

VIRGINIA: IN THE CIRCUIT COURT OF MONTGOMERY COUNTY

**JAMES J. BORSCHEL, III,
DANIEL LECLERE, THERON H. LEET,
BRENT METCALF, and
JOSEPH SLATON,**

Plaintiffs,

v.

**VIRGINIA POLYTECHNIC INSTITUTE
AND STATE UNIVERSITY, and**

JIM WEAVER,

Defendants.

COMPLAINT

Case No: _____

Please serve:

**Charles W. Steger, Jr., President
Virginia Polytechnic Institute and State University
210 Burruss Hall
Blacksburg, Virginia 24061**

**Jim Weaver
Virginia Tech Athletics
Athletic Director's Office
Jamerson Athletic Center
Blacksburg, Virginia 24061**

COME NOW your Plaintiffs, James J. Borschel, III, Daniel LeClere, Theron H. Leet, Brent Metcalf, and Joseph Slaton, by counsel, to allege the following in support of their Complaint:

1. Defendant, Virginia Polytechnic Institute and State University ("Virginia Tech" or "VT") is a university located in Montgomery County, Commonwealth of Virginia.

2. Jim Weaver ("Weaver") is a natural person and a resident of the Commonwealth of Virginia and at all times material hereto was an authorized agent for and acting athletic director of Virginia Tech, and was responsible for the wrongful actions complained of herein.

3. Venue is preferred in this county under §§8.01-261(2), (15), and 18(b) of the Code of Virginia, 1950, as amended.

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4. Each of the Plaintiffs were students at Virginia Tech during the 2005-06 academic year and are considered “student-athletes” pursuant to NCAA rules and guidelines.

5. Each of the Plaintiffs herein, prior to attending Virginia Tech, were student-athlete prospects under NCAA bylaws governing intercollegiate athletics at member institutions. Virginia Tech is an NCAA member institution.

6. Under applicable NCAA rules, once a student athlete attends a Division I member institution they may transfer to another Division I member institution without losing any eligibility to participate in intercollegiate competition under the so-called “one time transfer” exception if certain conditions are met, including the requirement that the institution from which they are transferring certifies in writing that it does not object to the transfer (NCAA Bylaw 14.5.5.2.10). Unless the one time transfer exception or some other exception is available, a student athlete transferring from one Division I school to another is ineligible to compete in NCAA intercollegiate competition until the student has attended the new school for one academic year, effectively resulting in a forfeiture of NCAA eligibility for that year (NCAA Bylaw 14.5.5.1).

7. In the spring of 2004, Virginia Tech hired Olympic Gold Medalist and three-time NCAA national champion Tom Brands as VT’s head wrestling coach.

8. In July and August of 2004, while still in high school in Iowa, Plaintiffs Borschel, LeClere and Slaton were all contacted by authorized agents and representatives of Virginia Tech’s athletic program, and its director, Weaver, to-wit: Virginia Tech Wrestling Coaches Tom Brands and Wes Hand. On at least one occasion, Coach Brands made a personal trip to Iowa to recruit these Plaintiffs and to request that they attend Virginia Tech and become part of the wrestling team there.

9. Pursuant to the personal visits made to recruit these Plaintiffs in Iowa, Plaintiffs Borschel, LeClere and Slaton, along with James and Carol Borschel and Matt Shaver (Slaton’s father), attended a campus visit at Virginia Tech in Blacksburg, Virginia, on or about October 15 and 16 of 2004.

10. During their campus visit of October 15 and 16, 2004, Athletic Director Weaver held a meeting with student athletes Borschel, LeClere, and Slaton, as well as certain of their parents, Jim and Carol Borschel and Matt Shaver. At the meeting, Weaver was specifically asked whether the student athletes would be allowed to transfer without objection by Virginia Tech if the head coach, Tom Brands, were to leave Virginia Tech. Weaver confirmed, agreed, represented and stated that Virginia Tech had an open release policy and that Virginia Tech would not object if the student athletes transferred for any reason.

11. Plaintiff Metcalf and his father, Thomas Metcalf, also made a campus recruiting visit to Virginia Tech on the same weekend as Plaintiffs Borschel, LeClere and Slaton, and during their visit to Blacksburg, Plaintiff Metcalf and Thomas Metcalf (i) were informed about the substance of the face to face meeting with Mr. Weaver of the Iowa recruits and their parents and of Virginia Tech's open release policy, (ii) confirmed the existence of the open release policy during a meeting with Associate VT Athletic Director John Jaudon and (iii) obtained confirming, written assurances from VT Coach Tom Brands that if Plaintiff Metcalf committed to attend VT but later decided to transfer, he would be released to transfer by VT.

12. During his tenure at Virginia Tech, Coach Brands was specifically authorized and certified by Weaver and Virginia Tech under NCAA Bylaw 11.5.1 to meet with and recruit prospective student athletes to attend Virginia Tech, and in doing so to offer and negotiate scholarships. Upon information and belief, in preparing to recruit student athletes having concerns about the transfer rules at VT, Coach Brands was told by Weaver and Assistant Athletic Director Jon Jaudon that Virginia Tech would not object to the transfer of student athletes nor would it deny them the right to take advantage of the one time transfer exception available under NCAA rule. Upon information and belief, Mr. Brands advised his supervisors that he was informing student athletes of the open release policy, and that he had confirmed it in writing to Mr. Tom Metcalf.

13. Pursuant to his authorization, and with knowledge of the commitments made by Mr. Weaver to the Iowa recruits and their parents, Coach Brands made verbal and/or written commitments to Plaintiffs Leet and Metcalf that they would be allowed to transfer to other schools without loss of any eligibility under NCAA rules.

14. These representations and commitments by Mr. Weaver, Mr. Jaudon and Coach Brands on behalf of VT were all made in the fall of 2004 in an effort by Virginia Tech to recruit a top flight group of student athletes in order to allow VT and recently hired Coach Brands to build a nationally competitive wrestling team. Although Coach Brands was well regarded nationally as a coach, Virginia Tech had not historically had a nationally renowned wrestling team.

15. Based on the inducements of their statements, the Plaintiffs herein committed to attend and did attend Virginia Tech in the 2005-2006 school year. Each of the student athletes signed National Letters of Intent with Virginia Tech and have completed and fulfilled all requirements of the letters and the terms of their scholarships. These five Plaintiffs constituted the first recruits signed by Coach Brands to attend Virginia Tech, and were the core of a recruiting class that was ranked as the No. 2 (i.e., second best) recruiting class in the USA by national collegiate wrestling publications and websites.

16. Mr. Weaver and Virginia Tech knew or reasonably should have known the Plaintiffs were relying upon these representations of an open release policy and, specifically, promises by Mr. Weaver and Mr. Brands, as authorized agents of VT, that VT would not object to the transfer by these five Plaintiffs if they decided in the future to seek to transfer from VT.

17. Pursuant to NCAA rules and guidelines, the financial incentives, such as scholarships which may be offered to student athlete prospects, are limited. However, applicable NCAA bylaws do not prohibit a member institution from agreeing or promising in advance that it will certify it has no objection to the transfer of a student athlete as an additional incentive to entice a student athlete to attend the university.

18. On or about March or April of 2006, upon information and belief, during his tenure as the coach for the wrestling team at Virginia Tech, agents for the athletic programs at Oregon State University, Ohio State University, and the University of Iowa, all NCAA member universities, attempted to contact Coach Brands to ask Mr. Brands to consider leaving Virginia Tech to be the head coach of their wrestling programs. Weaver did not allow Oregon State to contact Mr. Brands, but he did allow contact between Mr. Brands and Ohio State and the University of Iowa.

19. On or about April 7, 2006, Mr. Brands accepted an offer extended by the University of Iowa to become head coach of their wrestling program. Accordingly, he advised Virginia Tech that he would be terminating his employment there. After this announcement, Virginia Tech announced that it was considering discontinuing its wrestling program.

20. Following these announcements and relying on Mr. Weaver's and Virginia Tech's prior agreement to not to object to their transfer, the five Plaintiffs herein asked Mr. Weaver to provide a transfer release to allow them to transfer to the University of Iowa using the NCAA one-time transfer exception.

21. In direct contravention of the agreement and representations he made on behalf of Virginia Tech, Mr. Weaver advised the Plaintiffs that he would not release them to transfer, that he was objecting to their transfer, and that he was further refusing to allow the students to have any contact with the University of Iowa under NCAA Bylaw 13.1.1.3.

22. On information and belief, Virginia Tech has also released at least one other wrestler, Mr. Mark Logan, to transfer to another school from Virginia Tech at the same time it has denied releases to the Plaintiffs herein. During the 2005-06 school year, on information and belief, Virginia Tech also released another member of the VT wrestling team pursuant to the NCAA's "one-time transfer" exception to transfer to Penn State University. On or about April, 2006, Mr. Jaudon stated to Tom Metcalf, the father of Plaintiff Metcalf, that Plaintiff Metcalf would have been released if he wanted to attend any other university than the University of Iowa.

23. Plaintiffs appealed the denial of their release pursuant to NCAA bylaws under which a three-person panel (“Appeals Hearing Committee” or “the Committee”) from Virginia Tech was assembled by the University to hear the appeal. At the appeal hearing, Mr. Weaver indicated that he did not remember any meeting with the three Iowa Plaintiffs and their parents. The Committee denied the appeal, stating that it found “no compelling reason” to overturn Mr. Weaver’s decision to object to the Plaintiffs’ transfer to the University of Iowa. Following denial of the appeal, the Plaintiffs requested Virginia Tech’s President, Dr. Charles Steger, to reconsider the transfer denial, but President Steger has advised the Plaintiffs that he also did not find any “compelling reason” to overturn Mr. Weaver’s decision. Plaintiffs have exhausted all of their administrative remedies.

24. At the Committee hearings, the Plaintiffs were denied permission to record their hearings to create any record for appeal. There was no indication of any of the parties being sworn to tell the truth. During the proceeding, though witnesses were available to be interviewed both in person and by phone conference, the Committee members declined to interview any witnesses besides the Plaintiffs, Mr. Weaver, and Mr. Jaudon. None of the Plaintiffs were allowed to have a representative of their choice argue or present evidence on their behalf. In addition, the sworn affidavits, testimony, and other evidence offered by the Plaintiffs for the Committee’s consideration was not contradicted by any testimony or evidence offered by Virginia Tech, Mr. Weaver or Mr. Jaudon. On this basis, there was no rational basis for the Committee’s decision.

25. Before the Committee hearing for each Plaintiff, upon information and belief, Mr. Weaver and Mr. Jaudon engaged in ex parte communication with Committee members. In addition, Mr. Weaver and Mr. Jaudon were present in the room with the Committee between hearings, and for a significant period of time after hearings in presence of the Committee, and upon information and belief, engaged in additional ex parte communication with Committee members during these times as well.

26. Plaintiffs have requested an expedited hearing for the reason that, if the decision of Virginia Tech to object to their transfer is not reversed by this Court in a timely manner, their loss of eligibility under NCAA Bylaw 14.5.5.1 will commence running once they have enrolled in and attend another university in late August or early September of 2006. Plaintiffs would be irreparably harmed if they were not granted the transfer prior to applicable NCAA bylaws pertaining to eligibility and actual the commencement of NCAA sanctioned events.

COUNT I

INJUNCTIVE RELIEF – PETITION FOR MANDAMUS Breach of Contract, Specific Performance, Waiver, Detrimental Reliance

27. Plaintiffs re-allege Paragraphs 1 through 26 of their Complaint as if fully set forth herein.

28. The actions of Virginia Tech and Mr. Weaver in denying the transfer release to the Plaintiffs controls their eligibility to compete in NCAA sanctioned events.

29. The statements made to the Plaintiffs by Mr. Weaver and Mr. Brands constitute an enforceable contract between Plaintiffs and Virginia Tech which entitles them to a transfer release.

30. Weaver and Virginia Tech's refusal to grant the releases is a breach of his and Virginia Tech's agreement to allow the Plaintiffs to transfer to other schools without loss of eligibility and Mr. Weaver and Virginia Tech should be required to specially perform their contract as a ministerial function.

31. Mr. Weaver's statements and representations, as an authorized agent of Virginia Tech, were voluntary and knowing waivers of the right to object to the transfer of the Plaintiffs herein made in order to induce the Plaintiffs to commit to Virginia Tech. Plaintiffs detrimentally relied upon those statements, in electing to attend Virginia Tech and forego opportunities to attend other colleges and accept other scholarship offers. Mr. Weaver and Virginia Tech knew of the reliance and change of position of Plaintiffs and have accepted the benefits of Plaintiffs' change in position and attendance at Virginia Tech. Mr. Weaver and Virginia Tech are now estopped to deny the releases.

32. The improper actions of Mr. Weaver and VT in now objecting to the transfers will cause Plaintiffs irreparable harm by loss of one of four years of NCAA eligibility, which may not be recaptured, and for which no truly adequate relief at law exists. No harm will occur to Virginia Tech upon granting the releases.

33. This Court should order Mr. Weaver and Virginia Tech to certify in writing that VT does not object to the transfer of the Plaintiffs to University of Iowa or to any other NCAA member school by the issuance of a writ of mandamus to compel the performance of this ministerial act.

COUNT II

FRAUD IN THE INDUCEMENT

34. Plaintiffs re-allege Paragraphs 1 through 33 of their Complaint as if fully set forth herein.

35. Each of the Plaintiffs herein were offered financial (athletic) scholarships and/or aid to attend universities other than Virginia Tech.

36. Each of the other schools considered for attendance by the Plaintiffs had more established and secure wrestling programs than did VT.

37. Mr. Weaver and other representatives of Virginia Tech knew each of the Plaintiffs were considering Virginia Tech primarily because of the head coach they had just retained and Mr. Weaver made statements to Plaintiffs and other witnesses acknowledging this fact. Mr. Weaver and Virginia Tech also knew that the Plaintiffs were considering other schools and had scholarship offers from other schools.

38. Mr. Weaver's statements to the Plaintiffs and to Coach Brands regarding VT's open release policy and his statements assuring the Plaintiffs and Coach Brands that Coach Brands' wrestling recruits could transfer from Virginia Tech without loss of athletic eligibility should the head coach leave were made with the intent to induce Plaintiffs to commit, pursuant to NCAA bylaws, to attend Virginia Tech, and were material to the Plaintiffs acceptance of enrollment at Virginia Tech.

39. In reliance upon discussions with Mr. Weaver and Mr. Jaudon, Mr. Brands assured Plaintiffs in the fall of 2004 that if they committed to attend Virginia Tech and later decided to transfer for any reason, Virginia Tech would not object to their transferring.

40. These statements made by Mr. Weaver, Mr. Jaudon and Mr. Brands on behalf of Virginia Tech were in fact relied upon by Plaintiffs, and Mr. Weaver and Virginia Tech knew or should have known they were being relied upon by Plaintiffs.

41. If Mr. Weaver's statements made to the Plaintiffs and Mr. Brands that the Plaintiffs were free to transfer should Tom Brands leave are not binding on Virginia Tech, then these statements were false at the time they were made and Mr. Weaver knew they were false.

42. Mr. Weaver's misrepresentations and false statements made to the Plaintiffs and Mr. Brands represent intentional misconduct and bad faith in the exercise of his discretion, and exceeded the scope of his authority as an agent of Virginia Tech.

43. Each of the Plaintiffs has been damaged by Mr. Weaver's fraudulent misrepresentations. These damages include but are not limited to: the loss of scholarships that were offered by other institutions and that would have continued without loss of eligibility if they had not attended Virginia Tech, emotional distress, mental anguish, diminution in future earning capacity and employment opportunities.

44. The actions of Mr. Weaver were so willful, wanton and taken with such reckless disregard for the rights of the Plaintiffs as to evidence his specific intent of damaging each of the Plaintiffs, that he exceeded the scope of his authority as an agent of Virginia Tech, and he should be subject to punitive damages to deter similar future conduct.

COUNT III

DETRIMENTAL RELIANCE

45. Plaintiffs re-allege Paragraphs 1 through 44 of their Complaint as if fully set forth herein.

46. Plaintiffs relied upon the statements, promises and actions of Virginia Tech and Mr. Weaver to provide a transfer release when they decided to attend Virginia Tech, and decided to reject scholarship offers to attend other schools.

47. Mr. Weaver and Virginia Tech knew the Plaintiffs were relying on his statements and promises and intended to influence Plaintiffs' decision to attend Virginia Tech.

48. Virginia Tech received the benefit of Plaintiffs' change in position when they signed the National Letter of Intent to attend Virginia Tech, enrolled at Virginia Tech, and remained at Virginia Tech for a one year period.

49. Plaintiffs' reliance on Mr. Weaver's statements, and the statements made by authorized agents of Virginia Tech, would have induced such reliance in similarly situated persons of reasonable and ordinary sensibility.

50. Plaintiffs have been damaged by their reliance on those statements and promises made by Mr. Weaver and authorized agents of Virginia Tech regarding an open release policy.

51. Plaintiffs suffered damages as a direct and proximate result of their detrimental reliance on the indicated statements and promises.

COUNT IV

BREACH OF CONTRACT

52. Plaintiffs re-allege Paragraphs 1 through 51 of their Complaint as if fully set forth herein.

53. The authorized statements, representations and assurances of Mr. Weaver and other authorized representatives of Virginia Tech were offered as part of an agreement between each Plaintiff and Virginia Tech for attending Virginia Tech.

54. The offer was accepted by Plaintiffs when they signed the National Letter of Intent and enrolled at Virginia Tech. Plaintiffs have performed their obligations under the contract by attending Virginia Tech for one year.

55. Mr. Weaver's and Virginia Tech's refusal to provide the transfer releases as promised is a breach of the contract made with the Plaintiffs.

56. Mr. Weaver's and Virginia Tech's breach of contract caused Plaintiffs' damages.

COUNT V

FAILURE TO PROVIDE DUE PROCESS

57. Plaintiffs hereby replead Paragraphs 1 through 56 of their Complaint as if fully set forth herein.

58. NCAA Rule 14.5.5.2.10(d) provides for an Appeal Hearing Committee ("the Committee") to be established and for the NCAA member school to establish reasonable procedures for conducting the appeals.

59. The Plaintiffs were prohibited from recording or creating a record of the appeal hearings before the Committee. At the conducted Appeals Hearing, Mr. Weaver admitted to having no recollection whatsoever of the meeting between Plaintiffs and their parents. Mr. Weaver did not deny the meeting occurred but said he did not have any memory of it. The failure of Virginia Tech to provide for recording of this admission, among other due process irregularities, makes the actions of the Committee arbitrary and capricious and unsubstantiated.

60. The Plaintiffs were not provided with an indication of the standard of proof that must be met, or who must carry the burden of proof to convince the Committee to overturn Virginia Tech's decision prior to the hearings.

61. The Plaintiffs were prohibited from having their chosen representative speak on their behalf, present arguments, or cross-examine witnesses at their hearings before the Committee.

62. Upon information and belief, Mr. Weaver and Mr. Jaudon communicated with the Committee ex parte before the Plaintiffs' hearings, in between each of the Plaintiffs' hearings, and after the Plaintiffs' hearings. This ex parte communication was not a reasonable procedure as contemplated under applicable NCAA rules.

63. The actions of Mr. Weaver and Virginia Tech have been arbitrary and capricious without any rational basis or foundation. Other athletes, including wrestlers, have been released by Mr. Weaver and Virginia Tech. Weaver has offered to release the Plaintiffs if they will continue to attend Virginia Tech for one more year. In addition, one of the Plaintiffs has been told by an agent of Virginia Tech that he would be allowed to transfer if he had selected a different university. Plaintiffs have been treated arbitrarily because of their desire to transfer to the University of Iowa as opposed to some other institution which lacks any rational basis.

64. The appeals hearing failed to provide adequate protections of the rights of the Plaintiffs, specifically, but not limited to, the failure to allow a recording of the evidence and the actual manipulation of the process to deny representation to the Plaintiffs.

65. The actions of Virginia Tech and Mr. Weaver, as indicated above, violate Plaintiffs' due process rights under Article I, Section 11 of the Constitution of Virginia.

DAMAGES

66. As a direct and proximate result of Mr. Weaver's and Virginia Tech's promises and acts, made fraudulently to induce the Plaintiffs to attend Virginia Tech and to forego other offers of full athletic scholarships or to join the wrestling programs of other NCAA Division I member colleges and universities; of Mr. Weaver's and Virginia Tech's failure to honor the contractual promises they made which caused the Plaintiffs to rely to their detriment on these promises; of Mr. Weaver's and Virginia Tech's subsequent breach of those promises by failing to provide the Plaintiff's with written statements that Virginia Tech had no objection to their transfer to any other NCAA member institution; and of Mr. Weaver's and Virginia Tech's failure to provide adequate due process to protect the rights of the Plaintiffs; the Plaintiffs have suffered damages including but not limited to the loss of one full year of eligibility to compete with any other wrestling program in any NCAA competition, emotional distress, mental anguish, and diminution in future earning capacity and employment opportunities.

WHEREFORE, Plaintiffs pray that this Court to issue an Order declaring the rights of the Plaintiffs to a transfer release; to issue a Writ of Mandamus to compel Virginia Tech and Jim Weaver withdraw the objection they have to the transfer of the Plaintiffs herein to another institution, and to compel Mr. Weaver and Virginia Tech to certify in writing that they do not object to the transfer of the Plaintiffs to any other institution; and further that judgment be entered against Virginia Tech and Jim Weaver for reasonable compensatory monetary damages to each Plaintiff for damages proven at trial; and for an award of appropriate punitive damages against Defendant Weaver; and for such other and further relief as this Court and principles of equity would require.

A trial by jury is demanded.

Respectfully submitted,

JAMES J. BORSCHEL, III
DANIEL LECLERE
THERON H. LEET
BRETT METCALF
JOSEPH SLATON

BY:

Of Counsel

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Counsel for the Plaintiffs

CERTIFICATE OF MAILING

I, John J. Robertson, Esquire, Counsel for the Plaintiffs, certify that I mailed a true and complete copy of the foregoing Complaint on this 30th day of June, 2006, to:

**Charles W. Steger, Jr., President
Virginia Polytechnic Institute and State University
210 Burruss Hall
Blacksburg, Virginia 24061**

**Jim Weaver
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**Robert F. McDonnell, Attorney General
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John J. Robertson