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THOMAS M HARTWELL
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IN THE CIRCUIT COURT FOR THE SIXTEENTH JUDICIAL DISTRICT
KANE COUNTY, ILLINOIS

MOOSEHEART CHILD CITY & SCHOOL, INC.,	)	
Plaintiff,	)	
v.	)	Case No. 12 MR 661
ILLINOIS HIGH SCHOOL ASSOCIATION,	)	
Defendant.	)	

MEMORANDUM IN SUPPORT OF PLAINTIFF'S EMERGENCY MOTION FOR A TEMPORARY RESTRAINING ORDER

For 100 years, Mooseheart Child City & School, Inc. ("Mooseheart") has carefully built its reputation by nurturing, raising and educating more than 12,000 children in need from around the world. Interscholastic athletics is a crucial component of its success in achieving such an extraordinary educational mission, with 83% of its high school students fully so engaged. It seems that spurred on by Mooseheart's basketball archrival, the Executive Director of the Illinois High School Association ("IHSA") and his investigator embarked upon a mission of their own -- to take out three African-born players on Mooseheart's basketball team so as to give the archrival an advantage. Although the Executive Director proclaimed in July 2011 that those African Students could play basketball this year, in midseason last Thursday, just six days before the scheduled game with the archrival, he suddenly announced the African Students were permanently ineligible and that Mooseheart was bad based on a secret investigation but not fact. The timing is beyond suspect, but most importantly made at moment which ensured Mooseheart and the African Students would be denied their fundamental right to a fair hearing before the maximum stain and pain of the announcement could be made indelible. But the Executive Director and his investigator went about it all the wrong way: (a) the investigator lied to

Mooseheart when it asked what the investigator was doing; (b) the announcement relies only on frightening speculation and paranoid innuendo rather than the sworn evidence and facts actually presented; (c) notwithstanding his multiple maneuvers, the investigator never obtained any new information to allow the Executive Director to renege on his July 2011 Proclamation; (d) at the end of the failed effort, the Executive Director confessed to Mooseheart that its archrival -- Hinckley-Big Rock -- was behind it all; and (e) the IHSA sat by silently as one of the African Students competed for an entire IHSA cross country season and the other three African Students competed for the Mooseheart basketball team through last week, meaning that the last uncontested, peaceable state is full eligibility and interscholastic competition.

Fortunately, Illinois courts step in when an association tries to defease a member's fundamental right to a fair hearing (a right guaranteed both by law and the IHSA Constitution), or where, as here, the association record is tainted by fraud, mistake, collusion, lack of good faith and lack of fairness. To protect Mooseheart, the African students and the integrity of the IHSA itself, this Court must restrain the effect of the surprise Announcement until the IHSA provides its constitutionally-mandated hearing to review his conduct.

ARGUMENT[1]

This Court is empowered by Section 11-101 of the Code of Civil Procedure to a grant a temporary restraining order ("TRO") to preserve the status quo when the plaintiff demonstrates the possibility of "immediate and irreparable injury, loss or damage." 735 ILCS 5/11-101; *Instrumentalist Co. v. Band, Inc.*, 134 Ill. App. 3d 884, 890-91 (1st Dist. 1985). The "status quo" is the last actual, peaceable, uncontested status preceding the controversy. *Limestone Dev. Corp. v. Village of Lemont*, 284 Ill. App. 3d 848 (1st Dist. 1996)), and can consist of "not a condition

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[1] The background facts to this dispute are set forth fully in Mooseheart's Verified Complaint and are not repeated here.

of rest but of action because the condition of rest is exactly what will inflict irreparable injury upon complainant." *Gold v. Ziff Comm.*, 196 Ill. App. 3d 425, 432 (1st Dist. 1989).

In this case, the undisputed status quo is three of the African Students playing IHSA interscholastic basketball for Mooseheart -- having played such a game just last Tuesday -- pending the constitutionally-mandated hearing before the IHSA Board. In fact, one of the four the African Students, Wal Khat, just finished an <u>entire</u> season of interscholastic IHSA competition for Mooseheart in cross country with the knowledge and blessing of the IHSA. Additionally, the three African Students who participate in basketball have already played several games this season for Mooseheart, losing half of them. The November 29, 2012 Announcement destroys that last peaceable state.

To obtain an interlocutory injunction, the plaintiff must show: (1) it possesses a clearly ascertainable right which needs protection; (2) it would suffer irreparable injury without the protection of an injunction; (3) it lacks an adequate remedy at law; and (4) it is likely to prevail on the merits. *Elmer Miller, Inc. v. Landis*, 253 Ill. App. 3d 129, 132 (1st Dist. 1993); *A-Tech Computer Servs., Inc. v. Soo Hoo*, 254 Ill. App. 3d 392, 399 (1st Dist. 1993). Additionally, in deciding whether to grant an interlocutory injunction, the Court may balance the equities and relative inconvenience to the parties. *See Limestone Dev. Corp.*, 284 Ill. App. 3d at 853. The Court should look to the allegations of the Verified Complaint in determining whether a party has made the showing necessary to obtain a TRO. *Peoples Gas Light & Coke Co. v. City of Chicago*, 117 Ill. App. 3d 353, 355 (1st Dist. 1983).

A. <u>Mooseheart Possesses A Clearly Ascertainable Right In Need Of Protection</u>

Mooseheart possesses at least three clearly ascertainable rights in need of protection here. First, Mooseheart has a fundamental right to a fair hearing before the IHSA Board which to date has been denied. *Lee v. Snyder*, 285 Ill. App. 3d 555, 559 (1st Dist. 1996). This right derives

both contractually from IHSA Constitutional mandate of Section 1.460 and from Mooseheart's fundamental legal right to a fair hearing. *Monts v. IHSA*, 338 Ill. App. 3d 1099, 1104 (4th Dist. 2003), *vacated for mootness*, 205 Ill. 2d 588 (2003); *Talton v. Behncke*, 199 F.2d 471, 473 (7th Cir. 1952). Second, Mooseheart has a bundle of other rights relating to whether the IHSA has acted in good faith and completely free of fraud, mistake or collusion, all of which trigger more intense judicial review and, if appropriate, intervention and relief. *Monts*, 338 Ill. App. 3d at 1106-09; *see also Proulx*, 125 Ill. App. 3d at 787-88; *Robinson*, 45 Ill. App. 2d at 284; *Lee*, 285 Ill. App. 3d at 559. Third, Mooseheart, like all IHSA member schools, has a contractual right to the rational, consistent, fair and reasonable application of the IHSA rules governing its students' eligibility. *Robinson v. IHSA*, 45 Ill. App. 2d 277 (2d Dist. 1963). When an association fails to apply its by-laws in such a fashion, and instead acts arbitrarily and capriciously, this contractual right is breached and relief should issue. *Clements v. Board of Ed. Of Decatur Public Sch. Dist. No. 61*, 133 Ill. App. 3d 531, 533-34 (4th Dist. 1985).

B. Mooseheart Will Suffer Irreparable Harm Without A TRO And This Harm Outweighs Any Burden On The IHSA

Mooseheart will suffer immediate, severe, and irreparable injuries unless this Court issues a TRO. In Illinois, "[o]nce a protectable interest is established, irreparable injury to the plaintiff is presumed if the interest remains unprotected." *A-Tech Computer Servs.*, 254 Ill. App. 3d at 400; *Agrimerica, Inc. v. Mathes*, 170 Ill. App. 3d 1025, 1034-35 (1st Dist. 1988). Indeed, Illinois courts have held that "it is not necessary that a party seeking an injunction wait until an injury occurs before relief will be granted." *Gannett Outdoor of Chicago v. Baise*, 163 Ill. App. 3d 717, 722 (1st Dist. 1987). Damage to a party's reputation constitutes irreparable harm that is not compensable by an award of money damages. *SMC Corp. v. Lockjaw, LLC*, 481 F. Supp. 2d 918, 928 (N.D. Ill. 2007); *Kreg Therapeutics, Inc. v. Vitalgo, Inc.*, No. 11-cv-6771, 2011 WL

5325545, at *5 (N.D. Ill. Nov. 3, 2011). Moreover, Illinois courts have granted injunctive relief to allow schools to provide their students with purely intangible, non-recurring benefits, such as participation in interscholastic sporting events and other extracurricular activities. *See Robinson v. Oak Park & River Forest H.S.*, 213 Ill. App. 3d 77, 81-82 (1st Dist. 1991).

Here, Mooseheart will suffer irreparable injury in the absence of a TRO. First, Mooseheart will suffer damage to its reputation 100 years in the making as an institution of unending good, compassion and charity if the Announcement's baseless accusations impose any sanction upon either Mooseheart or any one of its African Students. On top of the destruction of Mooseheart's reputation with simply no hearing whatsoever, the Announcement steals from the African Students their once-in-a-lifetime opportunity to confront their persecutors on the basketball court. The stain upon an already impossible childhood in war-torn Sudan can simply never be rectified. Without a scintilla of evidence either Mooseheart or its already disadvantaged African Students engaged in any wrong, imposition of such a public stain absent any fair hearing whatsoever amplifies the outrage. Second, Mooseheart's 19-month effort to nurture, build, educate and develop the African Students will be irreparably harmed by the violent upheaval of their world midseason. Any attempt to explain to the African Students this injustice in this nation with its founding principles will be utterly incomprehensible.

Given the unique (and particularly difficult) circumstances from which the African Students came, and the crucial role interscholastic competition plays in Mooseheart's extraordinary educational mission, the African Students' eligibility is simply indispensable. According to the IHSA's Mission Statement, "participation in interscholastic activities offers students significant lifetime learning experiences that cannot be duplicated in any other instructional setting." (*See* Verified Compl., Ex. C.) In yanking three African Students from the

basketball court in the midst of a once-in-a-lifetime season at the urging of Mooseheart's basketball archrival teaches only the wrong kind of lessons.

Furthermore, the IHSA cannot possibly sustain any injury from the issuance of a TRO.[2] The three African Students who are basketball players for Mooseheart have been playing all season so their minimal additional participation can be no harm to the IHSA. Moreover, the IHSA went so far as to applaud -- directly and personally -- the fourth African Student, Wal Khat, for his season of IHSA interscholastic competition this fall. Had their been any legitimate issue, the IHSA could have (and should have) brought this matter to a head over a year ago at a time when the IHSA could have easily fulfilled its absolute constitutional obligation to provide Mooseheart a full and fair hearing prior to execution. Having delayed for almost 17 months, seven more days cannot possibly harm the IHSA.

The African Students have already upheld whatever integrity of the IHSA regulations might have by quietly awaiting their eligibility for 365 days. Mooseheart has abided by every IHSA stricture and may be perhaps the single most exemplary institution within the organization. Mooseheart seeks students and children in need, not athletes "for athletic purposes." As every single uncontested piece of sworn evidence proves, Mooseheart admission of the African

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[2] The IHSA Board of Directors acknowledges on the IHSA website: "[U]nder our current by-laws international students become eligible after 365 days of ineligibility." (*See* http:www.ihsa.org.) When the Executive Director issued his July 2011 Proclamation declaring the African Students eligible after one year, he was well aware of both A-HOPE and Mark Adams. With no new information and a failed cloak-in-dagger "investigation," there is simply no basis for any finding of ineligibility. The three yellowed newspaper clippings attached to the Announcement were published <u>more than 15 months ago</u> and two of them make <u>no</u> mention of Mooseheart or the African Students. Given the 16-month delay in releasing the Announcement until the basketball season commenced, that the investigator repeatedly made false representations to a member institution that no investigation was under way, and that the announcement of permanent ineligibility occurred on the eve of the Hinckley-Big Rock game based on unadulterated speculation and previously-known, stale information, the IHSA cannot possibly be heard to claim this action is in any way premature.

Students' was prompted by legitimate circumstances of need and motivated by education, not athletics. Because the substantial threat of irreparable harm to Mooseheart and the African Students greatly outweighs any slight (and hopelessly marginal) inconvenience to the IHSA, this Court should restrain the effect of the Announcement until after the IHSA provides Mooseheart its fundamental right to a fair hearing.

C. Mooseheart Lacks An Adequate Remedy At Law

A plaintiff lacks an adequate remedy at law where there is no remedy, such as money damages, that is clear and complete and that would provide the same practical and efficient resolution as an injunction would provide. *Tamalunis v. City of Georgetown*, 185 Ill. App. 3d 173 (4th Dist. 1989). In this case, no dollar figure could compensate for the damage caused to Mooseheart's reputation 100 years in the making and its ability to provide a full education to the African Students if they are denied their once-in-a-lifetime opportunity before their fundamental right to a fair hearing is provided. The only fair and reasoned remedy for Mooseheart, the African Students and even the integrity of the IHSA itself, is a temporary order restraining the implementation of any of the Announcement's baseless sanctions pending the constitutionally-mandated hearing, thereby preserving the rights of everyone.

D. Mooseheart Is Likely To Be Successful On The Merits Of Its Claims

To establish a likelihood of success on the merits, a plaintiff must only raise a "fair question" as to the existence of the right it is claiming for a TRO to issue. *McRand*, 138 Ill. App. 3d at 1050. In this case, Mooseheart has raised far more than a "fair question" concerning its claims in the Verified Complaint. Indeed, with respect to its fundamental right to a fair hearing, IHSA By-law 1.460 absolutely guarantees Mooseheart will be successful on the merits of its claim for a hearing before the Board. Indeed, judicial intervention is appropriate when a "member's fundamental right to a fair hearing" is jeopardized. *Lee v. Snyder*, 285 Ill. App. 3d

555, 559, 673 N.E.2d 1136, 1139 (1st Dist. 1996).

Additionally, Mooseheart is likely to succeed on the merits of its declaratory relief and contract claims based upon the November 29, 2012 Announcement. As a voluntary association, the IHSA owes Mooseheart the following duties which are subject to court review: (1) to act in good faith; (2) to exercise discretion under its rules consistently with its implied duty of good faith and fair dealing; (3) to avoid acting towards Mooseheart with either fraud, mistake or collusion; (4) to not act in an arbitrary or capricious way; and (5) to act toward Mooseheart with fundamental fairness and to implement its rules in a reasonable, consistent and fair manner. *Monts*, 338 Ill. App. 3d at 1106-09; *see also Proulx*, 125 Ill. App. 3d at 787-88; *Robinson*, 45 Ill. App. 2d at 284; *Lee*, 285 Ill. App. 3d at 559. An association violates these duties when it applies its rules in an *ad hoc* manner, leaving students (and others) with no ability to determine, before making life-changing decisions, whether a proposed course of action will render them ineligible. *Crane v. Indiana High Sch. Athletic Ass'n*, 975 F.2d 1315, 1325-26 (7th Cir. 1992).

The Announcement violates these duties in at least the following ways:

- The underlying "investigation" was orchestrated by deliberate deception toward a member institution and the evidence indicates collusive action involving a competitive member institution, in violation of almost all the above duties.
- The Announcement is hopelessly inconsistent with the eligibility ruling the IHSA issued for Deng Agouc -- a student who (unlike the African Students) is listed on the A-HOPE website as an A-HOPE student--which declared full eligibility in interscholastic athletics after one year.
- The Announcement is hopelessly inconsistent with the initial Proclamation that the African Students would be eligible after 365 days.
- The Announcement is in inconsistent with the IHSA's own conduct in directly bestowing on one of the African Students, Wal Khat, a prestigious award for his IHSA interscholastic competition this fall.
- The Announcement is inconsistent with the IHSA's treatment of the African Students who were eligible and who participated in IHSA basketball games prior to November 29, 2012.

- The timing and nature of the Announcement directly threaten Mooseheart's fundamental right to a fair hearing before the full measure of injury has been inflicted.

- The Announcement mistakenly asserts Mooseheart violated By-laws 3.071 and 3.073. However, these By-laws apply only if Mooseheart's actions with respect to the African Students were "for athletic purposes" and "for the purpose of participating in athletics" respectively. The Executive Director violated several of the above duties by disregarding the uncontroverted sworn evidence directly debunking any such finding and substituting instead biased speculation.

- Under IHSA By-laws, no "undue influence" exists absent "influence exerted by school personnel upon a prospective student or a prospective student's family." Here, the sworn evidence establishes no one at Mooseheart had any contact with the African Students or their families until the African Students arrived at Mooseheart. The Executive Director therefore violated several of the above duties by ignoring the truth and failing to reasonably apply the By-laws.

Based on the foregoing, Mooseheart is likely to succeed on the merits of its declaratory relief and contract claims against the IHSA. Accordingly, a TRO should be issued.

E. The IHSA Should Be Enjoined From Sanctioning Mooseheart Pursuant <u>To IHSA By-Law 6.022 For Complying With A TRO Issued By The Court</u>

The IHSA should be enjoined from applying and enforcing By-law 6.022 against Mooseheart and the African Students in this case. IHSA By-law 6.022 provides:

> If an ineligible student participates in any interscholastic contest(s), pursuant to and in accordance with a restraining order, injunction, or other court order entered against the IHSA or a member school, and the restraining order, injunction or other court order expires without final determination or is subsequently vacated (whether voluntarily or otherwise), stayed, reversed or otherwise modified or found to have been entered in error, the contest(s) in which such student has participated shall be subject to forfeiture pursuant to By-law 6.021.

By-law 6.022 has three effects, each of which is contrary to the public policy of this State: (1) its punitive effect makes it impossible for the courts to fulfill their constitutional duty to administer justice; (2) it fosters disrespect for and disobedience of the judiciary when it sanctions a member institution for obeying a judicial decision; and (3) it precludes the fair, adequate and timely resolution of claims for injunctive relief by complicating the court's effort to

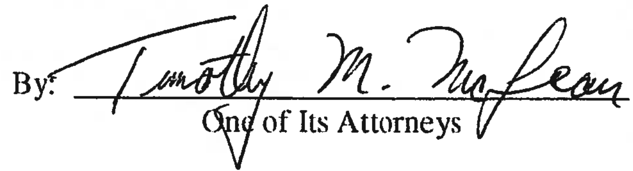
balance the equities so as long as obedience to the injunction subjects the school to sanctions. For these reasons, the Court should enjoin the IHSA from in any way attempting to sanction or punish Mooseheart or the African Students pursuant to By-law 6.022 for complying with any order issued by any authorized Illinois court. *See, e.g., Bingham v. Oregon School Activities Ass'n*, 24 F. Supp. 2d 1110, 1118-19 (D. Or. 1998); *Crocker v. Tennessee Secondary School Athletic Ass'n*, 735 F. Supp. 753, 760 (M.D. Tenn. 1990), *aff'd* 908 F.2d 972 (6th Cir. 1990); *Cardinal Mooney H.S. v. Michigan H.S. Athletic Ass'n*, 445 N.W.2d 483, 486 (1989); *Crandall v. North Dakota H.S. Activities Ass'n*, 261 N.W.2d 921, 927 (N.D. 1978).

CONCLUSION

For these reasons, Mooseheart respectfully requests that the Court issue a TRO against the IHSA: (1) ordering the IHSA to provide Mooseheart its fundamental and constitutional right to a fair hearing before Mooseheart's reputation is irreparably damaged, before once-in-a-lifetime opportunities are forever lost and before the full measure of the injury is inflicted; (2) restraining and enjoining the IHSA from enforcing any determination of ineligibility as to the African Students until seven days after Mooseheart is provided the "decision or action" that occurs after the constitutionally-guaranteed, fundamentally fair hearing; (3) finding that Mooseheart's students, Mangisto Deng, Makur Puou, Akim Nyang and Wal Khat (the "African Students"), are immediately eligible to participate in all interscholastic athletics, including basketball; (4) restraining and enjoining the IHSA from in any way affecting the eligibility of the African Students as a consequence of their matriculation to Mooseheart or the filing of this litigation; and (5) restraining and enjoining the IHSA from levying any sanctions or punishment on Mooseheart or the African Students for complying with any order issued by any Illinois court.

Dated: December 3, 2012

MOOSEHEART CHILD CITY & SCHOOL, INC.

By: 
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