

THE STATE OF SOUTH CAROLINA
In the Court Of Appeals

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APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Letitia H. Verdin, Circuit Court Judge

C.A. No.: 2014-CP-23-01463

Appellate Case No.: 2015-001678

The Legacy Charter SchoolAppellant

v.

National Collegiate Athletic Association.....Respondent

**INITIAL BRIEF OF APPELLANT
THE LEGACY CHARTER SCHOOL**

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STATEMENT OF ISSUES ON APPEAL

- I. DID THE COURT ERR IN DENYING SUMMARY JUDGMENT IN FAVOR OF APPELLANT AND GRANTING SUMMARY JUDGMENT IN FAVOR OF RESPONDENT WHERE APPELLANT HAS ESTABLISHED, AT A MINIMUM, THAT THERE IS A GENUINE ISSUE OF MATERIAL FACT AS TO WHETHER APPELLANT IS A DIRECT AND INTENDED THIRD-PARTY BENEFICIARY OF THE NCAA CONSTITUTION, BYLAWS, AND REGULATIONS?

- II. DID THE COURT ERR IN DENYING SUMMARY JUDGMENT IN FAVOR OF APPELLANT AND GRANTING SUMMARY JUDGMENT IN FAVOR OF RESPONDENT WHERE APPELLANT HAS ESTABLISHED, AT A MINIMUM, THAT THERE IS A GENUINE ISSUE OF MATERIAL FACT AS TO WHETHER APPELLANT HAS STANDING TO CHALLENGE ITS PLACEMENT UNDER EXTENDED EVALUATION STATUS PURSUANT TO THE CONTRACTUAL RELATIONSHIP BETWEEN IT AND RESPONDENT?

- III. DID THE COURT ERR IN DENYING SUMMARY JUDGMENT IN FAVOR OF APPELLANT AND GRANTING SUMMARY JUDGMENT IN FAVOR OF RESPONDENT WHERE APPELLANT HAS ESTABLISHED, AT A MINIMUM, THAT THERE IS A GENUINE ISSUE OF MATERIAL FACT AS TO WHETHER RESPONDENT INTENTIONALLY INTERFERED WITH APPELLANT'S PROSPECTIVE ECONOMIC ADVANTAGE AND/OR CONTRACTUAL RELATIONS?

STATEMENT OF THE CASE

The Legacy Charter School (“Legacy Charter School”) instituted this action against the National Collegiate Athletic Association (“NCAA”) on March 14, 2014. On September 3, 2014, Legacy Charter School filed an Amended Complaint, asserting causes of action against the NCAA for Breach of Contract (Count I) and Tortious Interference with Prospective Economic Advantage/Contractual Relations (Count II). In its Amended Complaint, Legacy Charter School asserted that the NCAA’s wrongful, arbitrary, and capricious conduct in placing Legacy Charter School under Extended Evaluation status constituted a breach of contract, i.e., a breach of the NCAA’s Constitution, Bylaws, and Regulations, which constitute a valid and enforceable contract between the NCAA and its member institutions and/or among the member institutions themselves, to the detriment of Legacy Charter School, a third-party beneficiary of the NCAA’s Constitution, Bylaws, and Regulations. Legacy Charter School also asserted that the NCAA’s wrongful, arbitrary, and capricious conduct in placing Legacy Charter School under Extended Evaluation status constituted a tortious interference with Legacy Charter School’s prospective economic advantage/contractual relations.

After the completion of extensive discovery, Legacy Charter School and the NCAA filed cross motions for summary judgment on April 21, 2015 with respect to Legacy Charter School’s causes of action for Breach of Contract (Count I) and Tortious Interference with Prospective Economic Advantage/Contractual Relations (Count II). By Order dated May 29, 2015 (“the Summary Judgment Order”), the trial court denied Legacy Charter School’s Motion for Summary Judgment and granted the NCAA’s Motion for Summary Judgment, finding that (1) Legacy Charter School is not an intended third-party beneficiary of the NCAA Constitution, Bylaws, and Regulations, (2) Legacy Charter School failed to establish a claim for tortious

interference with prospective economic advantage/contractual relations, and (3) “[t]he parties agree that there are no factual disputes in this matter.”

On June 12, 2015, Legacy Charter School filed a Motion for Reconsideration, and requested that the trial court reconsider and reverse its Summary Judgment Order. By Order dated July 14, 2015 (the “Reconsideration Order”), the trial court denied Legacy Charter School’s Motion for Reconsideration. On or about August 3, 2015, Legacy Charter School filed and served this Appeal.

STATEMENT OF FACTS

A. LEGACY CHARTER SCHOOL

Legacy Charter School is a free, public charter school open to all students in Greenville County, South Carolina. (Legacy Charter School Memorandum of Law in Support of Motion for Summary Judgment (hereinafter, "Legacy Memo"), p. 1; NCAA's Memorandum in Support of Motion for Summary Judgment (hereinafter "NCAA Memo"), p. 7; Excerpts of Deposition of William Brown attached to NCAA Memo (hereinafter, "Brown Depo"), pp. 8-19). It was founded in 2010 by William Brown, with funding provided primarily by Campbell Young Leaders Foundation, an operating private foundation that provides funding to serve underprivileged children. (Legacy Memo, Exhibit M – Transcript of Deposition of William Brown, pp. 7, 11-17, 24-27; Brown Depo, pp. 8-19).. From its inception, the purpose of Legacy Charter School was to serve children of poverty and provide an educational model based on hard work, a longer school day, a heightened standard of proficiency, and requiring physical fitness every single day for each of its students, on the belief that students who are fit have been demonstrated to do dramatically better academically, have fewer behavioral issues, and lower absenteeism. (Legacy Memo, Exhibit M, pp. 7, 11-17, 24-27; Legacy Memo, Exhibit G – Transcript of Deposition of Fred Crawford, p. 37). Consistent with this belief, Legacy Charter School chooses not to be a member of the South Carolina High School League (the "SCHSL"), because it believes it is critical for its student-athletes – who are held to the same, heightened academic standards as all other Legacy Charter School students – to be provided the opportunity to participate in sports on a year-round basis. (Legacy Memo, Exhibit M, pp. 41-43; Excerpts of Deposition of B.J. Jackson attached to NCAA Memo (hereinafter, "Jackson Depo"), pp. 54-59). Joining the SCHSL would, among other things, limit the number of practices, limit the length of

the athletic season for certain sports, and limit the number of competitions in which Legacy Charter School teams and student-athletes can participate, and this is inconsistent with Legacy Charter School's educational philosophy. (Legacy Memo, Exhibit M, pp. 41-43.).

At its inception, Legacy Charter School retained Fred Crawford as its Executive Director, based on his prior success in serving as Principal and Chief Executive Officer of Greenville Technical Charter High School, and his work in planning and helping to establish two similar charter schools within the Greenville County School District (Legacy Charter School's "sister schools"), Brashier Middle College High School and Greer Middle College High School. (Legacy Memo, Exhibit M, pp. 16-17, 43-45). These three charter high schools all operate in Greenville County and have arrangements with Greenville Technical College that allow many of their students to take college classes at the Greenville Technical College campus while still in high school, much the same way that Legacy Charter School does. (Legacy Memo, Exhibit M, pp. 42-43).

The academic curriculum of Legacy Charter School is modeled after and virtually identical to the curricula at each of the other two "sister schools" in all meaningful respects. (Legacy Memo, Exhibit M, pp. 16-17, 43-45; Legacy Memo, Exhibit G, pp. 34-35). Like its "sister schools," Legacy Charter School is accredited by the South Carolina Department of Education to award diplomas to its graduates, uses State-approved curriculum standards and approved/adopted textbooks for instruction, and also employs the South Carolina Department of Education's mandated Uniform Grading Scale. (Legacy Charter School's Amended Complaint (hereinafter, "Amended Complaint"), ¶¶ 30, 35; Legacy Memo, Exhibit G, p. 34; Legacy Memo, Exhibit J). Legacy Charter School is required to and does comply with federal and state mandates for evaluating high school performance using the same methodologies as all other high

schools (e.g., End of Course Exams, High School Exit Exam) within the Greenville County School District. (Amended Complaint, ¶ 36; Legacy Memo, p. 3).

Legacy Charter School exceeds the minimum State regulatory requirements for its academic programs with respect to, among other requirements, length of school day and year and academic requirements for graduation, and by providing expanded opportunities to obtain dual (high school and college) credits beyond traditional Advanced Placement requirements. (Amended Complaint, ¶ 37; Legacy Memo, Exhibit M, pp. 25-27). While the SCHSL imposes certain academic eligibility requirements for student-athletes to participate in sports (e.g., the maintenance of a grade of 70 or better in classes, measured at the start of a season), Legacy Charter School imposes a much higher standard – requiring all of its students, including student-athletes, to maintain a grade of 80 or better in all classes, a standard that is measured throughout the season for student-athletes and not just at the beginning of the season. (Legacy Memo, Exhibit M, pp. 41-43; Legacy Memo, Exhibit G, pp. 56-60). Failure to maintain a grade of 80 or better means a Legacy Charter School student must do extra work and take advantage of the extra help made available to them to bring the grade back to the required level. (*Id.*). Until that time, student-athletes are not eligible to participate in sports and non-student athletes are not eligible to participate in extracurricular activities at the school. (*Id.*). Legacy Charter School employs highly qualified and professionally certified teachers, and in 2014, it graduated its first senior class. (Legacy Memo, p. 4; Excerpts of Deposition of Fred Crawford attached to NCAA Memo (hereinafter, “Crawford Depo”), p. 81). All 33 of Legacy Charter School’s 2014 graduates were accepted to college, and they qualified, collectively, for more than \$400,000.00 in scholarship awards, which is a remarkable success for a new high school serving children of poverty. (*Id.*).

B. THE HIGH SCHOOL REVIEW PROCESS

The NCAA Constitution and Bylaws expressly provide a procedure by which a high school, such as Legacy Charter School, can seek “validation” of its academic credentials and ultimately obtain a “list of courses” or a “list of courses that have been reviewed and approved by the NCAA,” such that the high school’s courses and core curriculum can be used for purposes of “initial-eligibility review” of the high school’s prospective student-athletes. (Legacy Memo, Exhibit A – Excerpts from 2012-2013 NCAA Division I Manual, pp. 147-148 and 2012-2013 NCAA Division II Manual, pp. 101-102). In August 2012, Legacy Charter School began the process of seeking an NCAA list of courses and certification of its academic curriculum for purposes of initial-eligibility review of the academic credentials of its students and student-athletes who wish to participate and compete in intercollegiate athletics at NCAA member institutions. (Amended Complaint, ¶¶ 7-10; Legacy Memo, p. 4). Legacy Charter School submitted an “application”, in the form of an NCAA-required Academic Review Questionnaire, to the NCAA Eligibility Center to validate its academic curriculum and to obtain a list of courses that have been reviewed and approved by the NCAA for purposes of the initial-eligibility review of its prospective-student athletes. (Amended Complaint, ¶¶ 7-10; NCAA Answer to Amended Complaint (hereinafter, “Answer to Amended Complaint”), ¶¶ 8,10; Legacy Memo, p. 6).

Unfortunately, while all of Legacy Charter School’s “sister schools” were approved for their list of courses immediately upon application, the NCAA refused to clear Legacy Charter School such that core courses, grades, and graduation from Legacy Charter School may be used for purposes of initial-eligibility review of its prospective student-athletes. (Amended Complaint, ¶ 27; Legacy Memo, p. 4; Legacy Memo, Exhibit G, p. 34; Legacy Memo, Exhibit H – NCAA’s Response to Requests for Admissions, Response to Request for Admission No. 6;

Legacy Memo, Exhibit I – Letter from NCAA dated February 12, 2013). Instead, the NCAA notified Legacy Charter School via correspondence dated February 12, 2013 that, despite its application revealing “no immediate issues,” Legacy Charter School would be placed under “Extended Evaluation” status, an open-ended period during which prospective student-athletes from Legacy Charter School can only be certified for purposes of initial-eligibility review on an individualized, “case-by-case” basis. (Amended Complaint, ¶¶ 16-17; Legacy Memo, pp. 4-5; Legacy Memo, Exhibit D – Transcript of Deposition of Lisa Roesler, pp. 50-51; Legacy Memo, Exhibit I). Placement under Extended Evaluation status has created issues and problems for current student-athletes at Legacy Charter School, and has served to discourage prospective student-athletes from attending Legacy Charter School. (Amended Complaint, ¶ 19; Legacy Memo, Exhibit G, pp. 114-116; Legacy Memo, Exhibit N – Transcript of Deposition of B.J. Jackson, pp. 16-18, 25-36, 41-42, 44). To this day, the NCAA has failed to explain what provision in the NCAA Constitution and Bylaws requires Legacy Charter School’s placement under Extended Evaluation status, and instead informed Legacy Charter School only that it has been placed under Extended Evaluation status because it is not a member of the SCHSL and, after litigation started, because it is not accredited by a regional accrediting agency. (Amended Complaint, ¶¶ 22-23; Legacy Memo, Exhibit D, pp. 50-51; Legacy Memo, Exhibit F – Transcript of Deposition of Jeremy McCool, pp. 61-62).

Although these two requirements cannot be found in the NCAA Constitution and Bylaws, the underlying purpose of these “requirements,” according to the NCAA, is to ensure academic “oversight” of high schools seeking validation of their academic credentials and a “list of courses” or a “list of courses that have been reviewed and approved by the NCAA.” (Legacy Memo, Exhibit D, pp. 77-78; Legacy Memo, Exhibit F, p. 62; Legacy Memo, Exhibit O –

Transcript of Deposition of Janet Constantinides, pp. 29-32; Legacy Memo, Exhibit D, pp. 62-64). While Legacy Charter School is not a member of the SCHSL, Legacy Charter School's academic requirements meet and exceed those required by the SCHSL. (Legacy Memo, Exhibit M, pp. 41-43; Legacy Memo, Exhibit G, pp. 55-60). This fact notwithstanding, the NCAA was unable to cite any specific oversight provided by the SCHSL and in fact, the NCAA employees responsible for evaluating Legacy Charter School's application for a list of courses have never spoken with anyone from the SCHSL, nor did they ever conduct any review or analysis of the requirements for participation in the SCHSL. (Legacy Memo, Exhibit D, pp. 79-80, 92-94; Legacy Memo, Exhibit F, pp. 70, 87-88, 105, 107). Similarly, while Legacy Charter School is not individually regionally accredited, the sponsoring school district under which Legacy Charter School operates, the Greenville County School District, is accredited through AdvanceED, which merged with the Southern Association of Colleges and Schools, a regional accrediting agency. (Legacy Memo, Exhibit J). In South Carolina, this is the only manner in which a "high school" like Legacy Charter School can be accredited by a regional accrediting agency. (Legacy Memo, Exhibit P).

ARGUMENT

In reviewing a grant of summary judgment, this Court must apply the same standard that governs the trial court under Rule 56, SCRPC: granting summary judgment is only proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Bass v. Gopal, Inc.*, 395 S.C. 129, 133, 716 S.E.2d 910, 912 (2011) (citing *Edwards v. Lexington Cnty. Sheriff's Dep't*, 386 S.C. 285, 290, 688 S.E.2d 125, 128 (2010)). A trial court may properly grant a motion for summary judgment when the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits, show that there is no genuine issue of material fact. See Rule 56(c), SCRPC. In reviewing a summary judgment motion, “the court must view the evidence and all reasonable inferences that may be drawn from the evidence in the light most favorable to the non-moving party.” *Bass*, 395 S.C. at 133-34, 716 S.E.2d at 912 (citing *Gignilliat v. Gignilliat, Savitz & Bettis, L.L.P.*, 385 S.C. 452, 456, 684 S.E.2d 756, 758 (2009)). “[T]he non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment.” *Hancock v. Mid-South Mgmt. Co.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (S.C. 2009). As set forth below, the trial court erred in applying this well-established standard and in granting summary judgment in favor of the NCAA.

I. LEGACY CHARTER SCHOOL HAS ESTABLISHED, AT A MINIMUM, THAT THERE IS A GENUINE ISSUE OF MATERIAL FACT AS TO WHETHER IT IS A DIRECT AND INTENDED THIRD-PARTY BENEFICIARY OF THE NCAA CONSTITUTION, BYLAWS, AND REGULATIONS.

Legacy Charter School is entitled to enforce the NCAA Constitution, By-Laws, and Regulations because the same is made, in part, for the benefit of Legacy Charter School and other similarly situated high schools. “Generally, a third person not in privity of contract with the contracting parties has no right to enforce a contract. However, when the contract is made for the benefit of the third person, that person may enforce the contract if the contracting parties

intended to create a direct, rather than an incidental or consequential, benefit to such third person.” *Goode v. St. Stephens United Methodist Church*, 329 S.C. 433, 445, 494 S.E.2d 827, 833 (Ct. App. 1997) (citing *Bob Hammond Constr. Co. v. Banks Constr. Co.*, 312 S.C. 422, 440 S.E.2d 890 (Ct. App. 1994)). “The main guide in contract interpretation is to ascertain and give legal effect to the intentions of the parties as expressed in the language of the [contract].” *Gilbert v. Miller*, 356 S.C. 25, 30, 586 S.E.2d 861, 864 (Ct. App. 2003). “If a contract’s language is clear and capable of legal construction, this Court’s function is to interpret its lawful meaning and the intent of the parties as found in the agreement.” *Id.* at 30-31, 586 S.E.2d at 864. “A clear and explicit contract must be construed according to the terms the parties have used, with the terms to be taken and understood in their plain, ordinary, and popular sense.” *Id.* To this end, it is clear that there are provisions within the NCAA Constitution, Bylaws, and Regulations which specifically and unequivocally provide a direct and intended benefit to Legacy Charter School and other high schools. Accordingly, the Court erred by finding that Legacy Charter School is not a direct and intended third-party beneficiary of the NCAA Constitution, By-Laws, and Regulations, and the Summary Judgment Order must be reversed.

The NCAA is an “unincorporated association whose members reside in jurisdictions across the United States of America, including but not limited to the [S]tate of South Carolina.” (Amended Complaint, ¶ 4; Answer to Amended Complaint, ¶ 5). The NCAA has acknowledged that its member institutions “have adopted and agreed to operate their athletic programs pursuant to a membership agreement consisting of a Constitution and Bylaws for each of the three divisions respectively.” (Answer to Amended Complaint, ¶ 6; NCAA Memo, Exhibit A, ¶ 3.1.1). Courts in jurisdictions throughout the United States routinely have found that the NCAA Constitution and Bylaws constitute a valid and enforceable contract. *See e.g. Bloom v. NCAA*, 93

P.3d 621, 623-24 (Colo. App. 2004) (finding that the NCAA's Constitution, Bylaws, and Regulations constitute a valid and enforceable contractual relationship); *Hall v. NCAA*, 985 F. Supp. 782, 796-97 (N.D. Ill. 1997) ("the contract relevant to this claim appears to be the NCAA's [C]onstitution, [B]ylaws, and [R]egulations"); *NCAA v. Brinkworth*, 680 So. 2d. 1081, 1083-84 (Fla. Dist. Ct. App. 1996).

In submitting its written and oral arguments to the trial court, Legacy Charter School outlined several provisions of the NCAA Bylaws that evidence the direct and intended benefit conferred upon Legacy Charter School and other high schools. In particular, Legacy Charter School noted NCAA Bylaw 14.1.2, which provides that

As a condition and obligation of membership, it is the responsibility of a member institution to determine the validity of the information on which the eligibility of a student-athlete is based. Therefore, it is the responsibility of a member institution to determine whether a transcript is valid for purposes of applying appropriate NCAA legislation to the eligibility of a student-athlete when the institution receives notification, or otherwise has cause to believe, that a student-athlete's high school, preparatory school or two-year college transcript is not valid.

(Legacy Memo, Exhibit A-1, 14.1.2; Legacy Memo, Exhibit A-2, 14.1.2). To this end, NCAA Bylaw 14.1.2.2 provides for the "initial-eligibility review" process, which is a process whereby the NCAA Eligibility Center determines whether a particular high school's academic curriculum meets the NCAA initial-eligibility requirements legislated in the NCAA Constitution and Bylaws. Specifically, NCAA Bylaw 14.1.2.2, High School Review Committee, provides:

The High School Review Committee shall have the authority *to establish policies and procedures related to the academic review of high schools and to determine the validity of a high school* (e.g., core courses, curriculum, grades) for the purpose of meeting initial-eligibility requirements. *A review may result in a determination that a high school shall not be used for the purpose of meeting initial-eligibility requirements.* The policies and procedures for the review and determination of the validity of a high school shall be approved by the Academic Cabinet.

(*Id.*) (emphasis supplied).

Here, “the intention[] of the parties[,] as expressed in the language of” NCAA Bylaw 14.1.2.2, in its “plain, ordinary, and popular sense”, specifically demonstrates that the NCAA intended to directly benefit subject high schools with the requisite validation for meeting initial-eligibility requirements. The NCAA acknowledged that NCAA Bylaw 14.1.2.2 establishes the High School Review Committee and provides the High School Review Committee with the authority to establish policies and procedures related to the academic review of high schools and to determine the validity of a high school (e.g. core courses, curriculum, grades) for the purpose of meeting initial eligibility requirements. (Legacy Memo, p. 10, Exhibit C – NCAA’s Answers to Legacy Charter School’s First Set of Interrogatories, Answer to Interrogatory No. 5).

Crucially, Lisa Roesler (“Roesler”), the NCAA’s 30(b)(6) Designee and Director of High School Review, admitted in her deposition testimony that the NCAA the process outlined in these bylaws represent an integral requirement of high schools desiring to participate with the NCAA. She testified that

The purpose of the [high school] review process is to ensure that all schools/programs align with the NCAA’s initial-eligibility legislation. All schools/programs actively seeking to establish a list of NCAA courses are *required* to participate in the school review process. This process is *necessary* of any school/program regardless of accreditation and/or inclusion in a district with other schools currently in the NCAA Eligibility Center’s database.

(Legacy Memo, p. 11, Exhibit D, p. 59 (emphasis supplied)).

Roesler further explained that the High School Review Staff may determine (1) whether a high school can be used by a student seeking initial eligibility certification and (2) whether the high school’s core courses and curriculum meet NCAA legislation governing initial eligibility review and whether those courses can be used by students seeking initial eligibility certification. (Legacy Memo, pp. 12-13, Exhibit D, pp. 23-24, 59). According to Roesler, the “High School Review Staff reviews and determines whether a high school can be used, and then at a more

granular level, whether their courses meet NCAA [L]egislation and whether those courses may be used.” (*Id.*).

Following the High School Review Staff’s review of an applicant high school, a high school may be “cleared,” meaning that its “[c]ore courses, grades and graduation from the high school may be used in the initial-eligibility certification process.” (Legacy Memo, Exhibit E – NCAA High School Review Committee Policies and Procedures for High School and Core-Course Reviews, p. 8). Alternatively, a high school may be “cleared with conditions,” or a determination may be made as to the “appropriate use of [a] high school in [the] initial eligibility process.” (*Id.* at pp. 8-9). Finally, a high school may be “not cleared,” or, as here, a high school may be placed under “Extended Evaluation” status. (*Id.*)

Jeremy McCool (“McCool”), a former Associate Director of High School Review with the NCAA Eligibility Center and the individual responsible for reviewing Legacy Charter School’s application for a list of courses that have been reviewed and approved by the NCAA, also provided evidence regarding the NCAA’s intent to provide third-party benefits to Legacy Charter School and other high schools. McCool testified in his deposition that the “benefit” of a high school having a list of courses that have been reviewed and approved by the NCAA is that “[i]t allows prospective student-athletes and anyone who is interested to view that school’s courses that are potentially – I guess, potentially accessible or usable for initial eligibility – NCAA initial eligibility certification.” (Legacy Memo, Exhibit F, pp. 33-34).

In this respect, the trial court incorrectly found that Legacy Charter School “has identified no language within the NCAA Constitution or Bylaws which indicates that the NCAA and its members intended to confer a direct benefit upon Legacy [Charter School] or any other high school through the creation of the High School Review Process or the Eligibility Center.” (*See*

Summary Judgment Order, p. 3). The language of the NCAA Constitution and Bylaws explicitly, by its plain and ordinary language, creates a direct and intended benefit for high schools such as Legacy Charter School. *Goode*, 329 S.C. at 445, 494 S.E.2d at 834 (“[w]hen the language of the contract is clear, explicit and unambiguous, it must be taken and understood in its plain, ordinary, and popular sense”) (citing *C.A.N. Enters., Inc., v. South Carolina Health & Human Serv. Fin. Comm’n*, 296 S.C. 373, 373 S.E.2d 584 (1988)). Roesler’s testimony makes clear that in order for Legacy Charter School to establish a list of NCAA courses, it is “required” to participate in the High School Review Process, a process which is “necessary . . . regardless of accreditation and/or inclusion in a district with other schools currently in the NCAA Eligibility Center’s database.”

Thus, contrary to the trial court’s finding, Legacy Charter School identified “language within the NCAA Constitution [and] Bylaws which indicates that the NCAA and its members intended to confer a direct benefit upon Legacy [Charter School] [and] other high school[s] through the creation of the High School Review Process [and] the Eligibility Center.” While it is true that the NCAA Constitution, Bylaws, and Regulations are, as the trial court found, “designed to benefit the member institutions themselves,” it is equally true that the NCAA Constitution, Bylaws, and Regulations, and in particular NCAA Bylaw 14.1.2.2, are also designed to benefit high schools like Legacy Charter School. At the least, Legacy Charter School presented more than the mere scintilla of evidence required to withstand the NCAA’s Motion for Summary Judgment. In this respect, and rather than viewing the evidence presented in the light most favorable to Legacy Charter School, the trial court simply accepted the NCAA’s empty assertion that the high school review process was solely designed to provide “expedited or early academic certification to the individual prospective student-athletes,” but not [in any way]

to “confer any benefit on the vast number of public, private, parochial, or charter high schools from which those individual students graduate.”¹ Accordingly, the Summary Judgment Order and Reconsideration Order must be reversed.

II. LEGACY CHARTER SCHOOL HAS ESTABLISHED, AT A MINIMUM, THAT THERE IS A GENUINE ISSUE OF MATERIAL FACT AS TO WHETHER IT HAS STANDING TO CHALLENGE ITS PLACEMENT UNDER EXTENDED EVALUATION STATUS PURSUANT TO THE CONTRACTUAL RELATIONSHIP BETWEEN IT AND THE NCAA.

Legacy Charter School has established a direct contractual relationship between it and the NCAA Eligibility Center. By accepting Legacy Charter School’s application to the NCAA Eligibility Center for a list of courses, the NCAA could not wrongfully, arbitrarily, capriciously, or in bad faith refuse to “clear” Legacy Charter School if it clearly met the NCAA Eligibility Center’s requirements for a list of courses. In *Hall*, the United States District Court for the Northern District of Illinois held that, given the existence of a contract between a prospective student-athlete and the NCAA Clearinghouse (the predecessor to the NCAA Eligibility Center), the NCAA Clearinghouse (and thus, the NCAA) “could not arbitrarily, capriciously, or in bad faith refuse to find [the prospective student-athlete eligible] if he indeed clearly met the NCAA’s initial eligibility requirements.” 985 F. Supp. 782, 794 (N.D. Ill. 1997). In *Hall*, the contract was created by virtue of the student-athlete submitting and the NCAA Clearinghouse accepting the student-athlete’s application for initial eligibility certification. *Id.*

¹ Other courts have rejected this distorted interpretation by the NCAA of its Constitution, Bylaws, and Regulations. The Court of Appeals of Colorado rejected the NCAA’s argument that a student-athlete lacked standing to pursue claims against the NCAA for “breach of contract or arbitrary and capricious action on the part of the NCAA.” *Bloom*. 93 P.3d at 623. Specifically, the Court of Appeals of Colorado held that while courts are generally reluctant to intervene in the internal affairs of voluntary associations, “to the extent [plaintiff-student athlete’s] claim of arbitrary and capricious action asserts a violation of the duty of good faith and fair dealing that is implied in the contractual relationship between the NCAA and its members, his position as a third-party beneficiary of that contractual relationship affords him standing to pursue this claim.” *Id.* at 624.

Here, Legacy Charter School submits that, by accepting Legacy Charter School's application seeking a list of courses and approval of its academic curriculum for purposes of initial eligibility review and undertaking to review that application, the NCAA created a contractual relationship directly between Legacy Charter School and the NCAA. To this end, the NCAA simply cannot arbitrarily, capriciously, or in bad faith refuse to "clear" Legacy Charter School where it has clearly met the NCAA's initial-eligibility requirements. This is exactly what the NCAA did. Legacy Charter School advanced this position in both its Memorandum of Law in Support of Motion for Summary Judgment and its Memorandum of Law in Support of Motion for Reconsideration of May 29, 2015 Order, but the Court did not address the same. Therefore, the Summary Judgment Order and Reconsideration Order must be reversed so that this crucial issue can be properly adjudicated.

III. LEGACY CHARTER SCHOOL HAS ESTABLISHED, AT A MINIMUM, THAT THERE IS A GENUINE ISSUE OF MATERIAL FACT AS TO WHETHER THE NCAA INTENTIONALLY INTERFERED WITH ITS PROSPECTIVE CONTRACTUAL RELATIONS.

"To recover on a cause of action for intentional interference with prospective contractual relations, . . . the plaintiff must prove: (1) the defendant intentionally interfered with the plaintiff's potential contractual relations; (2) for an improper purpose or by improper methods; (3) causing injury to the plaintiff." *Crandall Corp. v. Navistar Trans. Corp.*, 302 S.C. 265, 66, 395 S.E. 2d 179, 180 (S.C. 1990) (internal citations omitted). In addressing the burden of proof required to prevail in such an action, this Court has acknowledged that a plaintiff alleging intentional interference with prospective economic relations must show a "reasonable probability" that a prospective economic relation will be realized. *See United Educ. Distrib., LLC v. Educ. Testing Serv.*, 350 S.C. 7, 16-17, 564 S.E.2d 324. 329-30 (Ct. App. 2002). Here, Legacy Charter School has demonstrated evidence of damages: at least three (3) student-athletes

left Legacy Charter School because of its placement under Extended Evaluation status, all students seeking to obtain initial academic certification in order to compete in intercollegiate athletics must participate in an onerous, individualized process, and Legacy Charter School has lost its ability to obtain educational financial revenues. (Legacy Memo, Exhibit G, pp. 111-114; Legacy Memo, Exhibit N, pp. 16-18, 25-37).

Without a list of courses, Legacy Charter School cannot provide its student athletes with the same streamlined process for initial eligibility clearance that other similarly situated schools are able to provide and Legacy Charter School students are unfairly required to go through an onerous, time-consuming, individualized review process in order to obtain initial academic certification to compete in intercollegiate athletics. (Legacy Memo, Exhibit G, p. 116; Legacy Memo, Exhibit N, p. 37.) Further, without a list of courses, two collegiate men's basketball coaches have questioned the integrity of Legacy Charter School's academic curriculum, and three (3) student-athletes left Legacy Charter School because of the uncertainty created with respect to Legacy Charter School's placement under Extended Evaluation status. (Legacy Memo, Exhibit N, pp. 16-18, 25-37).

While the trial court held that "[t]he processes established and followed by the NCAA in its evaluation of the eligibility of potential student athletes do not constitute intentional interference with Legacy [Charter School's] operation as a school," Legacy Charter School is, instead, arguing that the NCAA's wrongful, arbitrary, and capricious conduct in placing it under Extended Evaluation status has interfered with Legacy Charter School's ability to attract and retain prospective students and student-athletes (including three identified in the Legacy Memo, p. 31) and with its ability to obtain educational funding from the federal government, the

government of the State of South Carolina, and its local school district. (Legacy Memo, Exhibit G, pp. 111-116).

In fact, Legacy Charter School's Memorandum of Law in Support of Motion for Summary Judgment clearly demonstrates the wrongful, arbitrary, and capricious nature of the NCAA's conduct, and the resulting intentional interference with Legacy Charter School's prospective economic relations through improper methods. Again, the purported basis for Legacy Charter School being placed under Extended Evaluation status is that Legacy Charter School is not a member of its state's high school athletics association and not accredited by a regional accrediting agency, two "requirements" which are not found in the NCAA Constitution and Bylaws.

As noted by the evidence cited above, Legacy Charter School has demonstrated that its sponsor, the Greenville County School District, participates in a district-wide process of accreditation and that the entire Greenville County School District is accredited through AdvanceED, which merged with the Southern Association of Colleges and Schools, a regional accrediting agency. In South Carolina, this is the only manner in which a "high school" like Legacy Charter School can be "accredited" by a regional accrediting agency. Moreover, the NCAA is unable to explain why membership in the state's high school athletics association, the SCHSL, is necessary in order to obtain a list of courses. In fact, the NCAA employees responsible for evaluating Legacy Charter School's application for a list of courses have never spoken with anyone from the SCHSL, and have never conducted any review or analysis of the requirements for participation in the SCHSL. Neither Roesler nor McCool could explain what, if any, "oversight" the SCHSL allegedly provides. Moreover, Legacy Charter School's academic requirements meet and exceed those of the SCHSL, and in fact, the NCAA has admitted that

high schools in South Carolina, North Carolina, and Tennessee that “do not participate in their state’s high school athletic league [] are not [under] Extended Evaluation status.” (Answer to Amended Complaint, ¶ 20).

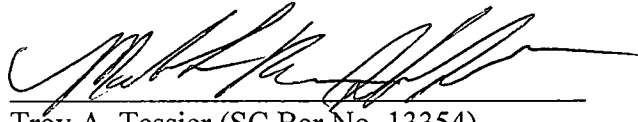
In granting summary judgment in favor of the NCAA, the trial court made a reversible error in the application of the law. The trial court held that damages in a claim for tortious interference must be “specific and concrete”. (Summary Judgment Order, p. 4). The trial court ignored the evidence presented and found that Legacy Charter School “has put forth no evidence of specific or concrete damages as a result of any action by the NCAA.” (Summary Judgment Order, p. 4). As demonstrated herein, the NCAA has clearly acted wrongfully, arbitrarily, capriciously, and in bad faith toward Legacy Charter School causing great interference with Legacy Charter School’s contractual relations. The NCAA made a decision to place Legacy Charter School under Extended Evaluation status ostensibly based upon two unsubstantiated bases, and has refused to remove Legacy Charter School from Extended Evaluation status, despite the fact that McCool clearly testified in his deposition that he does not know of *any* reason why Legacy Charter School remains under Extended Evaluation status. Again, Legacy Charter School is permitted, “[a]s an alternative to establishing an improper purpose,” demonstrating, which it did here, that the NCAA’s “method of interference was improper under the circumstances.” *Crandall*, 302 S.C. at 266, 395 S.E.2d at 180 (citing *Duggin v. Adams*, 234 Va. 221, 360 S.E.2d 832 (Va. 1987)). This evidence exhibits a “reasonable probability” that the NCAA disrupted a prospective economic relation expected to be realized by Legacy Charter School. *See, United Educ. Distrib., LLC, supra*. At a minimum, Legacy Charter School has demonstrated that there is a material question of fact as to whether the NCAA intentionally interfered with Legacy Charter School’s prospective economic advantage and whether it did so

by improper methods, which precludes a finding of summary judgment in the NCAA's favor. For these reasons, the Summary Judgment Order and Reconsideration Order must be reversed.

CONCLUSION

Legacy Charter School demonstrated that the NCAA's placement of Legacy Charter School under Extended Evaluation status and continuing refusal to "clear" Legacy Charter School is not only unwarranted – it is wrongful, arbitrary, and capricious. As such, Legacy Charter School submits that the trial court erred by denying summary judgment to Legacy Charter School and by granting summary judgment in favor of the NCAA. Therefore, the Summary Judgment Order and Reconsideration Order denying Legacy Charter School's Motion for Summary Judgment and granting the NCAA's Motion for Summary Judgment must be reversed.

Respectfully submitted,



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December 1, 2015

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In the Court Of Appeals

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Letitia H. Verdin, Circuit Court Judge

SC Court of Appeals

C.A. No.: 2014-CP-23-01463

Appellate Case No.: 2015-001678

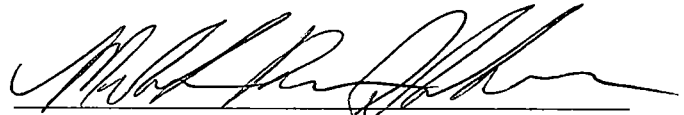
The Legacy Charter SchoolAppellant

v.

National Collegiate Athletic Association.....Respondent

PROOF OF SERVICE

I certify that I have served the INITIAL BRIEF OF APPELLANT THE LEGACY CHARTER SCHOOL on the National Collegiate Athletic Association by depositing a copy of it in the United States Mail, postage prepaid, on December 1, 2015, addressed to its attorneys of record John E. Cuttino, Esq., GALLIVAN WHITE & BOYD, P.A., 1201 Main Street, Suite 1200, Columbia, SC 29201 and William C. Odle, Esq., Corbyn W. Jones, Esq., SHOOK HARDY & BACON, 2555 Grand Boulevard, Kansas City, MO 64108.



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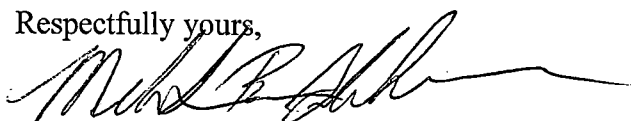
Re: *The Legacy Charter School, Appellant, v. National Collegiate Athletic Association, Respondent*, Appellate Case No. 2015-001678

Dear Ms. Kitchings:

Enclosed please find the original and two copies of Appellant's Initial Brief, Designation of Matter to be Included in the Record on Appeal, and Proofs of Service. We would appreciate your providing us with file-stamped copies in the enclosed self-addressed, stamped envelope.

Thank you for your assistance in this matter and please let us know if you need anything further.

Respectfully yours,



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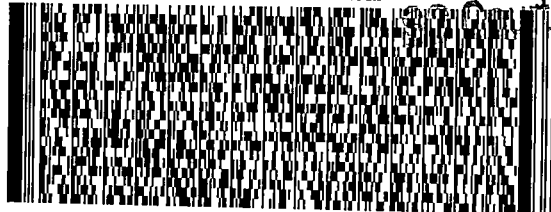
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