*, discipline, procurement and bill paying, physical plant, transportation, safety, insurance and charter compliance.

These sub-sections are a five-minute tour of Mosaica's performance in certain operational areas. Like the areas discussed in detail later in the brief, they strongly support Choice's decision to terminate its relationship with Mosaica.

**1. The Performance of the CAO was a Big Problem, and Mosaica Failed to Report to the Board the CAO's Obvious Intentional Misconduct.**

One thing that Choice and Mosaica can agree on is that the school's CAO located and recommended by Mosaica was unable to competently perform his job.<sup>31</sup> He was removed as CAO in the spring semester because both the Board and Mosaica agreed that he was unable to meet the challenges of that position. The evidence presented at the hearing will demonstrate his incompetence beyond the shadow of any doubt. Although relieved of his CAO duties, Mosaica permitted him to remain at the school as a Mosaica employee to assist with the transition to new leadership.

The CAO was ultimately terminated by Mosaica after the Board Chairman discovered that he had taken for his personal use at his home a television and DVD player that had been donated to the school by Teach for America and had been reported as

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"cannot get my phone calls returned" by Mr. Erste); Ex. 54 (Board Chairman asking Mosaica's founder when he could expect "a return call" by Mr. Erste).

<sup>31</sup> Mosaica may now try to claim that the CAO was the Board's choice and responsibility. But, as Mosaica's Vice-President, Louis Erste, reminded the Board on May 8, 2007, "Mosaica has the sole responsibility and authority to select necessary personnel, including the CAO (Head of Schools), faculty and staff." See Ex. 53.

stolen. After initially denying that the television was school property and stating that he had bought the T.V.,<sup>32</sup> he ultimately confessed and was fired immediately.

Perhaps the most troubling aspect of this sad story is the fact that the Mosaica Vice-President, Mr. Combs, whose job was to supervise the CAO, had learned of this incident from a school employee at least a month prior to the CAO's termination. Surprisingly, the Vice-President told the reporting employee that he did not plan to do anything about it, and, in effect, condoned the theft. True to his word, Mr. Combs did nothing about it – he did not even inform the Board. Only when this same school employee who had alerted Mr. Combs of the misconduct ultimately reported the CAO's misconduct to the Board Chairman did the Board find out about the theft and insist that an investigation be undertaken.

## **2. Mosaica's Management of the Physical Plant was a Failure.**

Lafayette's physical plant was not in good condition after the storm due to the combination of many years of neglect by the Orleans Parish School Board and an incomplete repair project conducted by the RSD in the summer of 2006 to address Katrina damages. The school's physical plant plan required two initiatives: 1) a good general maintenance and cleaning program to clean and maintain the school on a daily basis and to perform small repair projects as needed; and 2) an inventory of larger physical plant projects, appropriately prioritized, so that the Board could determine how to raise the money needed to tackle them and get started performing those projects. From the beginning, the Board expressed that these two missions needed to proceed on an expedited basis. Neither was conducted competently or expeditiously: daily cleaning and

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<sup>32</sup> The serial number on the missing television and DVD player matched the television and DVD player in the CAO's bedroom. Only then did the CAO confess.

maintenance was deplorable from beginning to end, and no project list ever materialized.<sup>33</sup>

Visitors to the school often commented on the strong urine smell. They also commented on how dirty the school looked in other places, especially the floors, which were often filthy. Floors were often not swept and trash cans not emptied. Mosaica's own personnel set a tone of apathy. They had no sense of urgency about picking up trash in the yard or performing obvious and easy projects such as removing the tape borders after volunteer painters painted door frames and moldings. As a concrete example, on November 16, 2006, the Board Chairman e-mailed Mr. Eidelman and others pictures of the school yard with a note<sup>34</sup> that said in part:

This is what the school yard looked like (see pictures above). We had a large construction dumpster, two school buses, two regular dumpsters, and two pallets of old concrete left over from the Kaboom function 30 days ago. Kids were literally playing in piles of trash (I would say over 100 pieces of trash).

I asked Ed [the school's CAO] weeks ago to get the dumpsters removed out of the school yard, and to get the school buses removed during the day.

What most upsets me is that we had teachers and administrators mulling around. When I inspect my properties I pick up trash. This proves a point to all involved that we take pride in the school.

The evidence at the hearing will prove that the school was generally dirty the whole year and that it got dirtier rather than cleaner as the year progressed. The Report Card also documents Mosaica's utter failure with respect to daily cleaning and

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<sup>33</sup> See Ex. 42, p. 2 for the Board's Report Card on Mosaica's performance in March, 2006 which noted, among other things that: (3) School projects have generally been poorly implemented, with minimal follow up. For example, tape still on interior windows from painting project several months ago. (4) no project list.

<sup>34</sup> See Ex. 23 for this November 14, 2006 e-mail.

maintenance.<sup>35</sup> With Mosaica gone and a new administration in place, the school already looks much cleaner.

### 3. **Mosaica Defaulted on Charter and Legal Compliance Issues.**

Mosaica apparently never conducted criminal background checks of the employees that it hired at the school,<sup>36</sup> both a State law and a Charter requirement.<sup>37</sup> This was a significant breach and could well have endangered the students and faculty and resulted in exposure to the Board if any problem had arisen as a result. Mosaica claims the background checks are in the individual personnel files, but they are not there. Perhaps as a result of this failure, the School hired a P.E. teacher who was homeless and, amazingly, the CAO allowed him to live in the faculty lounge for many weeks until the Board Chairman discovered this situation and put an end to it.

Incredibly, despite many requests,<sup>38</sup> Mosaica went the majority of the year without any physical inventory of the school's assets, which the Charter requires to be physically identified as either RSD property or Choice property. The Board repeatedly asked Mosaica and the CAO to implement an effective management system to ensure that

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<sup>35</sup> See Ex. 42, p. 2 for the Board's Report Card on Mosaica's performance, which states: (1) Bathrooms always smell strongly of urine; and (2) School has been poorly cleaned and maintained from the beginning.

<sup>36</sup> See Ex. 42, p. 17 for the Board's Report Card, which states that there was "No evidence of criminal background checks on premises."

<sup>37</sup> La. R.S. 17:15A(1)(a) provides that "No person who has been convicted of or has pled *nolo contendere* to a crime ... shall be hired by any city, parish, or other local public school board ...." La. R.S. 15:587.1 states, "As provided in ... R.S. 17:15 ... any employer or others responsible for the actions of one or more persons who have been given or have applied to be considered for a position of supervisory or disciplinary authority over children shall request in writing that the bureau supply information to ascertain whether that person or persons have been convicted of, or pled *nolo contendere* to, any one or more of the crimes listed in Subsection C." Moreover, Section 4.4.4 of the Charter provides, "A criminal history review through the Louisiana Department of Public Safety and Corrections, Office of State Police, Bureau of Criminal Identification, shall be administered. The criminal history review shall include a fingerprint check and simultaneous FBI check. All costs associated with the criminal history review shall be the responsibility of the entity granted the charter, although the Charter Operator may assign the responsibility to those persons undergoing the criminal history review."

<sup>38</sup> See Ex. 37 for Board Minutes reflecting inquiry about this topic.

federal and state funds were not being spent for assets that were not being accounted for and documented. A completely ineffective physical inventory that did not comply with generally accepted practice was accomplished in the late spring, 2007, but this was “for show” only, an obvious effort to placate the Board, who had asked about it multiple times, but of no practical effect. Most of the property was never individually identified, bar coded, or otherwise appropriately identified as belonging to the RSD or Choice as the Charter required. And by the time that the “for show” inventory occurred, some of the property had disappeared, including eight of the undistributed faculty laptops.

#### **4. Faculty Management and Espirit de Corps.**

Faculty turnover at the school was staggering due to Mosaica’s abysmal management. A total of 21 out of 37 faculty members left during the school year, many because they had lost hope that meaningful progress would be made towards making the school successful. In fourth grade, as an example, one class had four different teachers over the course of the year. The turnover caused many problems with consistent administration of the academic program. This troubling turnover was not reported to the Board and was only discovered when BESE Board Member Leslie Jacobs confronted Mr. Huger at a Christmas party to inquire as to when 20 teachers had quit.

Attrition was particularly bad among younger, initially enthusiastic “Teach for America” faculty. These younger, inexperienced faculty felt isolated and unsupported. Many of them faced the first months without appropriate academic materials like textbooks or even a working photocopier to copy worksheets, and were left, essentially on their own, to improvise some kind of curriculum until the materials arrived. They

worked hard for a while, but ultimately some of them became completely disillusioned and concluded that the problems at this school would never be solved.

As the year wore on, faculty absenteeism became a serious problem as teachers began to look for jobs for 2007/2008 in a more organized environment. Out of a faculty of around 35, it was quite typical to have six teachers or more absent on any given day, again creating significant continuity problems. About half of the faculty had more than ten absences during the year, and this sorry performance may be understated due to poor recordkeeping.<sup>39</sup>

Morale was low, as would be expected, given the various problems already discussed above and the faculty perception that Mosaica was not interested in input from the teachers. Mosaica compounded the morale problem by failing to properly issue some faculty paychecks due to a payroll glitch.<sup>40</sup> On top of that, the teachers initially had to buy their own supplies for their classrooms and seek reimbursement later. This reimbursement process was not expeditious or free of red tape, to say the least. Some teachers never received reimbursement as forms were often misplaced in the central office.

The faculty at Lafayette has been strongly in favor of terminating Mosaica's contract. An internal Mosaica document from an April 2007 visit graphically reports the disarray and disillusionment. It concludes that: "It is very apparent from the meetings

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<sup>39</sup> See Ex. 89 for a bonus spreadsheet showing absences

<sup>40</sup> See Ex. 9, p. 2 for Mr. Huger's September 20, 2006 letter to the CAO, which said "Prior to this e-mail I found out from a teacher that the paychecks were not correct. . . . For me to find out that the teachers haven't been paid from anyone other than you or Pat is not acceptable. You as the leader of that school should not have let that happen. I would have gladly paid the folks personally to avoid the embarrassment of 'teachers not being paid.'"

Payroll problems plagued Lafayette throughout Mosaica's tenure. In a move worthy of its incompetent predecessor, the Orleans Parish School Board, Mosaica paid at least one employee almost \$2000 after he left his job at Lafayette. See Ex. 67 for May 21, 2007 e-mail from the Board Chairman to Mosaica. Mosaica did not report this payroll problem to the Board either.

that were held with the CAO, PFs and various teachers that they are nearing the breaking point both personally and professionally.”<sup>41</sup> Many on the faculty have reported that they believe Mosaica’s management is even more incompetent than that of the Orleans Parish School Board. It is hard to imagine a worse indictment of Mosaica than that – and it comes from those who most closely observed Mosaica’s ineptitude on a day-to-day basis.

**5. Mosaica was Unable to Cultivate a Reasonable Level of Student Discipline in the Upper Grades.**

From near the beginning of school, because of the lack of structure and consistency at the outset, and the inadequate training of the faculty, the school suffered from a lack of effective discipline in the upper grades, particularly in Grades 4 through 7. At times, these problems were so bad that they threw portions of the school into complete chaos. The Board repeatedly asked Mosaica to repair the situation, but it was never fixed.<sup>42</sup>

Faculty members regularly complained that Mosaica did not address discipline issues consistently and firmly and did not document the numerous transgressions of many of the repeat offenders. Such documentation was required in order to proceed through the disciplinary sequence of detention, suspension and expulsion. Those disciplinary options, specifically including expulsion, are tools that must be seen by the students as credible threats in any effective discipline policy.

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<sup>41</sup> See Ex. 97, MEI School Contact Summary.

<sup>42</sup> See Ex. 12 for the Board Vice-Chairman’s October 15, 2006 e-mail to Mosaica noting: “Discipline. The teachers say the students in 4<sup>th</sup> grade and up are quite unruly. This is affecting discipline in other grades. They suggest that this could be solved with a uniform, consistent program of consequences for undesirable behavior. I don’t know how big of a problem it really is, but if it is a problem, we need to set the tone early on.” See also Ex. 47 for February 28, 2007 Minutes from the Board meeting when Board Chairman stressed to the CAO “that he wants a strict school, well-documented disciplinary reports, and predictable disciplinary procedures.”

At the one expulsion hearing that was held, Mosaica personnel conducting the expulsion hearing demonstrated that they were not familiar with the school's written discipline policies and, therefore, were at a loss as to how to follow them. This was dangerous because both charter compliance and student due process required that the written disciplinary policies, especially in an expulsion hearing, be strictly adhered to, to avoid risk of charter termination or exposure to after-the-fact litigation by the students.

Although this discipline discussion is short, it bears emphasizing that its brevity should not be taken as meaning that discipline was not a very big problem at the school. It was undoubtedly one of the school's biggest problems and got worse and worse as the year progressed.<sup>43</sup> Mosaica was slow to recognize the problem and took no productive steps to resolve it.

#### **6. Mosaica Failed to Deliver on the Charter Requirements for Student Transportation.**

The school's charter required that it provide transportation to all students living more than a mile from the school; these students comprised the majority of the student body. This should have been provided from the first day of school. But Mosaica had no plan for this and was only reactive to Board concerns about these problems. Over a month into the school year, nothing had been done about it and the parents were becoming concerned.<sup>44</sup>

Ultimately, as with many other important items, the Board had to step in to do Mosaica's job, arranging to rent school buses and hire drivers. But as a result of the

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<sup>43</sup> See Ex. 42, p. 9 for the Board's Report Card on Mosaica's performance, which concludes that: "(1) Discipline problems are a recurring theme in the higher grades; (2) Discipline referrals are increasing, not declining; (3) Many anecdotal reports of fights and widespread misbehavior. This is the most common faculty complaint."

<sup>44</sup> See Ex. 11 for Board Vice-Chairman's e-mail to Mosaica stating that "It is critical that we get our transportation program working ASAP."

initial inexplicable delays in the planning stages, transportation services were not provided as required by the school's Charter until the middle of November. And as of the time of the report card in March, 2007, bus transportation was not working efficiently and did not serve the school's after-school tutoring programs.<sup>45</sup>

**7. Mosaica Did Not Proactively Manage the Food Service Vendor.**

A recurring complaint during the year was that the children who ate early in the day received adequate portions, but that those who ate later were shortchanged and went away hungry. In addition, lunches were served as early as 10:30 a.m., and as late as 2:00 p.m., which meant that some students were still full from breakfast when lunch was served and others were quite hungry. And it was usually the hungry ones who received the miniscule portions towards the end of the lunch period. Again, it was only after Board intervention that any meaningful effort to improve this situation initiated.

**8. Mosaica Did Not Appropriately Safeguard the Children.**

Teachers have reported recently that at least five students broke bones on the school's playground. This is because the playground was overcrowded and supervision was minimal. As noted in the Board's Report Card, Lafayette's fire preparation was "woefully implemented." There also was no appropriately implemented plan for what would happen in the event of a tornado, or an armed intruder or other foreseeable emergencies. The Report Card notes that the school needs "written procedures to address all safety issues thoroughly."<sup>46</sup> One safety issue is that the school went for a considerable

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<sup>45</sup> See Ex. 42, p. 4 for the Board's Report Card on Mosaica's performance, which concludes that: "(4) Transportation implemented late. Routine system breakdowns; (5) Transportation does not serve after-school programs; (6) Bus drivers not in uniform."

<sup>46</sup> See *id.*

period of time without a fully functional phone system.<sup>47</sup> It never had a working alarm system although this issue was periodically discussed. Finally, evidence at the hearing will prove that Mosaica’s administration of traffic and student control on Carrollton Avenue was substandard and that control of access to the school building was lax. Fortunately, there were no serious incidents arising out of those deficiencies.

**9. Mosaica Failed to Obtain the Necessary Insurance.**

Although the school was required by its charter and its lease to maintain a variety of different insurance coverages, Mosaica never obtained insurance until prompted to do so by the Board.<sup>48</sup> The school and the Board were completely uninsured until at least November 19. That means there was no liability insurance protecting Choice and its Board during this period. And the property belonging to Choice, such as hundreds of thousands of dollars of computer equipment, is still uninsured today. This is unfortunate because eight of the never-distributed faculty laptops have disappeared, and there are no insurance proceeds to be used to replace them.

**B. Mosaica Promised a Comprehensive and Rigorous Academic Program, “a classical education worthy of finest private schools,” But Delivered a School Where Only 33 Percent of the Students Passed the LEAP Test.**

At the information sessions for parents held in the Newman auditorium, parents of prospective students were excited about the school because Mosaica’s presentations painted a picture of a well thought-out, well-organized, reproducible academic program featuring a “classical” and “rigorous” college preparatory curriculum taught in a way that

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<sup>47</sup> Mosaica has been on notice of the phone problems since at least the November 2, 2006 default letter. In it, Mr. Huger wrote “the school does not have a phone system, which is also a consideration for the safety of the school. The only phones exist in the school office, so that if an emergency occurred outside of that area, no phone would be available.” See Ex. 17, p. 1.

<sup>48</sup> See Ex. 1 p. 14 for this requirement in the Charter.

catered to the individual abilities and needs of the students. The following quotes from the Charter Application and other Mosaica materials give a sense of the kind of school that was promised:

- The Mosaica model will lead Lafayette Academy of New Orleans in becoming a high achieving K-8 public school by challenging each student with a tuition-free classical education worthy of the finest private schools in the nation.<sup>49</sup>
- At Lafayette Academy, it's not about 'if' a child is going to college...It's about preparing them for the college of their choice.<sup>50</sup>
- Lafayette will be characterized by "a rigorous, innovative curriculum and high student achievement.
- Our proposed curriculum is fully aligned with Louisiana state content standards.<sup>51</sup>

The school's academic program never resembled what was promised. It was critically handicapped by Mosaica's failure to align its curriculum with Louisiana standards, by the shortage of appropriate academic materials, and by a lack of follow-through on many of the elements of Mosaica's own program as set out in its own internal documents.

The results of this incompetent administration of the academic program speak for themselves. Although Mosaica forecasted as late as the February 28, 2007 board meeting that the Board could expect a 75 percent pass rate for Lafayette Fourth Graders on LEAP,<sup>52</sup> only 33 percent achieved a passing grade. Ultimately, even after summer re-testing, 45 students will have to repeat Fourth Grade. That 66 percent of the students failed either the math or the reading section of the test is a staggeringly poor performance indicative of a school in considerable disarray. Perhaps even more telling is that

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<sup>49</sup> See Ex. 4 for Mosaica PowerPoint presentation shown to parents of prospective students.

<sup>50</sup> See Ex. 6 for Mosaica's glossy brochure distributed to parents.

<sup>51</sup> See Ex. 2, p. 5 for the Application.

<sup>52</sup> See Ex. 90 for the meeting notes of Board Secretary, Steven Serio, noting "Ed estimates a 75% pass rate."

Lafayette finished second to last out of charter schools in the New Orleans area.<sup>53</sup> This is particularly bad considering that Mosaica told the Board that it would have a big head start over other schools due to Mosaica's detailed systems and substantial experience in opening schools.

Indeed, Mosaica's test results show that the school performed even worse than when it was run by the Orleans Parish School Board. During Mosaica's tenure, on the LEAP Test, 27 percent of Mosaica-led Lafayette students scored "Basic" or above on English and 29 percent of the students scored "Basic" and above in Math.<sup>54</sup> Contrast this with the 2005 Orleans Parish-led scores for Lafayette of 31 percent achieving "Basic" or above in English and 33 percent achieving "Basic" or above in Math.<sup>55</sup> In the end, these results show that, although Mosaica promised "a classical education worthy of the first private schools in the nation,"<sup>56</sup> it couldn't even deliver the results achieved by the pitiful Orleans Parish School Board, which ran some of the worst public schools in the nation. And the new Lafayette had a much more accomplished student body than the old Lafayette did.

On Thursday, August 9, Choice received a final piece of very bad news – hopefully the final chapter in this sorry chronicle of Mosaica's utter failure. Apparently, the Mosaica-administered summer tutoring program for the 62 Fourth Graders who were not able to pass the first time was less than successful. Choice was notified that 49 of the Fourth Graders who re-tested this summer did not achieve a passing grade. 44 of those

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<sup>53</sup> See Ex. 79 for a chart comparing Lafayette's performance to other schools. The schools in Lafayette's category are delineated by a red dot.

<sup>54</sup> See Ex. 84 for a chart that compares the LEAP scores of the 2005 Orleans Parish-led Lafayette to the 2007 Mosaica-led Lafayette.

<sup>55</sup> See *id.*

<sup>56</sup> See Ex. 4 for Mosaica's PowerPoint presentation to parents of prospective students.

will have to repeat the grade. This demonstrates in a stark fashion the consequences of Mosaica's effective abandonment of the school in the final months. The results might have been different had Mosaica accepted responsibility for the problems and attempted to remedy the awful situation that it had created.

**1. The Curriculum Alignment Problem.**

As an iconic demonstration of what the Board considers to be Mosaica's organizational dysfunction, recall that Mosaica promised that its curriculum would be fully aligned with Louisiana requirements,<sup>57</sup> which seems to be a very basic point. From the beginning of the year, Mosaica knew that the Fourth Graders would be tested in the spring on the LEAP test on Louisiana History and, therefore, that Louisiana History would need to be taught to the children in the Fourth Grade. Nonetheless, Mosaica never incorporated Louisiana History into its curriculum so that when the children took the LEAP test, they were left to guess at those questions. Predictably, the LEAP results were awful.<sup>58</sup> Curriculum alignment was an issue in every grade. Although Mosaica claimed its Paragon materials aligned with Louisiana standards, they really did not in significant ways.

A second obvious curriculum alignment issue was in Pre-Kindergarten. In order to receive federal and state funding, the Pre-K classes had to order and use LA4 materials, a multidisciplinary program designed specifically for Pre-Kindergarten. Although the need to use these materials was brought to the attention of the school's CAO on numerous occasions and to the attention of Mr. Erste in the Spring of 2007, the

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<sup>57</sup> In its application, Mosaica promised that its "proposed curriculum is fully aligned with Louisiana content standards and as such our goals provide guidance towards outcomes." *See* Ex. 2, p. 5 for the Application.

<sup>58</sup> *See* Ex. 63 for LEAP scores including Science and Social Studies.

required materials were never ordered and the school stands at risk of losing the funding that it received for its Pre-Kindergarten program. It is, in fact, fortunate that the State has not already asked for this money back.

## 2. The Textbook and Supply Problem.

The Board's dismay with Mosaica's performance regarding the implementation of the academic program near the beginning of the year is noted in a variety of contemporaneous letters and e-mails.<sup>59</sup> For every written communication, there were many more undocumented discussions with Mosaica personnel at the school where the Board made the same points with constantly increasing emphasis.

In a letter to the Mosaica CEO dated September 20, 2006, nine days after the school opened, the Board Chairman noted his displeasure with the way things were going

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<sup>59</sup> See Ex. 10 for the Board Vice-Chairman's September 27, 2006 e-mail inquiring about the plan to procure textbooks for the children: "I think that there has to be a better way to go than waiting to see what [the RSD] deliver[s] and then ordering supplements. Presumably, many supplies can be in perpetual inventory. This really needs to be addressed."

See Ex. 11 for October 13, 2006 e-mail from the Board Vice-Chairman to Mosaica Vice-President Lou Erste. "Classroom Supplies and Books. This one also concerns me because after our first parent's meeting I stopped by a few classrooms to talk to the teachers to see how much progress had been made since our staff meeting when Jim Huger promised the staff we would aggressively move to get books and supplies."

See Ex. 12 for October 15, 2006 e-mail from the Board Vice-Chairman to Mosaica personnel stating "Missing Materials. I am still concerned about this. The teachers I talked to say they cannot start [the study program] unless they have scripts. We must get this for them. We need a master list and system where we can monitor what we need and what the status of each such item is."

See Ex. 17 for November 2, 2006 default letter to Mosaica from Board Chairman which stated: "Furthermore, we have discussed many, many times going back many months, the necessity of having books or copies of the books for all of the teachers to carry out their lesson plans."

See Ex. 18 for November 4, 2006 e-mail from Board Chairman to Mosaica's founder, Gene Eidelman, stating: "Stephen (Mosaica's Vice-President) and Ed (Mosaica's CAO) come 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..."

See Ex. 19 for November 4, 2006 e-mail from Board Voice Chairman to Mosaica Vice-President Lou Erste: "Teacher morale is low. They have waited 60 days for basic materials. The problem solving in this area has been really bad. Jim and I were shocked to determine that teachers still didn't have basic instructional materials."

See Ex. 40 for March 7, 2007 e-mail from Ms. Asher to Mosaica Vice-President Lou Erste stating: "4<sup>th</sup> grade still does not have all of their books. They need class sets for all children not 18 out of 24. . . 5<sup>th</sup> graders are sharing books because they still don't have all their books."

since it did not appear that the school's program was coalescing appropriately.<sup>60</sup> He reiterated that the Board hired Mosaica "to run the school," that Mosaica was responsible for fulfilling the promise of "a first class educational experience," and that he hoped that Mosaica could get past basic operational issues to "begin to focus on academics."

When the Board Chairman came to the school on September 26, 2006, 15 days after it opened, to address a faculty meeting, many members of the faculty expressed great dismay at Mosaica's problem-solving regarding continuing shortages of textbooks, workbooks and supplies and expressed frustration about the lack of organization of the school as a whole. As an example of what they were complaining about at the time, the school's reading program, *Open Court*, requires strict adherence to the *Open Court* scripts in the teacher's manuals, but most of the teachers did not have the manuals so they could not start the program. (To skip ahead chronologically, this ridiculous situation existed into November in many classrooms as a result of blunder after blunder; as a result, the school's reading program was effectively stymied for months because of a few missing teacher's manuals per grade.)

For at least the next six weeks, every time the Board Chairman and other Board members came to the school, which was often, they did a spot check of whether the teachers had what they needed to teach. On each such visit, the teachers complained about missing materials. When inquiring to the administration of how this could continue to be the case, it was obvious that Mosaica had no idea what was there and what was missing. Informal interviews of the teachers revealed that many were becoming increasingly despondent about Mosaica's progress during this period, particularly the

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<sup>60</sup> See Ex. 9 for this letter.

younger, less experienced teachers without the desk drawer knowledge necessary to successfully improvise lesson plans on their own.

After the initial September 26, 2006 meeting, the Board Chairman intervened by attempting to mandate a simple system in which teachers would notify the administration in writing of what materials were needed, and the administration would act on the requests and report back to the teachers on the status of their requests. Unfortunately, although lip service was paid to this approach by the Mosaica CAO, who said that such a system was a “great idea,” by faculty accounts it never worked well, and there were many classrooms that lacked significant materials for the greater part of the first semester. A number of teachers have reported that their classrooms never received the materials that they needed at any time during the 2006/2007 school year.

The day following the September 26 meeting, 17 days after the school’s opening, the Board sent Mosaica an e-mail expressing the beginning of concern about the textbook situation, referencing the “class room punch lists” and the need for progress on them.<sup>61</sup>

Ultimately, because some of the missing materials were due from the RSD, the Board Chairman, on approximately October 2, 2006, personally went to the offices of the RSD’s representative, Alvarez and Marsal, to see what the problem was. The Alvarez employee in charge reported that he did not know that the school was missing books, but promised to look into it and, virtually immediately, the bulk of the missing books due from the RSD was delivered to the school. While the RSD delivery solved a part of the textbook problem, the Paragon materials, which were proprietary to Mosaica and are supposed to be a cornerstone of their curriculum, were also incomplete and remained so for an extended period. Paragon materials continued to trickle in slowly during the Fall

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<sup>61</sup> See Ex. 10 for this e-mail.

and Spring Semester, but because of the delay, the program was never completely implemented.

Mosaica exacerbated the missing textbook problem by failing to arrange for a photocopier to be delivered to and operational at the school until early November. This meant that teachers were unable to make photocopies to address workbook and textbook shortages without using outside vendors like Kinko's.<sup>62</sup> Initially, Mosaica made no arrangements to help the teachers, requiring the teachers to bring copying jobs to Kinko's at their own expense and seek reimbursement later. And reimbursement of faculty expenses was always a sore spot with the faculty because of Mosaica's slow turnaround and red tape. It is remarkable how the lack of a photocopier could affect academic progress and demoralize the faculty, but a working photocopier was critical to the school because, with so many gaps in classroom materials, the teachers needed to be able to copy what limited materials they did have just to improvise a reasonable curriculum until they got what they needed.

Even after the RSD made its large delivery, basic school material shortages still existed over a month after the school opened, as demonstrated by an October 13, 2006 e-mail<sup>63</sup> that discusses supplies and book shortages:

Classroom Supplies and Books. This one also concerns me because after our first parent's meeting I stopped by a few classrooms to talk to the teachers to see how much progress had been made since our staff meeting [September 26] when Jim Huger promised the staff we would aggressively move to get books and supplies. Every teacher told me that after they submitted their punch lists no one had come to their classrooms to follow up or to tell them what to do absent the books they need. Jim and I visited Alvarez [the RSD agent] after the meeting and lots of books were

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<sup>62</sup> See October 15, 2006 e-mail from Board Vice-Chairman to Mosaica's Vice-President Lou Erste stating: "Copy Machine. I don't understand why we don't have a copy machine, but there is a lot of complaining going on about this."

<sup>63</sup> See Ex. 11 for this October 13, 2006 e-mail.

delivered since then, but I want to be sure the teachers understand that we are listening to them. Pat [the Mosaica Vice-President] was going to send someone to each classroom to determine what we got and what we still need. There is supposed to be a master list prepared by today. I would like to be sure we have a plan in place to get the stuff we don't have and to keep the teachers up to date on what is being done to address their concerns. I suggested a helpdesk protocol early on. I don't care if we adopt it, but we need to do something.

An October 15, 2006 e-mail<sup>64</sup> to Mosaica followed up on these material procurement problems and expressed the growing urgency about getting the *Open Court* reading program on track:

Missing Materials. I am still concerned about this. The teachers I talked to say they cannot start *Open Court* unless they have the scripts. We must get this for them. We need a master list and a system where we can monitor what we need and what the status of each item is.

Copy Machine. I don't understand why we don't have a copy machine, but there is a lot of complaining going on about this.

On October 18, 2006, after receiving what he believed was an unacceptably vague and delayed response to the recent queries, Choice's Vice Chairman sent an e-mail to Mosaica summarizing the then-current situation<sup>65</sup>:

My concern is that all of the various critical items are sliding along without being systematically addressed. Setting the culture and tone is critical at the outset at the school because once set, expectations are created and it is difficult to upgrade them. The parents and teachers expectations are not being met.

I think there is a sense among our administrative staff [Mosaica's representatives] that schools run themselves and that teachers should be able to solve their own problems without a lot of intervention. This is the old Orleans Parish way. In this environment, a school can go a month or two without books, transportation or a copy machine and free lunch applications can be left untended for a couple months before anyone notices. But I want our teachers to understand that we are supporting them, both with what they need in supplies and materials, but also as partners and mentors and team members who are anticipating their needs

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<sup>64</sup> See Ex. 12 for this October 15, 2006 e-mail.

<sup>65</sup> See Ex. 15 for this October 18, 2006 e-mail.

and directing their progress. That we haven't implemented Open Court [the reading part of the curriculum], that no one has developed grade by grade plans for what to do until the supplies arrive, that we are having once per month staff meetings, that there is no master list of what is needed and no mechanism for reporting to them what we are doing to satisfy their needs is indicative of poor management. And we have asked for this time and time again.

Your vision and my vision was that this school was going to be a quantum leap from the old Orleans Parish regime. It isn't, in my view, coming anywhere close to what I expected when we started. We haven't even really started addressing the school's academic mission because we haven't been able to solve what appear to be fairly straightforward and foreseeable problems. And most troubling is that the identification of critical issues is coming from the somewhat inexperienced oversight board, not from the school's administration.

Left no other choice, after minimal progress during the seven weeks that the school had been open, on November 2, the Board Chairman placed Mosaica in default under the Management Contract,<sup>66</sup> citing, among other things, the problems with the delivery of textbooks and other materials and, in particular, noting that almost two months into the school year the *Open Court* reading program was still not implemented due to a lack of teacher's manuals. The notice letter<sup>67</sup> said:

Furthermore, we have discussed many, many times going back months, the necessity of having books or copies of the books for all of the teachers to carry out their lesson plans. To this day, your team cannot assure us that our teachers have books, or copies of books to carry out their lessons. We can understand the delays in getting RSD books (albeit the mitigation plan implemented at the school was nonexistent), but what about the delays in getting the Mosaica materials, which are still incomplete. At the meeting yesterday, we learned of some open account dispute that is thwarting our ability to get the Open Court teacher's manuals. Again, the troubleshooting and problem-solving is poor on this issue.

You have got to focus on our school and make dramatic progress right away. We think we have only one chance to get this right and you guys just are not delivering.

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<sup>66</sup> See Ex. 3 for this contract.

<sup>67</sup> See Ex. 17 for this November 2, 2006 notice letter.

On November 4, the Vice-Chairman wrote to Mosaica's head of operations, Lou Erste, to elaborate on the Board's frustration and to explain again why the Board believed Mosaica was in default. The e-mail<sup>68</sup> stated, in part, as follows:

We have tried to politely outline our concerns and that hasn't worked all that well. Both Jim [Huger] and I have tried putting together lists of problem areas and talking directly to Steve [Mosaica Vice-President] or Ed [the school's CAO]. They don't seem to understand how poor we think their performance has been. But we have had meeting after meeting with them where basic, important questions are not addressed, there is a real tendency to guess and surmise, instead of knowing the answers and there is never any evidence of a systematic approach to solving the problems that exist at the school. I think Steve is capable and we are glad to have him here, but even with him at the school the pace of change is slow and major problems are allowed to persist.

Teacher morale is low. They have waited 60 days for basic materials. The problem solving in this area has been really bad. Jim and I were shocked to determine that teachers still don't have basic instructional materials. Ed and Steve could have just made copies in the interim, but copying has been a constant source of heartburn for the teachers [because there was no photocopier]. We demanded that those guys get this straightened out by Friday and hopefully they did so. [They didn't.] The teachers don't get the sense that anyone is listening to them. We can turn this around by being proactive, but it will take leadership and I don't see much of that.

Every time I talk to someone who has been at the school, they comment on how disorganized it is. And Lou, frankly they are absolutely right and there is no excuse for it. The items on this list are a sampling not an exhaustive listing of the issues at the school.

After sending the notice of default, Mr. Huger met with Mosaica's founder, Gene Eidelman, and one of his top deputies, Lou Erste, in late November and they assured him that Mosaica would right the ship. Mr. Huger was a big supporter of Mosaica through the early stages of the relationship well into the second semester, and it took a lot of recurring problems and a dressing down by a BESE board member Leslie Jacobs during the Christmas Break to convince him that Mosaica could not fulfill its promises. It was

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<sup>68</sup> See Ex. 19 for this e-mail.

Mr. Huger who advocated withdrawing the first default notice in November based on Mr. Eidelman's statements that his organization had seen the light and that Mosaica would now be in a position to focus on consistent improvement. During the period following the first notice of default, Choice prepared and delivered the outline to Mosaica and Mosaica prepared a spreadsheet to track progress on the policies discussed in the outline.

The supply problem discussed above was just one of many, many problems that arose and Mosaica could never solve. As late as March 7, 2007,<sup>69</sup> Board Member Carol Asher reported:

4th grade does not have all their books. They need class sets for all children—not 18 out of 24. . . . 5th graders are sharing books because they still don't have all their books. . . . Two teachers ordered supplies in November and still have not received anything. Where do they turn? How do they follow up?

The evidence at the hearing will show that critical textbooks were missing until the very end of the school year. It will also demonstrate that numerous critical books and materials were at the school for many months, in the supply room, stacked up, unopened and unorganized. An internal Mosaica document demonstrates that the bulk of the missing materials that the teachers had been asking for since September 2006 were unpacked and organized in April of 2007.<sup>70</sup> The final Report Card also notes the continuing lack of textbooks and other supplies as well.<sup>71</sup>

### **3. Even in March 2007, the Academic Program Promised by Mosaica was Quite Incomplete.**

As discussed above, as the year wore on, the Board became more and more frustrated and realized that Mosaica could not be depended upon to follow its own

<sup>69</sup> See Ex. 40 for this March 7, 2007 e-mail.

<sup>70</sup> See Ex. 97, MEI School Contact Summary.

<sup>71</sup> See Ex. 42 for the Board's Report Card on Mosaica's performance. This Report Card notes: "Books have been consistently missing and many classes lack materials even now."

program. The Board prepared an outline of its expectations and then refined that outline into the Board's Report Card, which provided a fairly detailed checklist to determine whether Mosaica was following its own academic plan, among many other things.

As the final Report Card shows, even as late as March 2007, after constant pushing from the Board for fulfillment of the promises, Mosaica had not implemented major parts of its academic plan.<sup>72</sup> By way of examples taken from the Report Card, Mosaica had not fully implemented the Math initiative, Kaleidoscope, Number Worlds, nor prepared and routinely updated PSAPs<sup>73</sup>, nor consistently observed instructional groupings, nor appropriately used student assessment tools, among many, many other continuing deficiencies. In fact, a tour through Mosaica's own 12-point CAO checklist demonstrates that Mosaica really did not adhere to very much of its detailed internal procedures in running Lafayette Academy.<sup>74</sup>

One last, but important example, demonstrates the lack of implementation of key components of the academic program. Under Mosaica's plan, students were to be

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<sup>72</sup> See Ex. 42 for the Board's Report Card on Mosaica's performance, which listed the following deficiencies:

1. Teachers don't seem to know what ILS is. Powerschool is not implemented.
2. Books have been consistently missing and many classes lack materials even now.
3. Instructional grouping is not regularly reviewed and revised in some grades.
4. OCR evaluations are not used consistently.
5. Paragon Nights have been held only twice per grade, not monthly as promised.
6. PSAPs are not being updated regularly and were not delivered to parents at recent grading period.
7. Report cards have an alarming paucity of content.
8. Evaluation materials are not routinely used.
9. Learning specialists are being routinely used as substitute teachers.
10. After-school tutoring program is inadequate for many reasons. It has recently been discontinued.
11. LEAP tutoring program is too little, too late to meaningfully affect scores.
12. Curriculum not adjusted to be in line with State standards.

<sup>73</sup> "PSAP" is Mosaica's jargon for an individual plan for each student. This plan was crucial to the student's academic progress because it should ensure that teacher student and parent worked as a team and that everyone knew exactly what needed to be done in order for the student to achieve academic success.

<sup>74</sup> See Ex. 80 for this checklist.

grouped by ability levels every 10 weeks. The groupings were to be based on interim assessments using software that was never installed and assessment tests that were never performed. Students functioning below their grade level were to receive “basic skills” instruction by specialized faculty designated as “basic skills” instructors. This program, which was an important part of the remediation of below-grade-level students, was only implemented for about one month, then abandoned. Because of the high faculty absenteeism and turnover, “basic skills” faculty members were routinely used as substitute teachers leaving the “basic skills” students on their own without anyone to teach them.

**C. Mosaica Promised Extensive Parental Involvement, Including 8 “Paragon Nights,” But Did Not Have Its First Paragon Night Until November 30 and Had Only, at Most, Three “Paragon Nights” Per Student. Mosaica Never Implemented in a Meaningful Way the Other Aspects of Its Parental Involvement Program.**

**1. Paragon Nights.**

Mosaica’s presentations emphasized a parent’s important role in his/her children’s education. Mosaica told Choice that a significant and focused parent participation initiative from the opening of the school was absolutely essential in cultivating the necessary culture of parent involvement. The cornerstone of the parental involvement component of the Mosaica program was the promised eight “Paragon Nights,” school-wide parent nights held in the classrooms every six weeks showcasing student work, art, and performances related to the eight historical time periods that formed the eight units of Mosaica’s “Paragon” multidisciplinary curriculum. The following are quotes from the Charter Application and Mosaica’s promotional materials.

- Lafayette Academy believes that a close connection between home and school is absolutely essential for student academic growth... Lafayette

Academy teachers host regular goal-setting conferences with individual children and their parents so that, as a team, all cooperate to ensure his or her success.<sup>75</sup>

- Parents will receive letters prior to the beginning of each Paragon Unit with detailed information about upcoming subjects, events, and areas of focus on assisting their children.<sup>76</sup>
- The Academy will feature monthly Paragon Nights, which will follow the culmination of Paragon Units. Parents and family members will attend these events to celebrate with their children and watch student performances.<sup>77</sup>
- ‘Paragon Night’ [will be] held every 6 weeks for students to demonstrate their learning accomplishments to their parents and the community.<sup>78</sup>
- These “Paragon Nights,” held after the completion of each of 8 Paragon units, would allow parents “to see student portfolios and performances and provides for informal conversations between teachers and parents/guardians.”<sup>79</sup>

Although purportedly the cornerstone of the all-important parental involvement component, Mosaica got a late start on “Paragon Nights,” not having the first one until November 30, 2006 and then only having one more school-wide Paragon night at the end of the year.

It was at the insistence of the Board,<sup>80</sup> after 12 weeks of school, that Mosaica scheduled the first of eight “Paragon Nights” for November 30, 2006. Attendance at the event was substantial, with 500 to 600 of the parents there, belying Mosaica’s subsequent claim that the parents at the school did not want to be involved and that lack of parental interest, not Mosaica’s failures, is the main reason why parent involvement was so

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<sup>75</sup> See Ex. 6 for Mosaica’s glossy brochure.

<sup>76</sup> See Ex. 2, p. 25 for the Application.

<sup>77</sup> See *id.*

<sup>78</sup> See Ex. 6 for Mosaica’s glossy brochure.

<sup>79</sup> See Ex. 2, pp. 16-17 for the Application.

<sup>80</sup> See Ex. 11 for an October 13, 2006 e-mail to Mosaica stating “Paragon Nights. When does this start. I want to set a proper tone that this is a great school.”

The November 2, 2006 default notice pointed out, among other things, that no “Paragon Nights” had occurred. See Ex. 17. The November 4, 2006 e-mail said: “Parental involvement has been minimal because there is no plan on how to solicit it. There have been no Paragon Nights.”

distressingly anemic. The November 30, 2006 “Paragon Night” was the only such event during the 2006 Fall Semester.

After the apparent success of this first “Paragon Night” and without consultation with the Board, Mosaica unilaterally eliminated school-wide “Paragon Nights,” only reinstating them in a much more restricted fashion after the Board discovered their cancellation and complained about it. Mosaica had four more Paragon Nights during the second semester, but three of those nights were limited to a few grades only, so each student attended at best only two Paragon Nights in the second semester for a total of three, not the promised eight, for the year. The final “Paragon Night,” held school-wide was significantly dysfunctional for multiple reasons, as will be discussed at the hearing.

## **2. The PTO, Workshops, Seminars and Volunteer Activities.**

Mosaica promised a large variety of opportunities for parents to volunteer and participate in the school in other ways. As examples, there would be an active PTO and the school would present a rich array of different seminars and workshops for parents on important topics such as homework, test-taking, and discipline. Each parent would sign a contract binding them to two hours a month of volunteer activity at the school. The Mosaica promises are set forth below:

- There will be numerous opportunities for parents to volunteer at the school through tutoring, office assistance, fundraising events, chaperoning, working on school projects, or as a member of various school committees.<sup>81</sup>
- Parent Orientation Sessions, literature, and continuing workshops will provide examples of how parent involvement leads to increased academic achievement.<sup>82</sup>
- Lafayette will offer workshops on helping children study at home and on test preparation.<sup>83</sup>

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<sup>81</sup> See Ex. 2, p. 25 for the Application.

<sup>82</sup> See Ex. 2, p. 7 for the Application.

<sup>83</sup> See Ex. 2, p. 8 for the Application.

- Parents will be an integral component to the educational opportunities at this school. Lafayette Academy will seek parents to undergo training along with teachers for specific community-based activities.<sup>84</sup>

These promises were wholly ignored. There was no PTO, no workshops, no seminars, nor any of the other parent committees or activities promised before the school opened. The Board consistently inquired into when these activities would commence, but they never did. As just one example, Board Member Carol Asher wrote on March 7, 2007:<sup>85</sup>

The teachers on the PTO committee have requested several times the names of Mosaica contact people who can help them learn how to start a PTO. They have no idea how to go about it and had the idea that Mosaica schools that have done this could help them. I think this is a great idea, but was disappointed that their attempts to get help from Mosaica with contact names and numbers, e-mails, etc. had never been answered.

Eventually, because Mosaica did not create the involved culture that it advertised, parental interest diminished and, by the end of the year, apathy set in. The Report Card demonstrates Mosaica's utter failure in this area; even though the parents demonstrated strong interest at the beginning of the year, because the proper tone was never set, there was no meaningful parental involvement in the school by the end of the year.<sup>86</sup> This was an opportunity squandered, and it will be difficult to rebuild the enthusiasm that existed at the opening of Lafayette Academy.

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<sup>84</sup> See Ex. 2, p. 7 for the Application.

<sup>85</sup> See Ex. 40 for this e-mail.

<sup>86</sup> See Ex. 42, p. 15 for the Board's Report Card on Mosaica's performance. It concludes: "1) Mosaica has provided a total absence of leadership and the PTO has not gotten off the ground at all; 2) Parental attendance at Paragon Nights is very low. Paragon Nights have not been implemented school-wide. Average parent will attend no more than 3 Paragon Nights for this school year."

**D. Mosaica Promised That Each Student Would Receive a Thoughtful and Comprehensive Individual Learning Plan, But This Promise Was Almost Completely Ignored.**

Mosaica promised that parents would also receive and discuss with their child's teacher a written individual education plan that would be updated quarterly at mandatory parent teacher conferences. This plan would chart an individualized plan of action to achieve the unique goals and objectives of each student.<sup>87</sup> It would be based on test results, grades, weekly computer generated "A+" reports, student portfolios and teacher and parent observations. This individual plan, called a "PSAP" in Mosaica's well-developed internal jargon, was central to the student's academic progress because it would ensure that teacher, student, and parent worked as a team and that everyone knew exactly what needed to be done in order for the student to achieve academic success.

Mosaica said:

- Personalized Learning Plans for each student that would be a living document that adapts to student growth and development that is updated at least four times per year.<sup>88</sup>
- Individual student learning styles will be identified and documented in personalized learning plans. . .<sup>89</sup>
- On an individual level, PSAPs will document the history of student performances along with indicators of goals met and areas of continued or new weakness.<sup>90</sup>
- In a coordinated analysis of initial base-line test results, teacher assessments of student learning styles and current learning levels, parent input, student self-analysis, and any requirements delineated in existing IEPs, staff at the Academy will design personalized learning plans for every student. These plans become the basis for monitoring individual student achievement. As students grow and master skills, the learning plans are modified to reflect increasing levels of challenge or emphasize areas of weakness that require intensive focus. These plans allow the

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<sup>87</sup> In Mosaica's words, it would "implement an academically rigorous curriculum based on individualized learning plans with high expectations for every student." See Ex. 2, p. 6 for the Application.

<sup>88</sup> See Ex. 2, p. 16 for the Application.

<sup>89</sup> See Ex. 2, p. 7 for the Application.

<sup>90</sup> See Ex. 2, p. 11 for the Application.

leadership, teachers, parents, and the students to consistently document and reflect on learning successes or on-going needs.<sup>91</sup>

The promise of the preparation of meaningful individual learning plans was disregarded in substance. Only right before the Christmas break, after the Board repeatedly inquired about this critical element of Mosaica's program was any attempt at creating the promised individual learning plans attempted, and that initiative, like many others, was a short-lived, "for show only" effort, forgotten as soon as the Board had been temporarily placated. The few PSAPs that were prepared were not the promised "living documents" modified to reflect progress during the year. They did not include most of the promised components, particularly the routine student assessment by the A+ software and other standard tests. The plans that did exist had little foundation. They were not delivered to the parents at the promised in-person meetings inviting collaborative consultation. And they were never treated with institutional seriousness or attentiveness. The Report Card noted that, as of March 2007, most students did not have up-to-date PSAPs and that failure was indicative of Mosaica's wholesale neglect to observe its promise of an individually tailored education program.<sup>92</sup>

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<sup>91</sup> See Ex. 2, p. 21 for the Application.

<sup>92</sup> See Ex. 42, p. 7 for the Board's Report Card, which concluded "PSAPs are not being updated regularly and were not delivered to parents at grading period."

**E. Mosaica Promised to Use Technology as a Daily Classroom Educational Tool to Provide Individualized Instruction, to Make Routine Assessments of Student Performance and to Track Student Progress. Mosaica Delivered None of This.**

**1. Mosaica Promised Great Technology, Including “A+,” a Powerful Instructional and Assessment Tool.**

Mosaica promised an academic program supported by cutting-edge educational technology that would both instruct the students and assess their progress.<sup>93</sup> Students would use classroom computers daily to work in a software program called “A+” that would provide interactive instruction and assessment based on each student’s individual achievement level. This software would generate individualized exercises targeted to a student’s particular skill level and use those exercises to generate weekly reports on educational progress. Mosaica said:

- In order to master true computer literacy, students require hands-on access to computers in real time, rather than in isolated visits to a computer lab. Lafayette Academy will be equipped with a computer for every two to three children and we will provide laptops for each teacher and administrator. Personal desktop computers will be linked to the Internet...<sup>94</sup>
- Technology (at a ratio of 1 computer for every 3 students) is used regularly in the classroom – not just in a lab setting.<sup>95</sup>
- Full implementation of Integrated Learning System [“A+”] 15 minutes/day 3 days/week for each student.<sup>96</sup>
- Our most frequent assessment will be the weekly reports of student performance generated by the A+ Learning Software.<sup>97</sup>
- The diagnostic and prescriptive computer software A+ Learning will enable the Academy to custom-tailor curricular materials to individual needs and monitor their progress. The program will generate instructional assignments to promote proficiency in areas of weakness.<sup>98</sup>

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<sup>93</sup> In the Charter Application, Mosaica wrote that “The school will use computer technology and adaptive software to customize learning plans.” See Ex. 2, p. 7 for the Application.

<sup>94</sup> See Ex. 2, p. 22 for the Application.

<sup>95</sup> See Ex. 6 for Mosaica’s glossy brochure.

<sup>96</sup> See Ex. 4 for Mosaica’s PowerPoint presentations shown to parents.

<sup>97</sup> See Ex. 2, p. 12 for the Application.

<sup>98</sup> See Ex. 2, p. 28 for the Application.

- The use of *A+ Learning* software tutorial program enhances the ease of modifying student plans by offering “real-time” student assessments in Reading/Language Arts, Mathematics, and ESL or Bilingual education.<sup>99</sup>
- Lafayette Academy will use the *A+ Learning* software program to supplement teacher instruction and track student progress in math and language arts. It provides detailed reports to help evaluate individual students’ needs, provides information for use in parent conferences, guides instructional decisions, and assesses progress toward critical goals.<sup>100</sup>

As shown above, Mosaica’s academic program depended on the installation of working technology in the classroom. A key component of the academic program was the daily use of the “A+” program, which provided interactive instruction to the students and provided weekly reporting to the teachers regarding their progress. These assessments were supposed to be included in the individual learning plans (“PSAPs”) which were the all important individual game plans for the students. Despite constant prodding by the Board, Mosaica never installed this software.<sup>101</sup> The necessary computer technology to run this program, although delivered to the school by the RSD during the fall semester, was never appropriately hooked up so it could do its job.<sup>102</sup> RVP Combs, after initially asking Mr. Huger what A+ was, later said A+ could be installed on the computers at the school.

**2. Mosaica Promised the Installation of Powerschool, a Powerful Database Software Whereby Information on the Students Would be Kept and Routinely Updated.**

Mosaica said that the students’ testing records, grades, and individualized education plans would be entered into a database program called Powerschool so that up-to-date student data would be available at the push of a button to teachers and

<sup>99</sup> See Ex. 2, Exhibit “B,” p. 21 to the Application.

<sup>100</sup> See Ex. 2, p. 21 for the Application.

<sup>101</sup> See section below, which details the Board’s many communications relating to technology.

<sup>102</sup> See Ex. 42, p.5 for the Board’s Report Card on Mosaica, which notes that “Technology package still not in place.”

administrators. Powerschool would not only store test results, but would also be used with other software to analyze results, again so that an individualized student plan could be developed, recorded and implemented.

- Lafayette will use Powerschool to track longitudinal data from ITBS and LEAP results alongside RADRS and TestWiz software for results analysis<sup>103</sup>

Like “A+,” the touted Powerschool program was never utilized, which meant that the promised computer tracking of student progress, one of the keys to the promised tailored instruction to the unique needs and skills of the students, never occurred. In fact, what little data entry that did occur of student information into the School’s computer system was so limited that it was impossible to use the computer system to retrieve basic information such as student social security numbers, addresses, or phone numbers, which had to be looked up manually if needed.

**3. Each Teacher Was to Have a Mosaica-supplied Laptop to Communicate With Each Other, to Communicate With Mosaica and to Access Mosaica Procedures, On-line Training and Student Records as Needed.**

Each teacher would be provided a laptop, which he or she would use to communicate with Mosaica and each other and to have access to Mosaica training.

- One laptop for every professional staff member, 8 computers for every classroom, and a fully integrated network structure<sup>104</sup>

Although by the Spring semester the school had 36 laptops, they were never distributed to the teachers. There was never any network in place where teachers could communicate with each other or with Mosaica. The teachers did not have access to Mosaica’s web-based teacher training. This significant failure prevented implementation

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<sup>103</sup> See Ex. 2, p. 13 for the Application.

<sup>104</sup> See Ex. 2, p. 79 for the Application.

of an easy helpdesk procedure where teachers could raise questions, ask about missing textbooks or supplies or complain about the numerous other problems that the teachers faced on a daily basis. With a computer system, their queries could not have been routinely ignored, and it would have been easy for the Board to be sure that problems were being addressed. Like Mosaica's many other failures, its neglect of the computer system further demoralized the teachers because the teachers had been promised laptops, had been excited about them and felt misled when they were never delivered.

The Board consistently inquired about how to get the computers doing what they were supposed to do, urging Mosaica repeatedly to implement the instructional software as promised. For example, on September 28, the Vice-Chairman wrote Mosaica:<sup>105</sup>

We need to pay attention to the critical path regarding computer stuff. It doesn't seem wise to wait to see RSD delivery to order our own equipment. That will take way too long.

On October 13, he followed up by asking:

Computer Systems. I think we were told the RSD delivered what they were required to deliver. When are these systems going to be operational? We promised great technology, when will we deliver?

In the November 2, 2006 notice of default,<sup>106</sup> Mosaica was told:

In a meeting yesterday attended by myself, Jim Swanson, Ed Drozdowski and Steve Combs, we asked the status of the technology. Much to our dismay, Mr. Combs told us that he has no answer as to why the technology has not been installed nor did he have a timetable when it would be installed. This technology package is critical to the basic mission of the school academically and the best Steve could say is that most of the system might be functional in January.

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<sup>105</sup> See Ex. 10 for this e-mail.

<sup>106</sup> See Ex. 17 for the notice of default.

On November 4, 2006, the Vice-Chairman<sup>107</sup> wrote:

We made a lot of promises about technology and you guys don't seem to have ordered what we need to fulfill them. Steve's vague response that they might be working by January is unacceptable.

Of course, there were many, many in-person meetings between Mosaica and the Board Chairman. At practically every such meeting, the importance of expediting the technology implementation was emphasized. For example, the implementation of the technology program was discussed at every weekly meeting that Mr. Huger had with the CAO. The utter failure, after seven months, to get the computer system up and running is documented in the March 27, 2007 Report Card.<sup>108</sup> It is also evidenced by the unopened software boxes containing the promised products.

In the spring, it became apparent that Mosaica had ordered approximately \$65,000 of computer equipment that the RSD would have provided for free.<sup>109</sup> Inquiry revealed that Mosaica had not coordinated with the RSD, although specifically reminded by the Board to do so. Ultimately, it appears that the vendor may be willing to accept the return of this equipment, but this example demonstrates the lack of attention and follow-through that were the hallmarks of Mosaica's management.

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<sup>107</sup> See Ex. 19 for this e-mail.

<sup>108</sup> See Ex. 42, p.5 for the Board's Report Card on Mosaica's performance, which gave Mosaica a grade of "Not acceptable" for each of the six criteria in the Technology Section.

<sup>109</sup> See Ex. 54 for the Board Chairman's e-mail to Mosaica executives stating:

"Several months ago when we asked Mosaica to coordinate Technology with what the State is providing, prior to ordering new technology, you sent your technology people to campus. The board specifically warned in meeting, and writings that this coordination was critical to avoid waste and overlap. Based on an early review it appears that we have ordered \$65,000 in duplicate computers that the state are providing. Additionally, we signed a technology contract for a phone system that the state is providing.

Again, wasted resources that are provided by the state. Do you have anyone on your staff that has a clear understanding of what the state is providing the school? If you do please have them contact me, and explain why this technology was ordered, and please find out if we can return the computers ordered by Mosaica.

Also, what is my expectation for a return call from my EVP? What are your standards. I am accustomed to a same day return call, which I am not getting."

Finally, the school’s website was of very low quality. It did not include a directory of staff phone numbers or e-mail addresses, it had no updated calendar and it misidentified the Math curriculum, among other obvious deficiencies.

**F. Mosaica Promised a Foreign Language “Immersion” Program, But Delivered Only a Half-Year of Instruction.**

One of the inducements offered by Mosaica was the opportunity to receive true “immersion” quality instruction in Spanish from Kindergarten through Seventh Grade.

- The college prep approach at Lafayette Academy also includes Spanish instruction for all students, a strong in-classroom technology program (1 computer for every 3 students), and physical education.<sup>110</sup>
- Foreign language will be treated as an integral part of the core curriculum, providing all instruction in the target language to simulate an environment of immersion. Foreign language instruction will start in kindergarten.<sup>111</sup>

The promised Spanish “immersion” amounted to a single Spanish teacher for all 750 students at the school. This teacher taught the lower grades for one semester and the upper grades for the other, hardly living up to the program’s advance billing of an “immersion” in Spanish.

**G. Mosaica Promised Individual Tutoring for Students Not Meeting Grade Level Expectations, but Provided Only an Improvised, Poor Quality Program Which Commenced Over a Month Into the Second Semester.**

At the information session and in discussions with the Choice Board, Mosaica promised productive daily tutoring and instructional programs both before and after school to assist students who were not performing at their grade level. Mosaica touted the individual attention that each student would receive in these content-rich programs and confidently forecast that the school’s extensive safety net would quickly identify students who were lagging behind and catch them back up. This tutoring program was

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<sup>110</sup> See Ex. 6 for Mosaica’s glossy brochure.

<sup>111</sup> See Ex. 2, Exhibit “B,” p. 4 for the Application.

recognized as a critical need, especially after Katrina, since many of the prospective students had not enjoyed a full year of class work in 2005/2006.<sup>112</sup> Mosaica promised:

- Before- and after-school programs.<sup>113</sup>
- After-school tutorial with Full implementation of Kaleidoscope and ICS.<sup>114</sup>
- Tutoring, before/after school, small group instruction for underperformance.<sup>115</sup>
- The plan will include working with tutors before the school day, in after-school tutorial sessions and in summer school.<sup>116</sup>

Although Mosaica promised a robust early morning and after-school academic program with the acronym OASIS, this program as implemented by Mosaica had no academic content and constituted nothing more than pure babysitting for several months after the school opened. Mosaica promised that it would implement an impressive academic program called Kaleidoscope as part of OASIS, but like so many things, never did so. The unopened boxes of materials stand as a testament to Mosaica's lack of implementation. This was no trivial default because the majority of Lafayette students needed individual tutoring to catch up to their proper grade level. Mosaica knew this, promised individual tutoring, and then did not deliver.

Like many of the other issues, Mosaica never reported to the Board that it was not doing what was promised, and the Board only discovered this significant departure from the agreed-to game plan by pointedly questioning Mosaica's RVP or the school's CAO, who often had to be precisely and directly (and sometimes rudely) questioned to get any helpful, transparent reporting. Overall, Mosaica's reporting to the Board about problems

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<sup>112</sup> In the Charter Application, Mosaica promised that "All entering students will be screened for learning readiness. For students lacking prerequisite development skills, intensive 10-week intervention programs will be assigned." See Application, Ex. 2, p. 4.

<sup>113</sup> See Ex. 6 for Mosaica's glossy brochure.

<sup>114</sup> See Ex. 4 for Mosaica's PowerPoint presentation.

<sup>115</sup> See Ex. 4 for Mosaica's PowerPoint presentation.

<sup>116</sup> See Ex. 2, p. 22 for the Application.

at the school was characterized by deception, omission, confusion and tardiness. Other specific examples will be discussed at the hearing.

Once the Board discovered that no tutoring was taking place despite the critical need for it and Mosaica's promises, it insisted, at the January 31, 2007 Board meeting,<sup>117</sup> that Mosaica implement a comprehensive tutoring program immediately for every student who was not performing at grade level, which was a program that would involve most of the students at the school. Transportation was also to be provided. Mosaica, in typical fashion, initially appeared to ignore this mandate. Shortly before the next Board meeting, around February 20, 2007, Mosaica hastily convened a makeshift "for show only" program which worked so poorly that it was cancelled after only a couple of weeks. Several faculty members commented to the Board that everyone involved knew the program would not function properly, but that it was initiated as a sham only to relieve Board pressure.

The LEAP tutoring program was an even more visible disaster. It was started very late in the first place and was often cancelled without explanation. This is demonstrated by contemporaneous e-mails, which provide a real time picture of a school that did not work right. For example, on March 7, 2007,<sup>118</sup> Board Member Carol Asher commented after a Board gathering for faculty:

Resounding cries from teachers regarding LEAP tutoring. They also said that tutoring should have started in October, not two weeks ago. Several teachers told me that tutoring sessions have been cancelled 4 times in the past week when the kids need it most. They thought all students were supposed to have tutoring, but despite sending notes home, they are not and don't know why it keeps being cancelled.

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<sup>117</sup> See Ex. 34 for this meeting's minutes: "the Board was very clear that after-school tutoring is a critical service, and the board must come up with a plan to implement it."

<sup>118</sup> See Ex. 40 for this e-mail.

The results of this LEAP tutoring speak for themselves with only 33 percent of the students passing the test, and there is no doubt that this incompetent tutoring program, in part, helps explain the extremely poor results, especially when other similar charter schools with similarly disadvantaged populations did more than twice as well as Lafayette.<sup>119</sup>

**H. Mosaica Promised a Comprehensive Arts and Enrichment Program That Would Include Substantial Extra-Curricular Opportunities, But Did Not Deliver One.**

Mosaica's sales pitch featured the promise of a comprehensive arts and enrichment program that would make drama, music, and art integral in the fabric of school life. Among other things, Mosaica promised choral and instrument instruction, an after-school drama program, and robust visual arts programs, all of which would be characterized by significant outreach to community arts organizations, museums, art and music departments at local colleges, and the like. In addition, the school would emphasize ecological concerns, with frequent field trips and nature studies, in conjunction with local naturalists and researchers. Mosaica said:

- Lafayette Academy will fill students' minds and hearts with art!<sup>120</sup>
- Hands-on after-school art clubs.<sup>121</sup>
- The music specialist will also conduct chorale and instrumental instruction.
- The school will offer special field trips and nature studies... [the students] will visit museums, conduct field research, and visit research facilities. Working with naturalists and researchers will enhance student appreciation...<sup>122</sup>
- Our middle school curriculum uses an artist-in-residence mode!<sup>123</sup>

Not surprisingly, these promises turned out to be empty platitudes.

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<sup>119</sup> See Ex. 79 for the results of the LEAP test.

<sup>120</sup> See Ex. 2, p. 26 for the Application.

<sup>121</sup> See Ex. 2, p. 26 for the Application.

<sup>122</sup> See Ex. 2, p. 4 for the Application.

<sup>123</sup> See Ex. 2, p. 26 for the Application.

One of the school's Board Members was the highly successful fundraiser and community advocate Ms. Carol Asher. Ms. Asher was asked by the Board to perform fundraising work for a fee in the fall, but Ms. Asher declined the engagement and instead asked if she could serve the school in a volunteer capacity. Although Ms. Asher's efforts raised over \$350,000 for the school, a significant sum, she will testify as to how Mosaica made her job much more difficult than it should have been as a result of both broken promises of grant writing assistance and generally incompetent performance.

Among other things, she will testify that the Laura Bush Foundation, which gave the school \$50,000 for library books, sent a representative to the school to see the library and talk to Mosaica about it. After the visit, of which Ms. Asher was given no notice, the representative told Ms. Asher that the school was so obviously dysfunctional that the Foundation would not consider giving any further money as long as Mosaica was involved.

Although Board Member Carol Asher managed to secure the donation of a full set of band instruments, Mosaica never instituted any meaningful instruction as to how to play them and they sat for most of the year, unused. There was no after-school drama program, no "special field trips" or "nature studies," except for a trip to the Aquarium that Mr. Huger's mother funded, and no field research or contact with naturalists or researchers. In sum, fulfillment of any of these lofty promises about valuable extracurricular programs for the students was about as likely as a field trip to the moon.

Nor did the school have P.E. equipment until November when the Board Chairman put the equipment on his personal credit card. In his e-mail to Mosaica founder Gene Eidelman, he said:

Gene, what would you say if your kid was in school and they just bought PE equipment on November 13, 2 months after school. I gave Ed my credit card last week to buy the equipment because he had no way of buying it? Is this an over reaction?

**I. Conclusion of Discussion of Specific Defaults of Mosaica.**

Mosaica's management of Lafayette Academy was a chaotic disgrace that did great harm to the children who had the misfortune of attending the school. The recitation above does not do justice to how bleak the picture really was, but does provide more than a hint of it. The statements of Mosaica's President, Mr. Eidelman, at the June 6, 2007 Board Meeting that he was "proud" of what Mosaica did in New Orleans in 2006/2007 are the height of hypocrisy and self-delusion.<sup>124</sup> And Mosaica's legal position that it did not breach its contract is cynical and frivolous. All of this should be sufficient to boil any fair observer's blood since it was the interests of Katrina-ravaged students that were so cavalierly disregarded by Mosaica. The remaining question is what this arbitrator should do about this. That brings us to the discussion of remedies.

**VII. Remedies.**

The question in any remedies analysis is what can and should be done to right the particular wrong at issue. In an arbitration, the arbitrator has considerable discretion to fashion any remedy that he believes is appropriate. The arbitrator is not strictly bound to follow any particular law or laws, but is empowered to grant any relief that is just and appropriate.<sup>125</sup>

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<sup>124</sup> See Ex. 76 for the minutes of this meeting.

<sup>125</sup> *United Paperworkers Intern. Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29, 30 (1987) (noting that "arbitrators normally have wide discretion in formulating remedies"); *International Ass'n of Machinists & Aerospace Workers, Dist. 776 v. Texas Steel Co.*, 639 F.2d 279, 284 (5<sup>th</sup> Cir. 1981) (noting that an arbitration panel has "broad discretion in fashioning an appropriate remedy"); *National Gypsum Co. v. Oil, Chemical & Atomic Workers Intern. Union*, 97-0338, 1997 WL 358048, at \*8 (E.D. La. Jun 24, 1997) ("[T]o the extent that the arbitrator has retained jurisdiction to determine the appropriate remedy for the contractual violations, the discretion of the arbitrator is exceptionally broad, and a challenge to

Here, Mosaica's breach of its contract justifies the contract's termination for cause. But termination of the contract alone does not right Mosaica's wrong. Simply deciding that Mosaica has no right to manage the school next year does nothing to address what happened last year. The students were deprived of the education and experience that they were promised and that is obviously the most direct and significant damage. But it also cannot be overemphasized how much Mosaica's poor performance deprived the school of critical initial momentum and how difficult it will now be for the school to get back to the position that it would have been in if Mosaica had honored its promises. Mosaica's promises to the parents and the students generated enthusiasm, focus and a sense of civic-mindedness which, had they been harnessed at the time, would have launched the school on a highly-productive trajectory, which is certainly what happened at some of Lafayette's peer schools. Mosaica's poor performance suffocated this start-up energy with the result that the school never left the launching pad and the parents and students are justifiably skeptical as to whether it ever will. It is very difficult to get that initial opportunity back or to replicate the favorable circumstances that existed at the beginning of last year.

The remedies proposed by Choice provide the school with the opportunity to take significant concrete steps to place the school on a footing that will, over time, repair its

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the formulation of remedies by the arbitrator should not be made lightly.”). *See also Toroyan v. Barrett*, No. 06 Civ. 4422(RJH), 2007 WL 1982192, at \*3 (S.D.N.Y. Jul. 10, 2007) (“Where an arbitration clause is broad, as here, arbitrators have the discretion to order remedies they determine appropriate, so long as they do not exceed the power granted to them by the contract itself.”) (citing *Banco de Seguros del Estado v. Mutual Marine Office, Inc.*, 344 F.3d 255, 262 (2d Cir. 2003); *Advanced Micro Devices, Inc. v. Intel Corp.*, 885 P.2d 994, 995 (Cal. 1994) (“We conclude that, in the absence of more specific restrictions in the arbitration agreement, the submission or the rules of arbitration, the remedy an arbitrator fashions does not exceed his or her powers if it bears a rational relationship to the underlying contract as interpreted, expressly or impliedly, by the arbitrator and to the breach of contract found, expressly or impliedly, by the arbitrator.”)).

compromised credibility and create performance that will objectively demonstrate success. Choice suggests the following remedies:

1. a declaration that Choice was within its rights to terminate its contract with Mosaica and that Choice has the right to manage and operate Lafayette Academy in the future without interference from Mosaica and without paying the \$100,000 termination fee;
2. a money award that: (a) returns two-thirds of the fees paid by Choice for services rendered before April 4, 2007 in the amount of \$374,830.50 and 75 percent of the fees paid after April 4, 2007 in the amount of \$163,378; (b) reimburses Choice for the direct extra expenses incurred as a result of having to amend its charter to outline a new academic program and to buy the materials needed to implement that new program, a total of at least \$552,500; and (c) pays for a remedial program for the 2007/2008 school year in the amount of roughly \$1.9 million;
3. an award of longer term compensatory damages and/or punitive damages in the amount of \$2 million that will accomplish the dual purpose of creating an endowment for the school that can be used to benefit the children of this school for many years into the future as compensation for the intangible, but very real, long-term damage resulting from the failure to properly launch the school last year and of providing well-deserved punishment for a business that made unfounded promises to innocent families who were already suffering from the double whammy of a long-failing education system and the dislocation and interruption caused by Katrina; and
4. Attorney's fees of one-third of the other amounts awarded which would be paid to and kept by the school.

We will, in turn, discuss the legal and factual foundations for each of these requests for relief.

**A. Declaratory Judgment.**

Under the Management Agreement, Section 7.01(b), Choice can terminate Mosaica's contract if there is a "material breach" by Mosaica that remains unremedied after 30 days. As the foregoing discussion demonstrates, there were numerous material breaches of the Agreement over the course of the school year, and Mosaica has failed to

remedy most of those breaches. The totality of these circumstances fully validates a finding that the Agreement terminated effective as of May 15, 2007 when the Board voted to terminate it. As a result, under Louisiana law, which applies to the construction of this agreement as per Section 13.03, Choice is entitled to a declaration that this Agreement was properly terminated on May 15, 2007.<sup>126</sup>

In addition, Section 4.05 of the Agreement by Choice calls for the payment by Choice to Mosaica of \$100,000 if the agreement terminates, even with just cause. Because Mosaica's contract was void *ab initio* because Choice's consent was induced by promises that Mosaica had no intention or ability to keep, the arbitrator should declare that this termination fee is not due.<sup>127</sup> At a minimum, the arbitrator should declare that the \$100,000 termination fee must be offset against monies Mosaica owes Choice as per subsections "b." and "c." below.

**B. Compensatory Damages.**

When an obligor breaches a contract, the obligee is entitled to recover all foreseeable damages resulting from the breach. Where the breach is in bad faith, all damages, foreseeable or not, are properly recoverable. *See* LA. CIV. CODE ANN. art. 1997 (West 2007) ("An obligor in bad faith is liable for all the damages, foreseeable or not, that are a direct consequence of his failure to perform."); *Superior Oil Co. v. Transco*

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<sup>126</sup> *See* LA. CIV. CODE ANN. art. 2013 ("When the obligor fails to perform, the obligee has a right to the judicial dissolution of the contract or, according to the circumstances, to regard the contract as dissolved. In either case, the obligee may recover damages."). *See also* *Marionneaux v. Hines*, No. 2005-OC-1191 (La. 05/12/05); 902 So. 2d 373, 377 ("[A] person is entitled to relief by declaratory judgment when his rights are uncertain or disputed in an immediate and genuine situation and the declaratory judgment will remove the uncertainty or terminate the dispute.") (quoting *Louisiana Associated General Contractors, Inc. v. State, Division of Administration, Office of State Purchasing*, 95-2105, p. 7, (La. 3/8/96), 669 So. 2d 1185, 1191); *Prator v. Caddo Parish*, No. 2004-C-0794 (La. 2004); 888 So. 2d 812, 817 (La. 12/1/04) (same).

<sup>127</sup> *See* LA. CIV. CODE ANN. art. 1948 ("Consent may be initiated by error, fraud, or duress."); LA. CIV. CODE ANN. art. 2029 ("A contract is null when the requirements for its formation have not been met."); LA. CIV. CODE ANN. art. 2033 ("An absolutely null contract, or a relatively null contract that has been declared null by the court, is deemed never to have existed. . . .").

*Energy Co.*, 616 F. Supp. 94, 97 (W.D. La. 1984) (holding that in view of defendant's bad faith, losses of crude oil and gas because of a breach of gas purchase agreement were direct consequences of the breach and recoverable under Louisiana law).

**1. Return of a Portion of Management Fees.**

Under Louisiana law, Choice is entitled to recover a portion of the monies paid to Mosaica for periods where Mosaica incompletely and imperfectly performed its services.<sup>128</sup> From the time that the school opened, as demonstrated above, large portions of Mosaica's obligations were either not performed, were performed incompletely and imperfectly, or were performed by Choice. As discussed above, Choice had clearly signed on only as an oversight board, but Choice Chairman Jim Huger and other Board members were routinely forced to intervene to see that Mosaica's contractual obligations were performed when it was clear that Mosaica would not do so. Mr. Huger and other Board Members spent many hundreds of hours doing work that Mosaica should have been doing.

As a result, with respect to management fees paid to Mosaica from the beginning of the school year until the April 4, 2007 default notice, a reasonable remedy is for Mosaica to refund two-thirds of the fees it received during this period. This constitutes a conservative estimate of the portion of Mosaica's work that Mosaica failed to do. It

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<sup>128</sup> See LA. CIV. CODE ANN. art. 1994 ("An obligor is liable for the damages caused by his failure to perform a conventional obligation. A failure to perform results from nonperformance, defective performance, or delay in performance."); LA. CIV. CODE ANN. art. 1995 ("Damages are measured by the loss sustained by the obligee and the profit of which he has been deprived."); *Aucoin v. Southern Quality Homes, LLC*, No. CA 2006-979 (La. App. 3 Cir. 2/28/07); 953 So. 2d 856, 865 (affirming the lower court's ruling that the plaintiff was entitled to a return of the purchase price paid for his defective mobile home); *Clary v. D'Agostin*, No. 95 CA 0447 (La. App. 1 Cir. 12/15/95); 665 So. 2d 792, 794 ("The purchaser [of defective home] is entitled to rescission of the sale and refund of the purchase price."). See also *Hamilton v. Goeders*, 121 So. 2d 859, 861 (La. Ct. App. 2d Cir. 1960) (finding where a service contract was breached, the plaintiffs had the right to recover the amount that they had to expend to have another party perform the defendant's work). *Anderson v. Green*, 454 So. 2d 200, 201 (La. App. 1st Cir. 1984) (noting that an available remedy for defective performance is a reduction of the amount due per the contract).

represents the smallest return of compensation for that period that would accomplish rough justice. For the period after the April 4, 2007 default notice, because Mosaica performed very few services after this date (with the exception of the bookkeeping function performed by Roger Gray, who was both responsive and competent throughout), Mosaica should be required to refund 75 percent of the management fees it received. Again, that is a conservative estimate of the amount of the fees which were paid to Mosaica that it did not earn. The total refund would be \$510,208.50 which consists of a refund of \$347,830.50 of the \$521,798 paid for the period from the beginning of school to April 4, 2007 and \$163,378 of the \$217,838 paid for the period after April 4, 2007.

**2. Extra Expenses.**

Mosaica should also be called upon to pay the additional expenses incurred by Choice in preparing the amendment to its charter and for the materials needed to replace Mosaica's proprietary curriculum, which Choice purchased but is now contractually required to be returned to Mosaica. Choice has had to replace the Mosaica curriculum with the state-recommended K-7 curriculum. Choice has paid or is obligated to pay \$50,000 due to extra work and expense of preparing the charter amendment. In addition, Choice has ordered and will order at least \$500,000 in materials to replace Mosaica's proprietary curriculum and to pay for the required LA-4 materials that FEMA would have paid for if they had been ordered on time. Choice will have to also do criminal background checks costing approximately \$2,500. The total due here for extra expenses is approximately \$552,500. The amounts will be set forth more concretely at the hearing when final figures are obtained and the calculations are double-checked.

### 3. **One-Year Remedial Program.**

In addition, Choice should be allowed to institute, at Mosaica's expense, a carefully targeted one-year program to remediate the effects of Mosaica's poor performance. As demonstrated in detail above, Mosaica promised meaningful, substantive, individual education plans, routine targeted computerized instruction and assessment using ILS, "basic skills" instruction with dedicated faculty and before- and after-school tutoring programs that would ensure that students who were not functioning at grade level would receive individual attention. It is beyond dispute that if these components of Mosaica's had been provided, the LEAP and i-LEAP results would not have been so poor and the students at the school would have progressed much further during that year.

The Time-Picayune's summary chart of the LEAP scores<sup>129</sup> for Lafayette, versus other Orleans Parish open enrollment charter schools shows that Lafayette's scores placed it second to last, ahead only of the Green school. Only 27 percent of Lafayette's students scored at "Basic" or above in reading and only 29 percent at "Basic" or above in Math. Contrast that result to similar charter schools that succeeded, under the same adverse condition, in executing their academic programs, such as Dr. Martin Luther King Charter School, made up mostly of Ninth Ward students, or Sophie B. Wright Institute on Napoleon Avenue. The much better results in these similar schools demonstrate that those schools that did what they were supposed to do produced an environment where over 70 percent of their students could perform at "Basic" or above on LEAP. The results of these other charter schools were consistent with the Mosaica prediction at the February Board Meeting of a 75-percent pass rate for Lafayette.

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<sup>129</sup> See Ex. 79 for the Chart.

Lafayette's failure to perform at least as well as its peer schools is all the more remarkable when one considers that Lafayette should have had a significant head start for two reasons. First, Lafayette was using a national management company that was supposedly experienced at opening new schools. And second, Lafayette was one of the first schools to actively recruit students, which meant that Lafayette's population included many motivated parents and students. A portion of Lafayette's parents chose Lafayette over excellent schools like Lusher because of the promised comprehensive academic and arts program. When considered in this context, it is a true "travesty of justice" that Mosaica's program was not executed, and that the initial parent, student and teacher motivation and enthusiasm were not harnessed.

After conducting a national search that yielded a number of excellent candidates, Choice hired, on April 25, 2007, Mr. Mickey Landry, a Ninth Ward native who has been the Headmaster at four successful private schools in different parts of the country, including Christ Episcopal School in Covington and, most recently, the Colorado Springs School in Colorado Springs, Colorado. To address the year that was lost under Mosaica's incompetent leadership and in an attempt to restore squandered potential, momentum and cache, Mr. Landry has prepared a plan that he believes can both provide the individualized tutoring and attention that should have been started last year and succeed in meeting the students' needs for this academic year.

Mr. Landry will provide testimony about the cost of this program, and the specifics of how he would implement it in the event that funds are available as a result of this arbitration. This program is designed to improve the LEAP pass rate from 33 percent to the 75-plus percent Mosaica promised and that the peer schools achieved. This will be

a difficult, but not impossible, task if appropriate resources and expertise are brought to bear. The cost of this remedial program is between approximately \$1.4 and \$1.9 million, between \$1,795 and \$2,435 per student, depending upon whether it is staffed by certified teachers or by non-certified teaching assistants. Since Mosaica's PowerPoint<sup>130</sup> promised that its program would be the "gold standard," it is submitted that it would be wholly appropriate that the remedial plan also be at the highest standard.

C. **Long-Term Compensatory and Punitive Damages.**

It is respectfully suggested that an award of long-term compensatory or punitive damages in the amount of \$2 million, which is enough to send a stern message, but not so much as to bankrupt or seriously financially impair Mosaica, is an entirely appropriate award under the circumstances. It is admittedly difficult to know exactly how far Lafayette Academy was set back due to Mosaica's utter failure to take advantage of its significant initial momentum, but it is not difficult to see and know that this worthy project will bear the scars of Mosaica's performance for years to come. Exactly what amount of money would provide appropriate compensation for these long-term effects is hard to pin down, but \$2 million is not an unreasonable estimate.<sup>131</sup>

\$2 million is approximately a quarter of Choice's annual \$8 million budget, about 2 percent of Mosaica's annual revenue of \$93 million,<sup>132</sup> and is an amount that will be sufficient to make a real difference for the students in the years to come. Should such an award be received, Choice would place those funds into an endowment to be used to benefit the students the school serves in the future, spending earnings, but retaining

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<sup>130</sup> See Ex. 4 for the PowerPoint presentation.

<sup>131</sup> See LA. CIV. CODE ANN. art. 1999 ("When damages are insusceptible of precise measurement, much discretion shall be left to the court for the reasonable assessment of these damages.").

<sup>132</sup> See Ex. 96 for Inc. Article listing Mosaica's profile.

principal. Such an award would provide substantial justice under the circumstances. It would benefit, into the indefinite future, a worthy cause that was significantly set back by Mosaica's performance: the education of the innocent and deserving students of this City, who after decades of awful performance by their school system, may now be able to look to the future with real hope that things will get better. It would also send a needed message to private education companies like Mosaica that there is a significant downside to making promises that you do not intend to keep.

In an arbitration convened under the AAA Rules, the arbitrator has the inherent discretion to award punitive damages to address intentional or severely reckless conduct. *See* Commercial Arbitration Rules and Mediation Procedures, Rule 43 Scope of Award ("The arbitrator may grant any remedy or relief that the arbitrator deems just and equitable and within the scope of the agreement of the parties ...").

In *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 58 (1995), the United States Supreme Court held that the touchstone of whether the arbitrators can award punitive damages is the arbitration agreement itself. The contract in *Mastrobuono* stated that the parties agree to arbitrate under the NASD rules. *Id.* at 58-59. After examining the NASD rules and the manual provided to NASD arbitrators, the Supreme Court upheld the panel's award of punitive damages because it found that the NASD rules, which the parties agreed would govern their dispute, allowed for an award of punitive damages. *Id.* at 59-61. AAA Arbitration Rule 43 is the equivalent of the NASD rules that provide the arbitrators with broad remedial powers, and these powers include the ability to award punitive damages. *Davis v. Prudential Securities, Inc.*, 59 F.3d 1186, 1189 (11th Cir. 1995). In *Davis*, the court upheld the arbitrators' punitive damages award,

and noted that the *Mastrobuono* decision was also controlling for an AAA arbitrator's ability to award punitive damages. *Id.*

The *Mastrobuono* decision has been interpreted by the federal Fifth Circuit and Louisiana federal and state district courts to mean that arbitrators can award any damages authorized by the parties' agreement to arbitrate – even if these damages would not be allowed under Louisiana substantive law. For example, in a case recently arbitrated by undersigned counsel that also arose under Louisiana law, an NASD panel awarded \$3.5 million in punitive damages in addition to compensatory damages. *Adams v. Securities America, Inc.*, 2006 WL 2631863, \*3 (E.D. La. 2006). The award, including the punitive damage component, was upheld by the federal court. *Id.*

In this case, whatever money is awarded will go entirely and directly back into Lafayette's coffers to serve Lafayette's students. Counsel, like all of the other Board members, is working as an unpaid volunteer; as a result, there will be no attorney's fees to reduce any award that is rendered. If attorney's fees are awarded, they will be kept entirely by the school.

A punitive award is especially justified in this case because Mosaica is apparently running schools elsewhere in a similarly cavalier way. Mosaica's PowerPoint used to sell its program to the parents said: "Every school ever opened using the Mosaica Model is still serving students today." Mosaica also specifically told the Board that it had never been terminated at any school. The truth, however, is significantly different from these misleading representations.

The following chart chronicles publicly available information on terminations and failing schools operated by Mosaica.

School	Location	Failures and/or Terminations of Mosaica
Ronald H. Brown Charter School	Harrisburg, Pennsylvania	The Pennsylvania State Charter School Board revoked the charter of the school, which was run by Mosaica Education, Inc. <sup>133</sup>
Academy of Dover Charter School	Dover, Delaware	Terminated its management contract with Mosaica in June 2006, <sup>134</sup> citing numerous instances of mismanagement. <sup>135</sup>
Mosaica Academy Charter School	Bensalem, Pennsylvania	Terminated its management contract with Mosaica Education, citing an improperly aligned curriculum, inadequate computer systems, and mishandled finances. <sup>136</sup>
Detroit Advantage Academy	Detroit, Michigan	Terminated Mosaica citing unfulfilled promises, missing state reporting deadlines, and failing to update board members on fiscal issues. <sup>137</sup>
Columbus Arts and Humanities Academy	Columbus, Ohio	This school, which is run by Mosaica, has received an academic emergency rating. <sup>138</sup>
Columbus Humanities, Arts and Technology Academy	Columbus, Ohio	This school, which is run by Mosaica, has received an academic emergency rating. <sup>139</sup>
Columbus Preparatory Academy	Columbus, Ohio	This school, which is run by Mosaica, has received an academic emergency rating. <sup>140</sup>
Saginaw Preparatory Academy (formerly Mosaica Academy)	Saginaw, Michigan	The School Board terminated Mosaica, citing low state test scores and high staff turnover. <sup>141</sup>
Collegium Charter School	West Chester, Pennsylvania	Terminated Mosaica. <sup>142</sup>

<sup>133</sup> *Ronald H. Brown Charter School v. Harrisburg City School District*, 2007 WL 1932024 (Pa. Cmwlth 2007).

<sup>134</sup> Department of Education Charter School Accountability Meeting, November 1, 2006, at [http://delaware.gov/eGov/Calendar.nsf/\\*/EF6537E147BFBDC852571BD004993EC/\\$file/MinutesMt g%2011-01-06.doc?openelement](http://delaware.gov/eGov/Calendar.nsf/*/EF6537E147BFBDC852571BD004993EC/$file/MinutesMt g%2011-01-06.doc?openelement).

<sup>135</sup> Drew Volturo, *School fails audit test: Report questions Academy of Dover's fiscal management*, DELAWARE STATE NEWS, at [http://www.newspaper.com/articles/2006/12/19/dm/central\\_delaware/dsn03.prt](http://www.newspaper.com/articles/2006/12/19/dm/central_delaware/dsn03.prt).

<sup>136</sup> Alex Molnar, *Calculating the Benefits and Costs of For-Profit Public Education*, EDUCATION POLICY ANALYSIS ARCHIVES, April 24, 2001, at <http://epaa.asu.edu/epaa/v9n15.html>.

<sup>137</sup> Brad Heath, *Substandard Charters Fail 17,000 Pupils*, THE DETROIT NEWS, October 26, 2006, at <http://www.protectourpublicschools.org/site/apps/nl/content2.asp?c=fdJQIPMvA&b=217402&ct=250772>.

<sup>138</sup> Jennifer Smith Richards, *Kids Flock to Failing Charters*, THE COLUMBUS DISPATCH, October 8, 2006, at <http://www.dispatch.com/dispatch/contentbe/dispatch/2006/10/08/20061008-C1-01.html>.

<sup>139</sup> Jennifer Smith Richards, *Kids Flock to Failing Charters*, THE COLUMBUS DISPATCH, October 8, 2006, at <http://www.dispatch.com/dispatch/contentbe/dispatch/2006/10/08/20061008-C1-01.html>.

<sup>140</sup> Jennifer Smith Richards, *Kids Flock to Failing Charters*, THE COLUMBUS DISPATCH, October 8, 2006, at <http://www.dispatch.com/dispatch/contentbe/dispatch/2006/10/08/20061008-C1-01.html>.

<sup>141</sup> Saginaw News, July 10, 2004. NCSC News, available at <http://www.ncsc.info/newsletter/aug2004/stateside.htm>.

<sup>142</sup> F. Howard Nelson and Nancy Van Meter, *Student Achievement in Schools Management by Mosaica Education, Inc.*, AFT Research & Information Services Department, June 2003, at <http://www.aft.org/topics/charters/downloads/Mosaica2003.pdf>.

In addition, it appears that the following Mosaica schools were discontinued.<sup>143</sup>

School	Location
Victory Charter School	East Point, Georgia
Sugar Creek Charter School	Charlotte, North Carolina
Liberty Academy Charter School	Jersey City, New Jersey
New Horizons Community Charter School	Newark, New Jersey
George Washington Carver Academy	Detroit, Michigan

In sum, the unhappy results of Mosaica's program are apparently not limited to just New Orleans. It may be helpful for Mosaica to learn that there can be significant adverse financial consequences when promises made to parents and students are not kept.

**D. Attorney's Fees.**

Undersigned counsel is a Choice Board Member and an unpaid advocate for the school. The firm of Correro Fishman Haygood has agreed to waive its right to any fee that is awarded in this case.<sup>144</sup> Should the arbitrator award a standard one-third contingent fee on the amounts awarded in this case, those fees will be entirely retained in the school.

**VIII. Conclusion.**

For all of the foregoing reasons and for the additional reasons discussed at the hearing, The Choice Foundation prays for a judgment in its favor and against Mosaica Education as follows:

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<sup>143</sup> Alex Molnar, Glen Wilson, and Daniel Allen, *Profiles of For-Profit Education Management Companies 2003-2004*, Arizona State University, Commercialism in Education Research, February 2004, available at <http://epsf.asu.edu/ceru/Documents/EPFL-0402-101-CERU.pdf>.

<sup>144</sup> Attorney's fees are recoverable in this case. See LA. CIV. CODE ANN. art. 1958 ("The party against whom rescission is granted because of fraud is liable for damages and attorney's fees.") See also LA. CIV. CODE ANN. art. 1997 ("An obligor in bad faith is liable for all the damages, foreseeable or not, that are a direct consequence of his failure to perform.").

- 1) Declaring that Choice was entitled to terminate its contract with Mosaica and that it does not owe Mosaica the \$100,000 termination fee;
- 2) Awarding compensatory damages of \$2,962,708 together with legal interest from April 24, 2007;
- 3) Awarding punitive damages of \$2 million plus interest from the date of judgment;
- 4) Awarding attorney's fees of one-third of the total of items 1 through 3 above;
- 5) Dismissing Mosaica's frivolous counterclaim in its entirety at Mosaica's sole cost; and
- 6) Taxing all costs and fees of this proceeding to Mosaica.

August 13, 2007

Respectfully submitted,

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James R. Swanson, 18455  
Joseph C. Peiffer, 26459  
Lance C. McCardle, 29971  
CORRERO FISHMAN HAYGOOD PHELPS  
WALMSLEY & CASTEIX, L.L.P.  
201 St. Charles Avenue, 46<sup>th</sup> Floor  
New Orleans, LA 70170-4600  
Telephone: (504) 586-5252  
Facsimile: (504) 586-5250

*Attorneys for The Choice Foundation*

## APPENDIX A

### Chronology

March 20, 2006	Management Agreement between Mosaica and Choice executed  Charter application prepared by Mosaica approved by Choice Board
April 4, 2006	Meeting between the Board and the BESE representatives to discuss Charter Application
April 13, 2006	State recommends Choice for a charter
May 12, 2006	Mr. Drozdowski hired as CAO of school  Ms. Williams hired as Principal
June 22, 2006	First Newman outreach meeting where Mosaica presented PowerPoint
June 26, 2006	Second Newman outreach meeting where Mosaica presented PowerPoint
June 28, 2006	Final Newman outreach meeting where Mosaica presented PowerPoint
July 19, 2006	Mosaica claims 15,000 of the direct mail glossy brochures will be sent today  Mosaica Vice President Dawn Richardson relieved of her duties
July 31, 2006	15,000 direct mails still not sent because Mosaica mixup regarding postage payment
September 11, 2006	School opens
September 18, 2006	Many complaints by Principal Williams about operational issues
September 20, 2006	Mr. Huger writes Mosaica with polite complaints about performance
September 26, 2006	Faculty meeting with Board Chairman Huger; teachers complain about Mosaica performance
September 28, 2006	Mr. Swanson writes to inquire about numerous operational issues

October 2, 2006	Mr. Huger meets with Alvarez to obtain delivery of text books
October 13, 2006 – October 18, 2006	Mr. Huger and Mr. Swanson write various e-mails to Mosaica outlining numerous performance issues
October 19, 2006	First student expulsion hearing; Mosaica unfamiliar with procedures
November 2, 2006	Choice places Mosaica in default due to lack of classroom materials and delay in planning and delivery of promised technology
November 14, 2006	Mr. Huger meets with Mr. Eidelman and Mr. Erste
November 14, 2006	Choice provides Mosaica with an outline of what it expects to see going forward
November 29, 2006	Action items and tracking list approved by the Board  Parent complains about lack of books at Board Meeting
December 26, 2006	Ms. Jacobs confronts Mr. Huger at a party. She says school is “C-“ and that 20 teachers have resigned, something never reported to the Board
January 11, 2007	Mr. Huger initiates report card design process to objectively evaluate the school’s performance
January 23, 2007	Interview with NASCA for two new schools; Mosaica inadvertently sabotages the application by including a draft response to Choice’s default letter and Mosaica representative cannot answer obvious questions about numbers of teachers, etc.
January 31, 2007	LEAP tutoring discussed at Board Meeting, but not started yet  After-school tutoring for below-grade-level students mandated by the Board  Board adopts the Report Card format and provides it to Mosaica
February 12, 2007	Application for two new schools for Choice denied by the State
February 28, 2007	Report cards handed out for evaluation of areas by Board Members  A teacher comments at the Board Meeting that faculty resignations were because of lack of administrative support, not “personal reasons” as CAO says

Hastily conceived tutoring program discussed; Board mandates tutoring for every below-grade-level student

March 5, 2007 Board meets to discuss CAO's incompetence and Mosaica's poor performance

March 6, 2007 Board meets with staff in informal gathering at the school; staff complains about Mosaica administration

March 6, 2007 Ms. Williams named interim head of school; CAO Drozdowski reassigned

March 13, 2007 Board meets with parents in informal gathering at the school

March 13, 2007 School CAO is confronted about stealing a T.V. and confesses, after initial denial. He is immediately fired.

March 21, 2007 Report card completion deadline for Board members

March 26, 2007 Report card compiled and sent to Mosaica

March 28, 2007 Board votes to put Mosaica in default

April 4, 2007 Board transmits Notice of Default

April 24, 2007 Choice commences arbitration

April 25, 2007 Mr. Landry hired as Head of School

May 4, 2007 Mr. Landry's hiring announced to the school

Mosaica delays arbitrator selection process by insisting on 45-day arbitrator selection deadline

May 15, 2007 LEAP scores reported to the Board

Board votes to terminate Mosaica's contract after reading Mosaica rebuttal, hearing Mosaica presentation and reviewing LEAP scores

May 16, 2007 Choice sends Chairman's Summary of Reasons to Mosaica and notifies them of termination

June 6, 2007 Mr. Eidelman attends Board Meeting and says he is proud of Mosaica performance