

ORIGINAL

IN THE SUPREME COURT OF OHIO

Hope Academy Broadway Campus, et al., :
 :
 Appellants, :
 :
 v. :
 :
 White Hat Management, LLC, et al., :
 :
 Appellees. :

Case No. **13-2050**

On Appeal From The Franklin County
 Court of Appeals, Tenth Appellate
 District

Court of Appeals Case No. 12AP-496

**MEMORANDUM IN SUPPORT OF JURISDICTION OF
 APPELLANTS HOPE ACADEMY BROADWAY CAMPUS, ET AL.¹**

Karen S. Hockstad (0061308)
 (Counsel of Record)
 Gregory P. Mathews (0078276)
 DINSMORE & SHOHL LLP
 191 W. Nationwide Blvd., Suite 300
 Columbus, Ohio 43215
 (614) 628-6930 (telephone)
 (614) 628-6890 (facsimile)
 karen.hockstad@dinsmore.com
 gregory.mathews@dinsmore.com

James D. Colner (0012376)
 Adam M. Galat (0081068)
 SHUMAKER, LOOP & KENDRICK, LLP
 41 South High Street, Suite 2400
 Columbus, Ohio 43215
 (614) 628-4459 (telephone)
 (614) 463-1108 (facsimile)
 jcolner@slk-law.com
 agalat@slk-law.com
 Counsel for Appellants Hope Academy
 Broadway Campus, et al.

C. David Paragas (0043908)
 Kevin R. McDermott (0019256)
 Amy Ruth Ita (0074520)
 BARNES & THORNBURG, LLP
 41 South High Street, Suite 3300
 Columbus, Ohio 43215
 (614) 628-0096 (telephone)
 (614) 628-1433 (facsimile)
 dparagas@btlaw.com
 kmcdermott@btlaw.com
 aita@btlaw.com
 Counsel for Appellees White Hat
 Management, LLC, et al.

Todd Marti, Esq. (0019280)
 Assistant Attorney General
 30th East Broad Street, 17th Floor
 Columbus, Ohio 43215
 (614) 644-7250 (telephone)
 (866) 524-1226 (facsimile)
 Todd.marti@ohioattorneygeneral.gov
 Counsel for Ohio Department of Educ.

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¹ Appellants Hope Academy Broadway Campus, et al., include Hope Academy Broadway Campus, Hope Academy Cathedral Campus (both in Receivership), and Hope Academy Lincoln Park Campus, n/k/a Lincoln Prep, Hope Academy Chapelside Campus, n/k/a Green Inspiration Academy, Hope Academy University Campus, n/k/a Middlebury, Hope Academy Brown Street Campus, n/k/a Colonial Prep, Life Skills Center of Cleveland, n/k/a Invictus, Life Skills Center of Akron, n/k/a Towpath, Hope Academy West Campus, n/k/a West Prep, and Life Skills Center Lake Erie, n/k/a Lake Erie International.

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Explanation of Why This Case Is a Case of Public or Great General Interest

According to the Ohio Department of Education's 2011-2012 Annual Report, more than 100,000 students attended one of Ohio's 355 community schools during the 2011-2012 school year. These students represented more than 6% of public-school enrollment. As public schools, community schools receive taxpayer funds. *See State ex rel. Ohio Congress of Parents & Teachers v. State Bd. of Edn.*, 111 Ohio St.3d 568, 2006-Ohio-5512, 857 N.E.2d 1148, ¶ 5, 52; R.C. 3314.01(B); R.C. 3314.08. The aggregate value of these funds is substantial. The ten community schools involved in this case received more than \$90 million in public money from 2007 to 2010, the three-year period preceding this litigation. More than 95% of this \$90 million passed through to the private management companies that carried out the schools' day-to-day operations. In this case alone, the use of millions of taxpayer dollars is at stake. But the statewide impact of this appeal is greater still because it addresses two fundamental aspects of Ohio's community-school system: the use of public funds to operate the schools and the duties of private management companies toward their governing authorities and the general public.

This appeal involves a contract dispute between ten community Schools² and White Hat,³ but it does not present merely run-of-the-mill questions concerning contract interpretation. At its core, this appeal turns on fundamentally-important questions concerning the relationship

² "Schools" refers to Hope Academy Broadway Campus, et al., include Hope Academy Broadway Campus, Hope Academy Cathedral Campus (both in Receivership), and Hope Academy Lincoln Park Campus, n/k/a Lincoln Prep, Hope Academy Chapelside Campus, n/k/a Green Inspiration Academy, Hope Academy University Campus, n/k/a Middlebury, Hope Academy Brown Street Campus, n/k/a Colonial Prep, Life Skills Center of Cleveland, n/k/a Invictus, Life Skills Center of Akron, n/k/a Towpath, Hope Academy West Campus, n/k/a West Prep, and Life Skills Center Lake Erie, n/k/a Lake Erie International.

³ "White Hat" refers to White Hat Management, LLC, WHLS of Ohio, LLC, HA Broadway, LLC, HA Chapelside, LLC, HA Lincoln Park, LLC, HA Cathedral, LLC, HA High Street, LLC, HA Brown Street, LLC, LS Cleveland, LLC, LS Akron, LLC, HA West, LLC, and LS Lake Erie, LLC.

between community schools and private management companies and the control and use of taxpayer money by private management companies as they provide services to community schools. The practical issue here is which party—either the Schools or White Hat—owns the bulk of the personal property used in the Schools. The court of appeals decided that nearly all of it belongs to White Hat.

The management agreements involved in this case required White Hat to act as purchasing agent on behalf of the Schools when the “nature of the funding source” required the property to be titled in the Schools’ names. The Schools have argued that this nature-of-the-funding-source provision recognizes a distinction between public funds and private funds. That is, when public funds are used to purchase property, the property must be titled in the names of the Schools. When White Hat uses its private funds, it owns the property.

The parties agree that the “Continuing Fee” (paid by the Schools to White Hat under the terms of the management agreements) is the fund source used to purchase most of the property for the Schools. The Continuing Fee consists entirely of state funds designated by the Ohio Department of Education for the education of public-school students. Based on the public nature of these funds, the Schools contend that White Hat was contractually obligated to title the property purchased with these funds in the Schools’ names.

Although it did not outright reject the public-funds/private-funds distinction, the court of appeals nevertheless held that White Hat owns virtually all of the property used to operate the Schools. The court held that the bulk of the Schools’ operating revenue from the Ohio Department of Education, which was paid to White Hat as the Continuing Fee, does not by its nature require property to be titled in the Schools’ names. This holding was driven by the conclusion that the public funds ceased to be public funds “once the funds came into possession

and control of White Hat, a private entity.” *Hope Academy Broadway Campus v. White Hat Mgt., LLC*, 10th Dist. Franklin No. 12AP-496, 2013-Ohio-5036, ¶ 24.

The practical effect of this holding is twofold. First, the decision creates profound implications for the ongoing viability of community schools that contract with private management companies to carry out their day-to-day operations. Under the holding of the court of appeals, upon termination of a management agreement, a management company could retain not only its profit but also nearly all the hard assets used at the community school. The community school would be left with few resources to serve students while the management company would retain nearly all the property necessary to operate a school. When the General Assembly authorized community schools to hire management companies, it could not have intended to enrich the management companies in this way, leaving community schools with no hard assets to actually operate a school.

Perhaps more importantly, by deeming public funds to be private funds the moment they come into the possession and control of a private entity, the decision below threatens the public accountability that ordinarily accompanies the use of public funds. The court of appeals held that “White Hat could decide how and whether to spend the money, and the board no longer had any control over or possessory interest in the monies.” *Hope Academy* at ¶ 24. This conclusion is not just inconsistent with Ohio law; it threatens to insulate management companies such as White Hat from any degree of oversight or public scrutiny, even as they collect tens of millions of taxpayer dollars.

The court of appeals’ decision contravenes the policy choices enacted by the General Assembly, which chose to permit and encourage the growth of community schools within a framework of structured accountability. A community school’s performance and compliance

with law are monitored by the school's sponsor. *See* R.C. 3314.02(A)(1), 3314.023, and 3314.03. The Ohio Department of Education, in turn, monitors the sponsor. *See* R.C. 3314.015. Although a community school may hire a private company to manage the school's operations on a day-to-day basis, by declaring the funds they receive to be "private funds" immediately upon receipt, the court of appeals effectively frees management companies from any scrutiny or public accountability.

This appeal gives this Court the opportunity to address three important issues concerning public education and the use of taxpayer money. Through the Schools' first proposition of law, the Court can determine the point at which public funds become a private entity's earned profit, particularly in the context of a private entity exercising a government function. The second proposition of law will allow the Court to examine the nature of funds allocated for public education and to decide whether property purchased with such funds must be titled in the name of a public school. The third proposition of law, which addresses the existence of a fiduciary relationship, will allow the Court to determine the degree to which a private management company is accountable to a community school. Each of these questions is vitally important to Ohio's system of public education.

Statement of the Case and Facts

This case arises from ten substantially-identical management agreements entered into between the Schools and White Hat in November 2005. Each of the Schools entered into a management agreement with a separate education management organization ("EMO") owned by WHLS of Ohio, LLC. Each EMO receives administrative services and support from White Hat Management, LLC. White Hat Ventures owns WHLS of Ohio, LLC and White Hat Management, LLC. White Hat Ventures is not a party to the case. As set forth in n.3 *supra*, the

EMOS, White Hat Management, LLC, and WHLS of Ohio, LLC, are referred to collectively, as “White Hat.”

Depending on the school, the Schools paid White Hat 95% or 96% of “the revenue per student received by the School from the State of Ohio Department of Education pursuant to Title 33 and other applicable provisions of the Ohio Revised Code.” (Management Agreements at ¶ 8.a.) These funds are known as the “Continuing Fee.” White Hat also received 100% of the Schools’ state and federal grant funds. (*Id.*) The Schools received more than \$90 million in public money from 2007 to 2010, which means that more than 95% of \$90 million passed through the Schools to White Hat during that three-year period in exchange for White Hat’s services in operating the Schools’ day-to-day operations.

Under the terms of the management agreements, White Hat had the right and obligation, to the extent permitted by law, to provide “all functions” relating to the provision of the applicable educational model and the management and operation of the Schools. (*See* Management Agreements at ¶ 2.) Although the Schools retained the right to perform their own accounting, financial reporting, and audit functions, the management agreements required White Hat to provide nearly every aspect of the operation of the Schools, including the provision of the Schools’ staffing, academic, and purchasing needs. (*See id.*)

The Schools did not perform well under White Hat’s management. Of the ten schools involved in this suit, two have been shut down by the Ohio Department of Education for “academic failure,” four are on “academic watch” or “academic emergency,” and one has received a rating of “continuous improvement,” the equivalent of a “C” grade.⁴ This consistently-poor performance motivated the Schools to question, among other things, how

⁴ These ratings are an improvement from the date the lawsuit was filed.

White Hat spent the public funds it received. The Schools sued White Hat in May 2010 after White Hat refused to provide meaningful information. The Schools' complaint states claims for declaratory judgment, breach of contract, breach of fiduciary duties, injunctive relief, and accounting. The Schools named the Ohio Department of Education as a defendant because the lawsuit challenges the constitutionality of R.C. 3314.026.

This appeal relates to the trial court's decision granting in part and denying in part the Schools' motion for summary judgment concerning the parties' property rights. (*See* Appendix at A-21.) White Hat bought or was reimbursed for nearly all of the property used at the Schools with the Continuing Fee and grant funds. The Schools argued that, based on the nature of the funding sources and pursuant to the parties' management agreements, White Hat purchased the property as purchasing agent on behalf of the Schools. The Schools also argued that White Hat owes them duties as fiduciaries. The trial court found that White Hat was not acting as the Schools' purchasing agent when it used the Continuing Fee to purchase property. (*See* Appendix at A-27.) The trial court also found that the management agreements create only a limited fiduciary relationship based on White Hat's contractual duty to assist the Schools in obtaining assignments of existing leases. (*See* Appendix at A-31–A-34.) The Schools appealed to the Tenth District Court of Appeals, which affirmed, albeit for different reasons. Unlike the trial court, the court of appeals held that the Continuing Fee loses its nature as "public funds" immediately upon payment to White Hat.

The current appeal represents just part of the pending litigation. The trial court made several preliminary rulings concerning discovery and the merits of the parties' claims. In addressing these preliminary issues, the trial court concluded that White Hat is a "public official" under R.C. 117.01(E) and that the Continuing Fee is "public money." (*See* Appendix at A-48, 50,

70.) The trial court found that the authority of White Hat to operate the community schools arises from its rights under the terms of the management agreements. The court, therefore, concluded that White Hat is a “public official” as the “duly authorized representative or agent” of the Schools pursuant to R.C. 117.01(E). Because White Hat received money “under the color of office” as the duly authorized representative of the Schools, the trial court concluded that the money was “public money.” (See Appendix at A-48.) These findings of the trial court were not on appeal and therefore were not fully briefed in the court of appeals.

White Hat appealed a discovery ruling to the Tenth District Court of Appeals. In that appeal, the court held, among other things, that White Hat failed to establish good cause for a protective order and that the trial court did not abuse its discretion by denying a request for a protective order. The Tenth District ruled it did not have jurisdiction over the issue of whether White Hat is a public official. *See Hope Acad. Broadway Campus v. White Hat Mgt., LLC*, 10th Dist. Franklin No. 12AP-116, 2013-Ohio-911, ¶ 34. This Court declined to accept White Hat’s appeal. *See Hope Acad. Broadway Campus v. White Hat Mgt., L.L.C.*, 136 Ohio St.3d 1452, 2013-Ohio- 3210, 991 N.E.2d 258.

Argument in Support of Propositions of Law

Proposition of Law No. 1: Public funds paid to a private entity exercising a government function, such as the operation of a community school, retain their character as public funds even after they are in the possession and control of the private entity. Although the private entity may earn a profit out of the public funds, such profit is earned only after the private entity has fully discharged its contractual, statutory, and fiduciary obligations.

In *Oriana House, Inc. v. Montgomery*, 108 Ohio St.3d 419, 2006-Ohio-1325, 844 N.E.2d 323, this Court rejected the proposition that public funds automatically lose their public character once paid to a contractor for services rendered. The Court held that Oriana House, a private entity that had contracted with a community-based correctional facility to provide its day-to-day

operations, received and controlled public funds. *Id.* at ¶ 13. Because it controlled public funds, Oriana House had “a duty to account for [its] handling of those funds.” *Id.*, citing *State ex rel. Linndale v. Masten*, 18 Ohio St.3d 228, 229, 480 N.E.2d 777 (1985) and *State ex rel. Smith v. Maharry*, 97 Ohio St. 272, 276, 119 N.E. 822 (1918). Public funds do not automatically lose their public character when they are transferred to a private entity. Indeed, this Court held that a private entity holding public funds has a duty to protect the funds and handle them in accordance with law.

Although *Oriana House* involved the right of the State Auditor to conduct a special audit under R.C. 117.10, the fundamental principle recognized by the Court concerning the nature of public money—particularly when it is controlled by a private entity providing a government function—applies here. The Court held that public funds that flow to a private entity performing a government function necessarily retain their public character. *See Oriana House* at ¶ 15. Like *Oriana House*, *White Hat* performs a government function—*Oriana House* ran a correctional facility and *White Hat* operates public schools. Public policy demands that *White Hat* acquire all the public duties that traditionally accompany the receipt of public funds.

This conclusion is reinforced by the fact that *White Hat* is a “public official” that receives “public money” under “color of office” pursuant to R.C. Chapter 117. “Community schools fall within the definition of public office because they are entities ‘established by the laws of this state for the exercise of [a] function of government.’” *Cordray v. Int’l. Preparatory Sch.*, 128 Ohio St.3d 50, 2010-Ohio-6136, 941 N.E.2d 1170, ¶ 22, quoting R.C. 117.01(D). The state funds community schools receive are “public money.” *Cordray* at ¶ 27; R.C. 117.01(C). And any “duly authorized representative or agent” of a community school is a “public official.” *Cordray* at ¶ 24; R.C. 117.01(E). Because *White Hat* operates public schools on behalf of the Schools pursuant to

contract and under the authority of R.C. 3314.01(B), it has been operating as the Schools' "authorized representative or agent." White Hat, therefore, is a public official.

The General Assembly enacted a policy that allows community schools to contract with private, for-profit companies to conduct the daily operations of schools. *See* R.C. 3314.01(B), 3314.02(A)(8), and 3314.024. Nothing suggests that the legislature, in doing so, intended to relieve private management companies of the obligations that uniformly go with the receipt of public funds. In fact, this Court's holding in *Oriana House* suggests that a management company that performs a government function by handling the day-to-day operations of a public school indeed does control public funds.

The court of appeals rejected this conclusion, holding that the Continuing Fee becomes "private" immediately on receipt by White Hat. *Hope Academy Broadway Campus v. White Hat Management, LLC, et al.*, 2013-Ohio-5036, at ¶ 24. After concluding it could not identify a different point at which the funds could convert from public money to White Hat's earned profit, the court applied its holding in *State ex rel. Yovich v. Bd. of Edn. of Cuyahoga Falls City School Dist.*, 10th Dist. No. 91AP-1325, 1992 Ohio App. LEXIS 3323 (June 23, 1992). *See Hope Academy Broadway Campus* at ¶ 22-24. The court held that public funds lose their public character once they come into possession and control of a private entity. *Id.* at ¶ 23-24. The court ventured even further by holding that "White Hat could decide how and whether to spend the money, and the board no longer had any control over or possessory interest in the monies." *Id.* at ¶ 24.

The Schools recognize that White Hat, as a for-profit enterprise, is entitled to try to earn a profit for their services. Therefore, there must be a point at which White Hat encounters the possibility of earning a profit out of the public funds it receives. But the *Yovich* holding should

not guide the resolution of that issue in this case because *Yovich* does not account for the scope of White Hat's responsibilities in carrying out a government function.

Because it provided all the day-to-day operations for public schools, White Hat is very different from other private companies that contract with a public schools, or with any other public entity for that matter. *Yovich* involved a claim by an employee of a private entity that contracted to provide services at a nonpublic school. *Yovich* at *2. The private company agreed to provide the nonpublic school with "auxiliary educational services," and it paid Yovich (its employee) for his services as a school psychologist. *Id.* Thus, in *Yovich*, the private entity was an ordinary service provider to a nonpublic school that provided particular services in exchange for compensation, which happened to flow from public funds.

In applying *Yovich* here, the court disregarded the scope of White Hat's engagement. The Schools retained White Hat to provide all functions of the operation of public schools. White Hat, therefore, carried out a government function, making this Court's holding in *Oriana House* the more applicable authority.

Contrary to what the court of appeals stated, the Schools do not suggest that "the monies from the continuing fee must never convert to White Hat's 'own' private monies anytime during the effective terms of the agreements." *See id.* White Hat may earn a regular profit if it is able to operate community schools efficiently and effectively. That profit, however, can be earned only after White Hat fully discharges its contractual, statutory, and fiduciary obligations—that is, after it provides its bargained-for services in compliance with the law.

Proposition of Law No. 2: When a private entity uses funds designated by the Ohio Department of Education for the education of public-school students to purchase furniture, computers, software, equipment, and other personal property to operate a community school, the private entity is acting as a purchasing agent and the property must be titled in the name of the community school.

White Hat expressly agreed to serve as the Schools' purchasing agent for the purchase of furniture, computers, software, equipment, and other personal property when "the nature of the funding source" required the property to be titled in the names of the Schools. (*See* Management Agreements at ¶ 2.b.i.) The funding source at issue is the Continuing Fee—funds designated by the Ohio Department of Education for the education of public-school students. These funds, by their nature, require property to be titled in the name of the Schools.

Ohio law limits the use of public funds. *See State ex. rel. Smith v. Maharry*, 97 Ohio St. 272, 119 N.E. 822 (1918), paragraph one of the syllabus. Public funds can be spent only as authorized by law. *Id.* Absent clear authority to the contrary, funds designated for the education of public-school students must be used solely for the benefit of public schools. Logic demands that when such funds are used to purchase property for the operation of a public school, the public school must own the property. Instead, the Court of Appeals held that the term "nature of the funding source" was unambiguous, although the true definition was never provided by White Hat or the Court. The Court of Appeals also ruled that allowing a private contractor to use the Continuing Fee however it saw fit, and to keep all property purchased with it does not violate public policy. *Hope Academy-Broadway Campus, Inc., et al. v. White Hat Management, LLC, et al.*, 2013-Ohio-5036, at ¶¶ 24-27.

Due to the large amount of taxpayer money at issue in this case and the community school industry, in general, resolution of this issue is of great public interest.

Proposition of Law No. 3: A private entity that agrees to operate all functions of a community school has a fiduciary relationship with the community school. Although the private entity may earn a profit for the services it provides, it must act primarily for the benefit of the community school.

The existence of a fiduciary duty depends on the nature of a party's undertaking—that is, the responsibilities the party agrees to assume. *See Strock v. Pressnell*, 38 Ohio St.3d 207, 216,

527 N.E.2d 1235 (1988). White Hat agreed to act on behalf of the Schools to help them carry out their statutory purpose. The Schools contracted with White Hat to operate “all functions” of their day-to-day operations. (See Management Agreements at ¶ 2.) White Hat acquires the real and personal property needed for the Schools’ operations, acts as the Schools’ liaison with the Ohio Department of Education, maintains portions of the Schools’ records, hires and manages the Schools’ personnel, obtains insurance on behalf of the Schools, and applies for and manages grants on behalf of the Schools. (See Management Agreements at ¶ 2(a)(i), 2(b)(i), 2(c)(iii) and (ix), 3, 6(a), 8(b).) This type of broad undertaking, when coupled with the public purpose being carried out, imposes fiduciary obligations upon White Hat to work primarily for the benefit of the Schools.

“The term ‘fiduciary relationship’ has been defined by this court as a relationship ‘in which special confidence and trust is reposed in the integrity and fidelity of another and there is a resulting position of superiority or influence, acquired by virtue of this special trust.’” *Ed Schory & Sons v. Francis*, 75 Ohio St.3d 433, 442, 662 N.E.2d 1074 (1996), quoting *In re Termination of Employment of Pratt*, 40 Ohio St.2d 107, 115, 321 N.E.2d 603 (1974). In determining whether a fiduciary duty exists, a court should “look beyond the agreement to the reality of the relationship between the parties.” *Eyerman v. May Kay Cosmetics, Inc.*, 967 F.2d 213, 219 (6th Cir. 1992). The management agreements placed White Hat in a position of superiority over the Schools, forcing the schools to place their trust in them. See *The Health Alliance of Greater Cincinnati v. The Christ Hospital*, 1st Dist. Hamilton No. C-070426, 2008-Ohio-4981, ¶ 21.

In denying the existence of a fiduciary duty in this case, White Hat has argued that its relationship with the Schools is just an ordinary business relationship, pointing to contract language that labels White Hat as an independent contractor. White Hat’s fiduciary duties,

however, are not extinguished simply because it acts as an independent contractor. *See Guth v. Allied Home Mortg. Capital Corp.*, 12th Dist. Clermont No. CA2007-02-029, 2008-Ohio-3386, ¶ 63. “The term “independent contractor” “is antithetical to the word “servant,” although not to the word “agent.” In fact most of the persons known as agents, that is brokers, factors, attorneys, collection agencies, and selling agencies, are independent contractors as the term is used in the Restatement of this Subject, since they are contractors, but although employed to perform services, are not subject to the control or right to control of the principal with respect to their physical conduct in the performance of their services. However, they fall within the category of agents. They are fiduciaries; they owe to the principal the basic obligations of agency: loyalty and obedience.” *Id.*, quoting Restatement (Second) of Agency, Section 14N, comment a. Under the terms of the management agreements here, White Hat operates on behalf and for the benefit of the Schools.

The fact that White Hat is a public official that agreed to carry out a governmental function reinforces the fiduciary character of its undertaking. Public officials are fiduciaries who owe fiduciary duties to the public. *State v. McKelvey*, 12 Ohio St.2d 92, 95 (1967), citing *Crane Twp. ex rel. Stalter v. Secoy*, 103 Ohio St. 258, (1921). White Hat is a public official pursuant to *Cordray v. The International Preparatory School*, 128 Ohio St.3d 50, 2010-Ohio-6136. White Hat’s authority derives from its status as the Schools’ “duly authorized representative” under the management agreements. *See Cordray v. The International Preparatory School*, 128 Ohio St.3d 50, 2010-Ohio-6136, ¶24 (“community schools are *public* schools” and a “duly authorized representative of a community school is a public official”). White Hat was the Schools’ “authorized representative” under R.C. 117.01(E). The management agreements gave White Hat “authority * * * necessary to undertake its responsibilities described in [the] Agreement,” and

required White Hat to represent the schools by acting as purchasing agent, serving as liaison with governmental or quasi-governmental offices, applying for grants on behalf of the schools, acting as the schools' intermediary with sponsors.

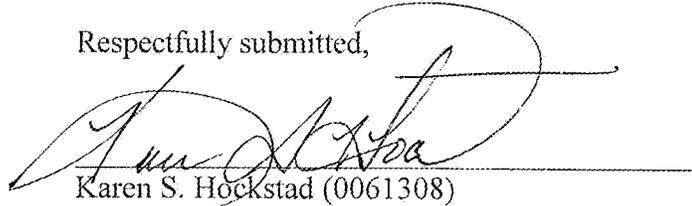
The nature of White Hats' undertaking here demands the existence of a fiduciary duty by contract and pursuant to statutory law and public policy. The Court of Appeals erroneously relied upon *Applegate v. Fund for Constitutional Govt.*, 70 Ohio App. 3d 813, 817 (10th Dist. 1990) (*Id.* at ¶39) to find the lack of a fiduciary relationship, however, that case involved an informal fiduciary relationship not one created by contract and statute like the one at issue here.

Pursuant to the Management Agreements, White Hat expressly agreed to act on the Schools' behalf to operate "all functions" of their day-to-day operations, including an agreement to act as the Schools' purchasing agent in certain circumstances. The existence of a fiduciary duty must be recognized under Ohio law based on the scope and public purpose of White Hat's undertaking. The Court of Appeals ruled that the Schools' arguments in support of White Hat's fiduciary obligations were inapplicable because "such precedent...[is] typically applied, in the context of public officials who engaged in some sort of financial misconduct...(citations omitted)...[s]uch is not the case here." *Hope Academy Broadway Campus, Inc., et al. v. White Hat Management, LLC, et al.* 2013-Ohio-5036 at ¶38. In making this ruling, the Court of Appeals overreached, assumed facts not in evidence, and ignored the volumes of pleadings, motions, and transcripts in which the schools argue that very thing: that White Hat, as a public official, misappropriated the Continuing Fee and violated both the public trust and its fiduciary obligations to the Schools.

Conclusion

Because this case involves a matter of public and great general interest, this Court should accept the appeal and order that the case be briefed on the merits.

Respectfully submitted,



Karen S. Hockstad (0061308)

†Counsel of Record

Gregory P. Mathews (0078276)

DINSMORE & SHOHL LLP

191 W. Nationwide Blvd., Suite 300

Columbus, Ohio 43215

(614) 628-6930 (telephone)

(614) 628-6890 (facsimile)

karen.hockstad@dinsmore.com

gregory.mathews@dinsmore.com

James D. Colner (0012376)

Adam M. Galat (0081068)

SHUMAKER, LOOP & KENDRICK, LLP

41 South High Street, Suite 2400

Columbus, Ohio 43215

(614) 628-4459 (telephone)

(614) 463-1108 (facsimile)

jcolner@slk-law.com

agalat@slk-law.com

*Counsel for Appellants Hope Academy Broadway
Campus, et al.*

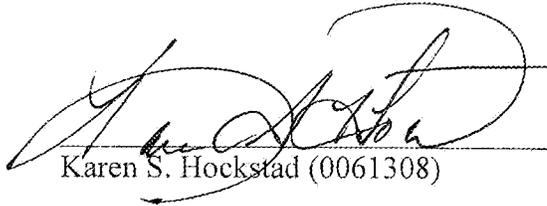
Certificate of Service

It is hereby certified that a copy of the foregoing was served via U.S. mail this 30th day of December, 2013, upon:

James D. Colner
Adam M. Galat
SHUMAKER, LOOP & KENDRICK, LLP
41 South High Street, Suite 2400
Columbus, Ohio 43215
*Counsel for Appellants Hope Academy
Broadway Campus, et al.*

C. David Paragas
Kevin R. McDermott
Amy Ruth Ita
BARNES & THORNBURG, LLP
41 South High Street, Suite 3300
Columbus, Ohio 43215
*Counsel for Appellees White Hat
Management, LLC, et al.*

Todd Marti, Esq.
Assistant Attorney General
30 East Broad Street, 17th Floor
Columbus, Ohio 43215
Counsel for Ohio Department of Educ.



Karen S. Hockstad (0061308)

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

Hope Academy Broadway Campus et al.,	:	
	:	
Plaintiffs-Appellants/ Cross-Appellees,	:	No. 12AP-496
	:	(C.P.C. No. 10CVC-05-7423)
v.	:	
	:	(REGULAR CALENDAR)
White Hat Management, LLC et al.,	:	
	:	
Defendants-Appellees/ Cross-Appellants.	:	

D E C I S I O N

Rendered on November 14, 2013

Dinsmore & Shohl LLP, and Karen S. Hockstad; Shumaker, Loop & Kendrick, LLP, James D. Colner, and Adam M. Galat, for plaintiffs-appellants/cross-appellees.

Taft, Stettinius & Hollister LLP, Charles R. Saxbe, Donald C. Brey, and James D. Abrams, for defendants-appellees/cross-appellants.

Jones Day, Chad A. Readler, and Kenneth M. Grose, Amicus Curiae Ohio Coalition for Quality Education.

Michael DeWine, Attorney General, and Todd R. Marti, Amicus Curiae Ohio Department of Education.

APPEAL from the Franklin County Court of Common Pleas.

BROWN, J.

{¶ 1} Hope Academy Broadway Campus, Hope Academy Chapelside Campus, Hope Academy Lincoln Park Campus, Hope Academy Cathedral Campus, Hope Academy University Campus, Hope Academy Brown Street Campus, Life Skills Center of Cleveland, Life Skills Center of Akron, Hope Academy West Campus, and Life Skills Center Lake Erie

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("the schools"), plaintiffs-appellants/cross-appellees, appeal the judgment of the Franklin County Court of Common Pleas, in which the court granted partial summary judgment in favor of White Hat Management, LLC, WHLS of Ohio, LLC ("WHLS"), HA Broadway, LLC, HA Chapelside, LLC, HA Lincoln Park, LLC, HA Cathedral, LLC, HA University, LLC, HA Brown Street, LLC, LS Cleveland, LLC, LS Akron, LLC, HA West, LLC, and LS Lake Erie, LLC (referred to as a singular entity "White Hat"), defendants-appellees/cross-appellants. The Ohio Department of Education ("ODE") and the Ohio Coalition for Quality Education have filed amicus briefs. White Hat has filed a motion to dismiss for lack of a final, appealable order.

{¶ 2} The schools are the governing boards of ten community schools. In November 2005, each of the schools entered into similar management agreements with separate education management organizations ("EMO"). The EMOs are owned by WHLS. The EMOs receive assistance from White Hat Management. The White Hat EMOs manage and operate the schools. The management agreements provide for certain payments from the schools to White Hat. The schools paid White Hat a fixed percentage of the per-student state funding they received, called a "continuing fee," as well as full reimbursements for federal and state grants. White Hat was responsible for the day-to-day operation of the schools, including the purchasing of furniture, computers, books, and all other equipment. White Hat also was responsible for providing a building and staff for the schools.

{¶ 3} The management agreements terminated on June 30, 2007, but the parties renewed them for one-year terms in 2007-2008, 2008-2009, and 2009-2010. As of the time of briefing, of the ten original subject schools, two Hope Academies had closed, and the three Life Skills Centers were under different management.

{¶ 4} On May 17, 2010, the schools filed an action against White Hat and ODE, seeking declaratory relief, injunctive relief, and an accounting alleging claims of breach of contract and breach of fiduciary duty. In general, the schools asserted that, pursuant to the terms of the management agreements, they were entitled to all property purchased by White Hat using public funds without having to pay White Hat for such property. After the action was filed, the parties executed a series of "standstill agreements," which

permitted the parties to continue operations as if the management agreements were still in effect.

{¶ 5} On February 21, 2012, the schools filed a motion for partial summary judgment, claiming they were entitled to all property, without payment to White Hat, that White Hat purchased using public funds to operate the schools. On May 11, 2012, the trial court granted the schools partial summary judgment, finding that the schools are entitled only to the personal property purchased by White Hat using funding sources that required the purchase to be in the schools' names pursuant to the terms of the management agreements. The trial court also found that White Hat had no fiduciary duty to give property to the schools without compensation. The schools appeal the trial court's decision, asserting the following assignments of error:

[I.] The trial court erred when it found that White Hat owns certain personal property under the terms of the Management Agreements and that the Schools must purchase the property from White Hat at the expiration of the Management Agreements.

[II.] The trial court erred in declaring that the Schools have legal authority to transfer title to personal property under R.C. Chapters 3313 and 3314.

[III.] The trial court erred in limiting the nature of White Hat's fiduciary relationship to the Schools.

{¶ 6} We first address White Hat's motion to dismiss for lack of a final, appealable order. Pursuant to Ohio Constitution, Article IV, Section 3(B)(2), this court's appellate jurisdiction is limited to the review of final orders of lower courts. "A final order * * * is one disposing of the whole case or some separate and distinct branch thereof." *Lantsberry v. Tilley Lamp Co.*, 27 Ohio St.2d 303, 306 (1971). A trial court's order is final and appealable only if it satisfies the requirements of R.C. 2505.02 and, if applicable, Civ.R. 54(B). *Denham v. New Carlisle*, 86 Ohio St.3d 594, 596 (1999), citing *Chef Italiano Corp. v. Kent State Univ.*, 44 Ohio St.3d 86, 88 (1989).

{¶ 7} When determining whether a judgment or order is final and appealable, an appellate court engages in a two-step analysis. First, the court must determine if the order is final within the requirements of R.C. 2505.02. Second, if the order satisfies R.C. 2505.02, the court must determine whether Civ.R. 54(B) applies and, if so, whether the

order contains a certification that there is no just reason for delay. *Gen. Acc. Ins. Co. v. Ins. Co. of N. Am.*, 44 Ohio St.3d 17, 21 (1989). Civ.R. 54(B) does not alter the requirement that an order must be final before it is appealable. *Id.*, citing *Douthitt v. Garrison*, 3 Ohio App.3d 254, 255 (9th Dist.1981).

{¶ 8} R.C. 2505.02 defines a final order and provides several definitions. Pursuant to Civ.R. 54(B), a trial court may separate one or more claims from other pending claims for purposes of appellate review. *Ohio Millworks, Inc. v. Frank Paxton Lumber Co.*, 2d Dist. No. 14255 (June 29, 1994). The claims separated must otherwise have been finally adjudicated. *Id.* If the trial court expressly determines that there is no just reason for delay, then the claim or claims separated, pursuant to Civ.R. 54(B), may be reviewed on appeal even though other claims remain pending. *Id.*

{¶ 9} In the present case, White Hat's only real argument is that the trial court's order did not adjudicate all of the parties' claims, and the trial court did not indicate there was no just reason for delay. It is true that the trial court did not adjudicate all claims in this multiple-claim action; thus, there could be no final judgment with regard to either claim absent the "no just reason for delay" language from Civ.R. 54(B). In the original decision, the trial court made no determination that there was no just reason for delay. However, the schools filed a motion for Civ.R. 54(B) certification with respect to the trial court's judgment, which the trial court granted on July 24, 2012. Therefore, we find the judgment was both a final and appealable order. White Hat's motion to dismiss is denied.

{¶ 10} The schools argue in their assignments of error that the trial court erred when it granted partial summary judgment in favor of White Hat. Summary judgment is appropriate when the moving party demonstrates that: (1) there is no genuine issue of material fact, (2) the moving party is entitled to judgment as a matter of law, and (3) reasonable minds can come to but one conclusion when viewing the evidence most strongly in favor of the non-moving party, and that conclusion is adverse to the non-moving party. *Hudson v. Petrosurance, Inc.*, 127 Ohio St.3d 54, 2010-Ohio-4505, ¶ 29; *Sinnott v. Aqua-Chem, Inc.*, 116 Ohio St.3d 158, 2007-Ohio-5584, ¶ 29. Appellate review of a trial court's ruling on a motion for summary judgment is de novo. *Hudson* at ¶ 29. This means that an appellate court conducts an independent review, without deference to the trial court's determination. *Zurz v. 770 W. Broad AGA, L.L.C.*, 192 Ohio App.3d 521,

2011-Ohio-832, ¶ 5 (10th Dist.); *White v. Westfall*, 183 Ohio App.3d 807, 2009-Ohio-4490, ¶ 6 (10th Dist.).

{¶ 11} When seeking summary judgment on the ground that the non-moving party cannot prove its case, the moving party bears the initial burden of informing the trial court of the basis for the motion and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact on an essential element of the non-moving party's claims. *Dresher v. Burt*, 75 Ohio St.3d 280, 293 (1996). The moving party does not discharge this initial burden under Civ.R. 56 by simply making a conclusory allegation that the non-moving party has no evidence to prove its case. *Id.* Rather, the moving party must affirmatively demonstrate by affidavit or other evidence allowed by Civ.R. 56(C) that the non-moving party has no evidence to support its claims. *Id.* If the moving party meets its burden, then the non-moving party has a reciprocal burden to set forth specific facts showing that there is a genuine issue for trial. Civ.R. 56(E); *Id.* If the non-moving party does not so respond, summary judgment, if appropriate, shall be entered against the non-moving party. *Id.*

{¶ 12} The present case involves the reading and interpretation of contracts between the parties. In construing the terms of a written contract, our primary objective is to give effect to the intent of the parties, which is presumed to rest in the language they have chosen to employ. *Shifrin v. Forest City Ents., Inc.*, 64 Ohio St.3d 635, 638 (1992). Common words appearing in a written instrument will be given their ordinary meaning unless manifest absurdity results, or unless some other meaning is clearly evidenced from the face or overall contents of the instrument. *Alexander v. Buckeye Pipe Line Co.*, 53 Ohio St.2d 241 (1978), paragraph two of the syllabus. Where the terms are clear and unambiguous, a court need not go beyond the plain language of the instrument to determine the rights and obligations of the parties. *Aultman Hosp. Assn. v. Community Mut. Ins. Co.*, 46 Ohio St.3d 51, 53 (1989). Where possible, a court must construe the agreement to give effect to every provision in the agreement. *In re All Kelley & Ferraro Asbestos Cases*, 104 Ohio St.3d 605, 2004-Ohio-7104, ¶ 29. Moreover, the construction of a written contract is a question of law, which we review de novo. *Id.* at ¶ 28.

{¶ 13} Here, the schools argue in their first assignment of error that the trial court erred when it found that White Hat owns certain personal property under the terms of the

management agreements and that the schools must purchase the property from White Hat at the expiration of the management agreements. The pertinent language in the agreements is found in three sections of the agreements: Sections 2, 8, and 12. Section 2 provides, in pertinent part:

b. Equipment:

i. The Company shall purchase or lease all furniture, computers, software, equipment, and other personal property necessary for the operation of the School. Additionally, the Company shall purchase on behalf of the School any furniture, computers, software, equipment, and other personal property which, by the nature of the funding source, must be titled in the School's name.

{¶ 14} Section 8 provides, in pertinent part:

8. Fees.

a. Management, Consulting and Operation Fee. The School shall pay a monthly continuing fee (the "Continuing Fee") to the Company of Ninety Six Percent (96%) of the revenue per student received by the School from the State of Ohio Department of Education pursuant to Title 33 and other applicable provisions of the Ohio Revised Code (the "Code") plus any discretionary fees paid under the discretionary bonus program identified in Paragraph 8.c. (the "Qualified Gross Revenues"). Qualified Gross Revenues do not include: Student fees, charitable contributions, PTA/PTO Income and other miscellaneous revenue received which shall be retained by the School or PTA/PTO. Federal Title Programs, lunch program revenue and such other federal, state and local government grant funding designated to compensate the School for the education of its students shall be fully paid to the Company.

i. Payment of Costs. Except as otherwise provided in this Agreement, all costs incurred in providing the Educational Model at the School shall be paid by the Company. Such costs shall include, but shall not be limited to, compensation of all personnel, curriculum materials, textbooks, library books, computer and other equipment, software, supplies, building payments, maintenance, and capital improvements required in providing the Educational Model. It is understood that at the School's election, upon termination of this Agreement all personal property used in the operation of the School and owned by the Company or one of its affiliates and used in the

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operation of the School, other than proprietary materials owned by the Company, may become the property of the School free and clear of all liens or other encumbrances upon the School paying to the Company an amount equal to the "remaining cost basis" of the personal property on the date of termination.

ii. Property Owned by the School. The property purchased by the School shall continue to be owned by the School.

{¶ 15} Section 12 provides, in pertinent part:

c. Equipment and Personal Property. On or before the Termination Date, and after the payment of the "remaining cost basis" to be made by the School in accordance with Section 8 (a), herein the Company shall transfer title to the School, or assign to the School the leases (to the extent such leases are assignable), for any and all computers, software, office equipment, furniture and personal property used to operate the School, other than the Company's proprietary materials. Other than said proprietary materials, the School shall own said personal property and the rights under any personal property lease assigned from the Company to the School.

{¶ 16} The trial court concluded that Section 8(a)(i) provided that White Hat would buy and own all personal property, with the single exception of any property required by the funding source to be purchased in the names of the schools. For all personal property bought and owned, the trial court found, the schools would have to pay White Hat.

{¶ 17} The schools argue that the agreements were ambiguous with respect to the ownership rights to property purchased with the continuing fee, as it is unclear when White Hat was required to act as the schools' purchasing agent. The schools argue there were at least the following two interpretations as to when White Hat had to act as the schools' purchasing agent: (1) the schools' interpretation – White Hat acted as the schools' purchasing agent with respect to any property purchased with the continuing fee, and (2) White Hat's and the trial court's interpretation – White Hat sometimes acted as the schools' purchasing agent in undefined circumstances.

{¶ 18} With regard to the first interpretation – that White Hat acted as the schools' purchasing agent with respect to any property purchased with the continuing fee – the

schools contend that Section 2(b)(i) clearly indicates that White Hat was required to act as the schools' purchasing agent when the property was required to be titled in the schools' names due to the nature of the funding source. The schools argue that the "nature" of the funding source is meant to differentiate between public and private funding. The schools point to Section 8(a) to assert that ODE was one funding source, and the federal, state, and local governments that provided grant funding were other funding sources, and the common characteristic shared by these funding sources listed in Section 8(a) was that they are all public entities. Thus, the schools contend, as Section 8(a) relates to Section 2(b)(i), the "funding sources" underlying the continuing fee were public in nature. Accordingly, White Hat was obligated to act as the schools' purchasing agent for any property purchased with the continuing fee, and all such property purchased with the continuing fee was owned by the schools.

{¶ 19} With regard to the second interpretation, which was advocated by White Hat and adopted by the trial court – that White Hat sometimes acted as the schools' purchasing agent in certain circumstances – the schools contend that neither the trial court nor White Hat explained when White Hat would be obligated to act as the schools' purchasing agent. The schools point out that White Hat's position is that it owns all property purchased with the continuing fee, as funds received in the form of the continuing fee convert from public funds to private funds, relying upon the language in Section 8(a)(i). The schools claim that White Hat's and the trial court's reading of the agreements fails because: (1) White Hat's obligation to "pay costs" under Section 8(a)(i) is irrelevant to the ownership rights of property because under Section 2(b)(i) White Hat was required to make purchases, or "pay costs," for property purchased on behalf of the schools, (2) White Hat's reading would render meaningless Section 2(b)(i), which recognizes instances when White Hat was to act as the schools' purchasing agent based upon the nature of the funding source, and the schools are public schools that receive their funding from public sources, and (3) the repurchase provision in Section 8(a)(i) applies only to property used in the operation of the schools and owned by White Hat, so White Hat's reliance on that section presupposes that White Hat already owns the property, which is the center of the current dispute.

{¶ 20} In its appellate brief, White Hat argues simply that White Hat is a purchasing agent for the schools in one very limited situation: when a funding source requires property to be titled in the schools' names. White Hat contends that, in all other circumstances, White Hat bought the property with its own money and is the sole owner of that property.

{¶ 21} After reviewing the plain language of the agreements, we find the terms of the agreements, when read as a whole, are not ambiguous. The schools own only that property that must be titled in the schools' names due to "the nature of the funding source." Section 2(b)(i). The language as used in the agreements does not support the schools' interpretation that White Hat acted as the schools' purchasing agent with respect to all property purchased with the continuing fee because the fee originated from a "public" funding source. Presumably the bulk of White Hat's purchases to execute its educational model for each school come from that school's continuing fee and grant funding. Thus, under the schools' interpretation of the agreements, they would be entitled to virtually all of the property purchased by White Hat to execute its educational model, as the schools believe they are entitled to all property purchased with the continuing fee and any grant funding. However, it is apparent from Sections 2(b)(i), 8(a)(i), and 12(c) that the agreement contemplates that White Hat will purchase property to execute its educational model and will own certain of that property. Thus, that the agreements contemplate that White Hat will own property it purchases strongly suggests that the schools' interpretation that they should own virtually all of the property is incorrect.

{¶ 22} Although the schools might counter that the property that White Hat owns is that property paid for with its "own" money, this attempted distinction reveals the flaw in the schools' overall theory. Under the schools' theory, White Hat's "own" money used to pay for property apparently must derive from earnings gained in the business of managing schools. However, presumably these earnings derive, at least in significant part, from the continuing fee paid to it by various schools – both those schools in the present case, as well as others. Thus, at some point, the continuing fee paid to White Hat must convert to White Hat's private monies with which it may then purchase its "own" property. The schools neglect to define precisely when the continuing fee paid to White Hat loses its public character and becomes White Hat's private income. Pursuant to the

schools' theory, the monies from the continuing fee must never convert to White Hat's "own" private monies anytime during the effective terms of the agreements; that is, the continuing fee payments are always public funds as long as the parties are operating under the agreements or any extension of the agreements. The schools fail to present any authority for such an expansive definition of public funds. Therefore, the schools' contention that the continuing fee paid to White Hat is still public funds, even after it is paid to White Hat, has logical failings.

{¶ 23} Indeed, as White Hat points out, this court has explicitly found that once public funds are paid to a private entity, they lose their public character. In *State ex rel. Yovich v. Bd. of Edn. of Cuyahoga Falls City School Dist.*, 10th Dist. No. 91AP-1325, (June 23, 1992), a school psychologist, who worked at a non-public school through its contract with a private corporation, filed an action seeking a declaration that the board of education had a duty to make employer contributions to the State Teachers Retirement System ("STRS") for him. The board claimed that, although it was obligated to provide psychological services to pupils with funds appropriated by the state of Ohio, the psychologist was an employee of a private corporation and was not a teacher. In seeking STRS contributions, the psychologist argued, in relevant part, that the board paid him with public funds. On appeal, we rejected the psychologist's public funds argument, concluding:

Finally, appellant urges that * * * he was paid from public funds while working for [the private corporation]. While public funds were appropriated initially to pay for the type of services performed by appellant, the funds lost their chief characteristic of "public funds" once the funds came into possession and control of CSO, a private entity. The hallmark of public funds is that such money belongs to the state or a subdivision of government. The appellant in this case was paid by a private corporation whose funds were not controlled or held by the board. We, therefore, reject the contention that appellant was paid with public funds.

{¶ 24} Our holding in *Yovich* is applicable to the present circumstances. Although the monies White Hat used to pay for property were once public funds, at the time of the purchases, the monies used to pay for the property were in the possession and control of White Hat, a private entity. White Hat could decide how and whether to spend the money,

and the board no longer had any control over or possessory interest in the monies. Therefore, consistent with *Yovich*, we agree that the continuing fees the schools paid to White Hat using public funds lost their chief characteristic of public funds once the funds came into possession and control of White Hat, a private entity.

{¶ 25} Accordingly, if the funds White Hat used to pay for the property were private funds, then the meaning of the language in Sections 2, 8, and 12 is clear. Section 8(a)(i) provides that White Hat must pay for all property used in the education of the students, and the schools may purchase any property owned by White Hat upon termination of the agreement. Section 2(b)(i) explains which property White Hat owns. Section 2(b)(i) requires White Hat to purchase on behalf of the schools only that property that, by nature of the funding source, must be titled in the schools' names. Because White Hat's private funds do not require the property purchased with them be titled in the schools' names, the property purchased with White Hat's private funds is owned by White Hat. Following this logic to its end, pursuant to Section 12(c), White Hat must then transfer title in the property to the schools after the schools' payment under Section 8(a)(i).

{¶ 26} We disagree with the schools' contention that ambiguity in the agreements is illustrated by the trial court's finding that the parties must refer to some unspecified funding source "requirements" outside the agreements to determine each party's property rights and the court's failure to explain how the parties should determine whether the funding source required the purchase of property in the schools' names. The schools present no authority for the proposition that a contract cannot reference a defined variable outside of the contract. To be sure, contractual language is ambiguous if a court cannot determine its meaning from the four corners of the contract. *See Covington v. Lucia*, 151 Ohio App.3d 409, 2003-Ohio-346, ¶ 18 (10th Dist.). However, contracts are not invalid simply because they depend upon an outside source to supply a contract term. *See, e.g., State ex rel. Ohio Atty. Gen. v. Tabacalera Nacional S.S.A.*, 10th Dist. No. 12AP-606, 2013-Ohio-2070, ¶ 20 (finding that the case was not one involving a contract that named a specific outside source to give meaning to a particular term, like a term in a variable rate loan that refers to a rate set by an outside source to calculate the rate for the loan); *Arlington Hous. Partners, Inc. v. Ohio Hous. Fin. Agency*, 10th Dist. No. 10AP-764, 2012-

Ohio-1412, ¶ 36 (variable terms that will fluctuate with an independently set index are a common and enforceable component of many types of contract). Here, the terms of the agreements are explicit in requiring property to be titled in the schools' names only if the source of the funds requires purchases made with them to be titled in the names of the schools. Whether a funding source requires purchases made with them to be titled in the name of the school is not an uncertain variable capable of varying interpretations but, rather, a definite term to provide meaning to the terms of the agreements. Despite the schools' attempt to deconstruct the agreements with ambiguity, the intent and meaning of the agreements, specifically Section 2(b)(i), are clear here.

{¶ 27} The schools next argue that because of the uncertainties and ambiguities in the contract, the trial court was required to resolve them in a way that makes the agreements fair and reasonable, and the trial court's finding was against public policy. The schools contend that it was unfair to find that White Hat owned all of the property it bought with the continuing fee because White Hat was already earning substantial income from the continuing fee and was not entitled to earn even more in the form of property ownership.

{¶ 28} Initially, we reject the schools' unfounded argument that it would be unfair to find that White Hat owned all of the property it bought with the continuing fee because White Hat was already earning substantial income from the continuing fee and was not entitled to earn even more in the form of property ownership. The schools fail to cite any authority for the proposition that White Hat is somehow precluded from earning "even more" by keeping any property it purchased even though it was also earning income from the continuing fee. There is no case law we are aware of that caps a private entity's level of income based upon the sole nebulous reason of it being "unfair." If the contracts entered into by the parties here permitted White Hat to purchase and own private property using its own income, including income derived by the continuing fee, then we see no inherent unfairness in such an agreement. We also fail to see why property retained by White Hat spending the continuing fee should be treated any differently than earnings retained by White Hat not spending the continuing fee. If it is not unfair for White Hat to retain the unspent continuing fee as profit, it should not be unfair for White Hat to retain property purchased with the continuing fee.

{¶ 29} With regard to the schools' claim that we must interpret the agreements in such a way that makes them fair and reasonable, that rule of contract is only implicated when a contract is susceptible to two interpretations. *See GLIC Real Estate Holdings, LLC v. Bicentennial Plaza Ltd.*, 10th Dist. No. 11AP-474, 2012-Ohio-2269, ¶ 10 (where a contract is susceptible of two constructions, we must employ the construction that makes the agreement fair and reasonable and gives the agreement meaning and purpose). Where contractual language is unambiguous, we must apply that language as written without resort to methods of construction or interpretation, and we may not, in effect, create a new contract by finding an intent not expressed by the clear language. *See Cleveland Constr., Inc. v. Kent State Univ.*, 10th Dist. No. 09AP-822, 2010-Ohio-2906, ¶ 29. Therefore, in the present case, as we have found the language in the agreements is unambiguous, we do not resort to this rule of contract.

{¶ 30} The schools next argue that the trial court ignored the absence of statutory authority for community schools to transfer property for the benefit of a private entity. Furthermore, the schools contend that the trial court misinterpreted R.C. 3314.04 and 3313.41. R.C. 3313.41 provides rules that boards of education must follow when disposing of real or personal property that it owns in its corporate capacity. R.C. 3314.04 provides:

Except as otherwise specified in this chapter and in the contract between a community school and a sponsor, such school is exempt from all state laws and rules pertaining to schools, school districts, and boards of education, except those laws and rules that grant certain rights to parents.

{¶ 31} White Hat counters that the schools were exempt from "all state laws pertaining to" traditional public schools, except as noted in R.C. 3314.04; thus, the schools' contention that they do not have authority to pass title of personal property to White Hat is invalid. White Hat also asserts that the schools' argument that it cannot dispose of the property is premised on the notion that the schools owned the property in the first place. White Hat points out that the schools' own records do not reference or account for the personal property it claims to own, White Hat purchased all of the property in dispute with its own money and not any grant money, and the contracts did not specify that White Hat was buying property on behalf of the schools.

{¶ 32} The trial court found that the schools operate under R.C. 3314.04 and that section exempts them from all state laws and rules that apply to traditional schools, school districts, and boards of education, except for those laws and rules that grant certain rights to parents. The court concluded that, because R.C. 3313.41, upon which the schools rely, does not grant any rights to parents, it does not fall under the exception in R.C. 3314.04.

{¶ 33} We agree with the trial court. As White Hat points out, the schools' argument that R.C. 3313.41 limited its ability to dispose of property is grounded upon the presupposition that it owned the property in question in the first place. As we have already found, the schools did not own the property. Notwithstanding this finding, we would still reject the schools' contention. Although the schools again attempt to create ambiguity with the language used in R.C. 3314.04, we find it clear. As the trial court found, R.C. 3314.04 exempts community schools from all laws and rules that apply to traditional schools, except for those relating to the rights of parents. As R.C. 3313.41 does not relate to the rights of parents, the schools are exempt from that rule and it does not impose any limits on its disposal of property. We find no reason to read anything more complicated into this plain language. Thus, this argument is without merit. Therefore, for all of the above reasons, the schools' first assignment of error is overruled.

{¶ 34} The schools argue in their second assignment of error that the trial court erred in declaring that the schools have legal authority to transfer title to personal property under R.C. Chapters 3313 and 3314. The schools' argument under this assignment of error closely tracks the final argument addressed under the schools' first assignment of error above. The schools contend that, as public entities created by statute, they may take only those actions specifically authorized by statute, and they must pursue the proper statutory method of disposing of its property. The schools maintain that nothing in community school legislation authorizes property transfers with respect to community schools; thus, they are barred from selling or transferring property.

{¶ 35} However, the schools' arguments are again based upon the notions that the schools owned the property bought by White Hat with monies that were paid to it as the continuing fee and that the property was purchased with public funding. As we have found, the schools never owned the property, and the property was not purchased with

public funding. Instead of transferring property to White Hat, the schools paid money to White Hat, which then bought property using the income generated from the continuing fee. There has never been any exchange of the property in question here. Therefore, this argument is without merit, and the schools' second assignment of error is overruled.

{¶ 36} The schools argue in their third assignment of error that the trial court erred by limiting the nature of White Hat's fiduciary relationship to the schools. " 'A "fiduciary relationship" is one in which special confidence and trust is reposed in the integrity and fidelity of another and there is a resulting position of superiority or influence, acquired by virtue of this special trust.' " *Stone v. Davis*, 66 Ohio St.2d 74, 79 (1981), quoting *In re Termination of Employment*, 40 Ohio St.2d 107, 115 (1974). The term "fiduciary" is defined as "a person having a duty, created by his undertaking, to act primarily for the benefit of another in matters connected with his undertaking." (Emphasis omitted.) *Groob v. KeyBank*, 108 Ohio St.3d 348, 2006-Ohio-1189, ¶ 16. A fiduciary relationship may be created by contract or an informal relationship where both parties understand that a special trust or confidence has been reposed. *Id.*, citing *Umbaugh Pole Bldg. Co., Inc. v. Scott*, 58 Ohio St.2d 282, 287 (1979).

{¶ 37} Here, the trial court found that a formal general fiduciary relationship was not created by the agreements. The court found that the parties dealt with each other at arm's length in a commercial context, and the parties' relationship was not created informally but, rather, by execution of 16-page contracts that specifically provided that the contracts were not to be construed as creating a partnership of joint venture between the parties. The court did find that the agreements created a limited fiduciary duty on the part of White Hat to use its best efforts to assist the schools in obtaining assignments of existing leases under the same terms and conditions and left open the possibility that a general fiduciary relationship was created by the conduct of the parties.

{¶ 38} The schools contend that White Hat was barred from taking title to the property even if the schools had authority to pass it because White Hat is both a public official and a fiduciary barred from taking pecuniary gain in performing a public contract. In support, the schools cite *State v. McKelvey*, 12 Ohio St.2d 92, 95 (1967), in which the Supreme Court of Ohio held that a public official is a fiduciary, and a public official cannot use his position for private profit, as it would be a violation of this duty to the citizens of

the state for an official to use his public office for private gain. However, such precedent "was established, and has typically been applied, in the context of public officials who engaged in some sort of financial misconduct, such as using their public office for private gain or misappropriating funds in contravention of express statutory duties." *Cristino v. Bur. of Workers' Comp.*, 10th Dist. No. 12AP-60, 2012-Ohio-4420, ¶ 19, quoting *State ex rel. Cook v. Seneca Cty. Bd. of Commrs.*, 175 Ohio App.3d 721, 2008-Ohio-736, ¶ 32 (3d Dist.). Such is not the case here. Here, the "private gain" resulting from White Hat's ownership in the property was not due to financial misconduct but from the expenditure of the corporation's own income derived from formerly public funds. The schools have not cited any authority for the proposition that the fiduciary duty of public officials extends to a community school management company's purchase of goods with private corporate income generated from continuing fees, and we decline to extend the law in this manner to create such a duty when the agreements specifically indicated that the parties did not intend to create a partnership or joint venture and termed White Hat an independent contractor. *See, e.g., Nilavar v. Osborn*, 127 Ohio App.3d 1, 20 (2d Dist.1998) (parties to a joint venture owe each other fiduciary duties, such as a duty of full disclosure and a duty against self-dealing); *Schulman v. Wolske & Blue Co., L.P.A.*, 125 Ohio App.3d 365 (10th Dist.1998) (under Ohio law, there is generally no fiduciary relationship between an independent contractor and his employer unless both parties understand that the relationship is one of special trust and confidence).

{¶ 39} In addition, a fiduciary relationship cannot be unilateral. *Applegate v. Fund for Constitutional Govt.*, 70 Ohio App.3d 813, 817 (10th Dist.1990). "A party's allegation that he reposed a special trust or confidence in an employee is insufficient as a matter of law to prove the existence of a fiduciary relationship without evidence that both parties understood that a fiduciary relationship existed." *Schulman* at 372, citing *Lee v. Cuyahoga Cty. Court of Common Pleas*, 76 Ohio App.3d 620, 623 (8th Dist.1991). In the present case, the schools failed to produce any evidence showing that White Hat, which was an independent contractor under the agreement, entered into any mutual fiduciary relationship with the schools. Although we agree every contract contains an implied duty for the parties to act in good faith and to deal fairly with each other, *Littlejohn v. Parrish*, 163 Ohio App.3d 456, 2005-Ohio-4850, ¶ 27, there was no formal general fiduciary duty

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created by the agreements that required White Hat to purchase and hold property for the schools' benefit. For these reasons, the schools' third assignment of error is overruled.

{¶ 40} Accordingly, the schools' assignments of error are overruled, and the judgment of the Franklin County Court of Common Pleas is affirmed.

*Motion to dismiss denied;
judgment affirmed.*

TYACK and McCORMAC, JJ., concur.

McCORMAC, J., retired of the Tenth Appellate District,
assigned to active duty under authority of the Ohio
Constitution, Article IV, Section 6(C).

Franklin County Ohio Court of Appeals Clerk of Courts- 2013 Nov 14 12:00 PM-12AP000496

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

Hope Academy Broadway Campus et al.,	:	
	:	
Plaintiffs-Appellants/ Cross-Appellees,	:	No. 12AP-496
	:	(C.P.C. No. 10CVC-05-7423)
v.	:	
	:	(REGULAR CALENDAR)
White Hat Management, LLC et al.,	:	
	:	
Defendants-Appellees/ Cross-Appellants.	:	

JUDGMENT ENTRY

For the reasons stated in the decision of this court rendered herein on November 14, 2013, the schools' three assignments of error are overruled, and White Hat's motion to dismiss is denied. To the extent that White Hat asserts any cross-assignments of error, we overrule them. It is the judgment and order of this court that the judgment of the Franklin County Court of Common Pleas is affirmed. Costs are assessed against the schools.

BROWN, TYACK, and McCORMAC, JJ.

 /S/ JUDGE
Judge Susan Brown

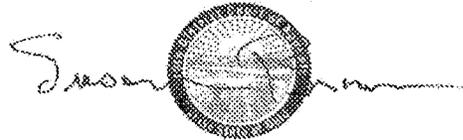
McCORMAC, J., retired of the Tenth Appellate District, assigned to active duty under authority of the Ohio Constitution, Article IV, Section 6(C).

Franklin County Ohio Court of Appeals Clerk of Courts- 2013 Nov 14 1:44 PM-12AP000496

Tenth District Court of Appeals

Date: 11-14-2013
Case Title: HOPE ACADEMY BROADWAY CAMPUS -VS- WHITE HAT
MANAGEMENT LLC
Case Number: 12AP000496
Type: JEJ - JUDGMENT ENTRY

So Ordered

A handwritten signature in cursive script, appearing to read "Susan Brown", is written over a circular official seal. The seal has a textured, embossed appearance with some illegible text around its perimeter.

/s/ Judge Susan Brown, P.J.

Electronically signed on 2013-Nov-14 page 2 of 2

Court Disposition

Case Number: 12AP000496

Case Style: HOPE ACADEMY BROADWAY CAMPUS -VS- WHITE
HAT MANAGEMENT LLC

Motion Tie Off Information:

1. Motion CMS Document Id: 12AP0004962-980000
Document Title: 07-06-2012-MOTION TO DISMISS
Disposition: 3200

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IN THE COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO
CIVIL DIVISION

Hope Academy Broadway Campus, et al.,	:	
Plaintiffs,	:	
v.	:	Case No. 10CVH-05-7423
White Hat Management, LLC, et al.,	:	Judge John F. Bender
Defendants.	:	

**DECISION AND ENTRY
GRANTING IN PART AND DENYING IN PART
MOTION OF PLAINTIFFS FOR SUMMARY JUDGMENT
DECLARING PROPERTY RIGHTS OF THE PARTIES
Filed February 21, 2012**

BENDER, J.

I. Procedural Posture

On February 21, 2012, plaintiffs Hope Academy Broadway Campus, et al. ("Plaintiff Schools") filed a motion for summary judgment asking the court to declare the property rights of the parties under the terms of their contracts and applicable laws. Defendants White Hat Management, LLC, et al. ("White Hat Defendants") filed a brief opposing the motion, to which the Plaintiff Schools replied. The motion is fully briefed and now comes before the court for a ruling. Loc.R. 21.01.

II. Summary Judgment Standard

Summary judgment is proper only when the moving party demonstrates it is entitled to judgment as a matter of law because no genuine issue of material fact exists to merit a trial. Civ.R. 56(C). All evidentiary materials and all reasonable inferences based on them must be viewed in a light most favorable to the nonmoving party. *Temple v. Wean United, Inc.*, 50 Ohio St. 2d 317 (1977). Because summary judgment terminates

a lawsuit without a trial, it must be awarded cautiously. *Norris v. Ohio Std. Oil Co.*, 70 Ohio St.2d 1, 2 (1982).

The party moving for summary judgment may not simply state that the nonmoving party cannot prove its case; it must identify those portions of the record that show the absence of a genuine issue of material fact on an essential element of the nonmoving party's case. *Dresher v. Burt*, 75 Ohio St.3d 280, 293, 1996-Ohio-107. If the moving party does not do so, the summary judgment motion must be denied.

A nonmoving party's failure to respond to a summary judgment motion does not mean the moving party automatically prevails; the court must still examine all the evidence properly before it and determine, based on that evidence alone, whether a genuine issue of material fact exists for trial. There is no "default" summary judgment in Ohio. *Maust v. Palmer*, 94 Ohio App. 3d 764, 769 (10th Dist. 1994).

However, if the moving party satisfies its initial burden, the nonmoving party must identify specific facts showing that a genuine issue of material fact remains for trial. *Id.*, Civ.R. 56(E). "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted." *Martinez v. Yoho's Fast Food Equipment*, 10th Dist. No. 02AP-79, 2002-Ohio-6756, ¶138 quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505 (1986); see also, *Turner v. Turner*, 67 Ohio St.3d 337, 339-340, 1993-Ohio-176. If the nonmoving party shows that a genuine issue of material fact remains, the case proceeds to trial; if the nonmoving party fails to do so, the moving party is entitled to summary judgment. *Beneficial Ohio, Inc. v. Kennedy*, 10th Dist. No. 04AP-1383, 2005-Ohio-5159, ¶11, citing *Dresher*, supra.

III. Discussion

The Plaintiff Schools and the White Hat Defendants dispute the meaning of their written contracts, particularly as they relate to their respective rights in personal and real property when the contracts end. The Plaintiff Schools claim these contracts entitle them to lease the facilities they now occupy. The Plaintiff Schools also submit they are entitled to the personal property without payment and argue that the court should not enforce the contracts' plain language. The White Hat Defendants respond that the Plaintiff Schools have no rights to any property because the contracts were not "terminated;" they simply "expired."

Section 8(a) states:

i. **Payment of Costs.** Except as otherwise provided in this Agreement, all costs incurred in providing the Educational Model at the School shall be paid by the Company. Such costs shall include, but shall not be limited to, compensation of all personnel, curriculum materials, textbooks, library books, computer and other equipment, software, supplies, building payments, maintenance, and capital improvements required in providing the Educational Model. It is understood that at the School's election, upon termination of this Agreement all personal property used in the operation of the School and owned by the Company or one of its affiliates and used in the operation of the School, other than proprietary materials owned by the Company, may become the property of the School free and clear of all liens or other encumbrances upon the School paying to the Company an amount equal to the "remaining cost basis" of the personal property on the date of termination. * * * In the event that School purchases the personal property it must purchase all of said personal property, except any proprietary materials, and must also exercise the School's Option to Lease the School Facility pursuant to Section 12(b).

ii. **Property Owned by the School.** The property purchased by the School shall continue to be owned by the

The omitted language explains how to calculate the "remaining cost basis."

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School. The Company shall prominently mark or tag with a number any property owned by the School in accordance with School policy and keep an inventory of said property.

Section 12 states:

b. **Option to Lease.** Upon payment to the Company of two (2) months (sic) rent and other relevant monthly facility costs, including, but not limited to, utilities, insurance and maintenance, for sixty (60) days following the Termination Date, the Company shall keep the lease for the School's facility in effect for the purpose of allowing the School to evaluate its desire to lease all or part of the School Facility upon the same terms and conditions as the Company or in the event that the Company owns such facility, rent shall be based upon the fair market value as determined by an independent appraiser. In the event that the School does desire to lease the School Facility, the Company shall use its best efforts to assist the School in its attempt to obtain an assignment of the lease. If such an assignment does occur, then any leasehold improvements installed and paid for by the Company or its affiliates for the School Facility, which were not included in the rent paid by the Company for the School Facility, shall be treated as personal property and the school shall pay to the Company the remaining cost basis of such property, based upon the calculation methodology included in Section 8(a)(i), herein, on or before the date of such assignment less any start-up or developmental grants received pursuant to Section 8 and which were applied for said leasehold improvements. In the event that the School shall elect to exercise its option to lease the School Facility it shall also purchase and lease (to the extent such leases are assignable) the personal property as set forth in Section 8(a)(i).

c. **Equipment and Personal Property.** On or before the Termination Date, and after the payment of the "remaining cost basis" to be made by the School in accordance with Section 8(a), herein the Company shall transfer title to the School, or assign to the School the leases (to the extent such leases are assignable) for any and all computers, software, office equipment, furniture and personal property used to operate the School, other than the Company's proprietary materials. Other than said proprietary materials, the School shall own said personal property and the rights under any personal property lease aside from the Company to the School.

The construction of a written contract is a matter of law for the court to resolve. *Alexander v. Buckeye Pipe Line Co.*, 53 Ohio St.2d 241 (1978), paragraph one of the syllabus. "Our purpose in interpreting contracts is to ascertain and effectuate the intent of the parties, and '[t]he intent of the parties is presumed to reside in the language they chose to use in their agreement.'" *Lorain Cty. Auditor v. Ohio Unemployment Comp. Review Comm.*, 113 Ohio St.3d 124, 2007-Ohio-1246, ¶34, quoting *Graham v. Drydock Coal Co.*, 76 Ohio St.3d 311, 313, 1996-Ohio-393.

Common words in a contract are given their plain and ordinary meaning, unless another meaning is clearly evident from the face or overall content of the contract, or unless the result is manifestly absurd. *Alexander, supra*, paragraph two of the syllabus. "Courts apply clear and unambiguous contract provisions without regard to the relative advantages gained or hardships suffered by the parties." *Cent. Allied Ents., Inc. v. Adjutant Gen.'s Dept.*, 10th Dist. No. 10AP-701, 2011-Ohio-4920, ¶19, citing *Dugan & Meyers Constr. Co. v. Ohio Dept. of Adm. Servs.*, 113 Ohio St.3d 226, 2007-Ohio-1687, ¶29, quoting *Ohio Crane Co. v. Hicks*, 110 Ohio St. 168, 172 (1924).

A contract "does not become ambiguous or unfair simply because it has a result not anticipated by some of the parties." It is not the responsibility or function of this court to rewrite the parties' contract in order to provide for a more equitable result." *Rice v. Montgomery*, 10th Dist. No. 02AP-1261, 2003-Ohio-5577, ¶21, quoting *Foster Wheeler Enviresponse, Inc. v. Franklin Cty. Convention Facilities Auth.*, 78 Ohio St.3d 353, 362, 1997-Ohio-202. "Absent fraud, bad faith, or other demonstrated unlawfulness, 'courts are powerless to save a competent person from the effects of his own voluntary agreement.'" *Cent. Allied Ents., Inc., supra* at ¶29, citing *Dugan & Meyers* at ¶29, quoting *Ullman v. May*, 147 Ohio St. 468, 476 (1947).

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1. The Plaintiff Schools can legally transfer property.

The Plaintiff Schools claim they should not have to pay anything for the personal property, arguing that it has always belonged to them because they never had the legal authority to transfer it to the White Hat Defendants in the first place. In support of this argument, the Plaintiff Schools rely upon R.C. 3313.41, which states how boards of education may dispose of property.

The Plaintiff Schools operate pursuant to Chapter 3314 of the Revised Code, titled "Community Schools." R.C. 3314.04 states:

Except as otherwise provided in this chapter and in the contract between a community school and a sponsor, *such school is exempt from all state laws and rules pertaining to schools, school districts, and boards of education, except those laws and rules that grants certain rights to parents.* (Emphasis added.).

R.C. 3313.41, upon which the Plaintiff Schools rely, is part of Chapter 3313 of the Revised Code, titled "Boards of Education." R.C. 3313.41 is a state law that applies to boards of education and it does not grant any rights to parents. Accordingly, pursuant to R.C. 3314.04, R.C. 3313.41 does not apply to community schools. The Plaintiff Schools' argument that R.C. 3313.41 somehow deprives them of legal authority to convey property is wholly unfounded.

2. The law allows the White Hat Defendants to make a profit.

The Plaintiff Schools contend they should not have to pay for the personal property because the White Hat Defendants cannot take title to property for their own benefit, since they are public officials. In support, the Plaintiff Schools cite several cases which do state that public officials may not use a public office for personal gain. See, e.g., *State v. McKelvey*, 12 Ohio St.2d 92, 95 (1967). However, these cases all predate the

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General Assembly's decision to allow private corporations to operate community schools for a profit. Because the law expressly allows the White Hat Defendants to earn a profit, the cases upon which the Plaintiff Schools rely are inapposite.

3. The White Hat Defendants did not purchase the personal property as the Plaintiff Schools' purchasing agent.

The Plaintiff Schools contend they should not have to pay the White Hat Defendants for the personal property because they bought it as the Plaintiff Schools' purchasing agent. This argument is based on a highly selective reading of the contracts, which the court must read as a whole and give effect to every provision, if possible. *Mason v. Gaddis*, 10th Dist. No. 03AP-23, 2003-Ohio-4690, ¶8, citing *Farmers' National Bank v. Delaware Ins. Co.*, 83 Ohio St. 309, 337 (1911). Section 8(a)(i) of the contracts clearly state the parties' intent: the White Hat Defendants would buy and own all personal property, with one exception.

The contracts call for the White Hat Defendants to serve as the Plaintiff Schools' purchasing agent in one situation. "Additionally, the Company shall purchase on behalf of the School any furniture, computers, software, equipment, and other personal property which, by the nature of the funding source, must be titled in the School's name." Section 2(b)(i). At the same time, the "property purchased by the School shall continue to be owned by the School." Section 8(a)(ii).

If the funding source required the White Hat Defendants to purchase the personal property in the Plaintiff Schools' names, it belongs to them. Otherwise, if the Plaintiff Schools want the rest of the personal property the White Hat Defendants purchased for the operation of these schools, the contracts require the Plaintiff Schools to pay them for it.

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4. Enforcing these contracts does not constitute a "taking."

The White Hat Defendants contend that the Plaintiff Schools "seek a forfeiture of the [White Hat Defendants] leasehold rights" which "effectuates a taking of private property." Memorandum, p. 22-24.

"Both the United States and the Ohio Constitutions provide that private property shall not be taken for public use without just compensation." *State ex rel. R.T.G., Inc. v. State of Ohio*, 98 Ohio St.3d 1, 2002-Ohio-6716, ¶33, citing Fifth and Fourteenth Amendments to the United States Constitution; Ohio Constitution, Article I, Section 19. To establish a taking, the property owner must show a substantial or unreasonable governmental interference with a private property right. *State ex rel. Cleveland Cold Storage v. Beasley*, 10th Dist. No. 07AP-736, 2008-Ohio-1516, ¶12, citing *State ex rel. OTR v. Columbus*, 76 Ohio St.3d 203, 206, 1996-Ohio-411 and *Smith v. Erie Rd. Co.*, 134 Ohio St. 135 (1938), paragraph one of the syllabus.

The crux of any takings claim is that the value of private property has been impaired due to actions by the government. See, e.g., *State ex rel. Duncan v. Village of Middlefield*, 11th Dist. No. 2005-L-140, 2008-Ohio-191, ¶40. A judicial construction of a contract or deed does not violate the Takings Clauses of the United States and Ohio Constitutions. *Am. Energy Corp. v. Datkuliak*, 174 Ohio App.3d 398, 2007-Ohio-7199, ¶100. The White Hat Defendants' contention that enforcing these contracts constitutes a taking is not well taken.

5. These contracts grant the Plaintiff Schools rights to purchase the personal property and lease the buildings.

The White Hat Defendants insist the Plaintiff Schools have no rights in the real (or personal) personal property because the contracts were not "terminated."

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The Management Agreements provide that termination can occur in three ways: (1) termination by the Plaintiffs for cause as set forth in Section 10; (2) termination by the [White Hat Defendants] as set forth in Section 11; (3) termination of the sponsor school as set forth in Section 8(a). In other words, termination is distinct from expiration, and occurs only when one or more parties indicate their desire to end the agreement *prior* to the end of the term. (Emphasis sic.) Memorandum in Opposition, p. 18.

According to the White Hat Defendants, these contracts simply "expired" on their own because no party "terminated" them before the end of a term, and that as a result the Plaintiff Schools' contract right to purchase the personal property and lease the real property "was never triggered." *Id.*, p. 19-20. The White Hat Defendants now insist that for the Plaintiff Schools to have any rights in the personal or real property, they had to "terminate" the contracts for cause at some point before they "expired."

The contracts do not define "termination" or "expiration." Accordingly, the plain and ordinary meaning of these words applies. "Termination" means "the act of ending something; the end of something in time or existence; conclusion or discontinuance." *Black's Law Dictionary* 1511 (8th Ed.2004). "Expiration" means "a coming to an end; esp., a formal termination on a closing date <expiration of the insurance policy>." *Id.*, 619. When a dictionary uses "termination" to define "expiration," whatever distinction that might theoretically exist loses any legal or practical significance. Moreover, if the White Hat Defendants intended to ascribe a different meaning to each word, then as drafters of these contracts they had the opportunity to do so. Having failed to do so then, they are precluded from doing so now.

The contracts use the words "termination," "terminate," and "terminated" sixteen times. Section 1 uses the term "terminated for cause by either party" twice; once in relation to the initial two-year contract term and a second time in relation to the three

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one-year renewal terms. Section 10, which allows the Plaintiff Schools to end the contracts early under certain conditions, uses the term "termination by the school for cause" once. Section 11, which also allows the White Hat Defendants to also "terminate" the contracts early under certain conditions, does not use the term "for cause."

Section 8(a)(i) states, "It is understood that at the School's election, upon termination of this Agreement all personal property * * * may become the property of the School * * * upon the School paying to the Company an amount equal to the "remaining cost basis" of the personal property on the date of termination." By including in the contract a formula to calculate the purchase price of the personal property, the parties showed they understood from the outset that it would be worth something when the contracts ended.

Section 12(b) provides the Plaintiffs Schools an "Option to Lease":

Upon payment to the Company of two (2) months (sic) rent and other relevant monthly facility costs * * *, for sixty (60) days following the Termination Date, the Company shall keep the lease for the School's facility in effect for the purposes of allowing the School to evaluate its desire to lease all or part of the School Facility upon the same terms and conditions as the Company, or in the event that Company owns such facility, rent shall be based upon the fair market value as determined by an independent appraiser.

In this section, the White Hat Defendants not only granted the Plaintiff Schools the option to lease the buildings; they also agreed to help them do so.

In the event that the School does desire to lease the School Facility, the Company *shall use its best efforts to assist the School* in its attempt to obtain an assignment of the lease. (Emphasis added.)

The contracts state that if the White Hat Defendants own the current facilities at termination, they are obligated to lease them to the Plaintiff Schools at a fair market

rent as determined by an independent appraiser. They also state that if the current facilities are leased, the White Hat Defendants "shall use their best efforts" to help the Plaintiff Schools obtain an assignment of the leases on the same terms and conditions that the White Hat Defendants now have. These rights were established when the contracts were executed, and they exist today.

Section 12(c) states that after the Plaintiff Schools pay the "remaining cost basis" in accordance with Section 8(a), the White Hat Defendants shall transfer title or assign whatever leases are assignable for all personal property, which then shall belong to the Plaintiff Schools.

These provisions are clear and straightforward. The only limiting language on the property rights in Section 8 is that they may be exercised " * * * at the School's election, upon termination * * * ." The only limiting language on the property rights in Section 12(b) is the payment of two months' rent and related costs. Those rights may be exercised for sixty days "following the Termination Date, which Section 12(a) defines as "the end of the school year or June 30th, whichever date is sooner." If the White Hat Defendants wanted Sections 8 and 12 to apply only upon termination "for cause," then as drafters of the contracts they should have said so, as they clearly did in Sections 1 and 10. They did not do so then, and may not do so now.

6. The contracts create a limited fiduciary relationship between the Plaintiff Schools and the White Hat Defendants.

The Plaintiff Schools contend they should not have to pay anything to the White Hat Defendants for the personal property, claiming a fiduciary relationship exists with the White Hat Defendants "because of the overall control granted it by the management

agreements and because it has been entrusted with the schools' property." Plaintiff Schools' Motion, p. 12.

By operation of law, every contract includes an implied duty of good faith and fair dealing, which is "an implied undertaking not to take an opportunistic advantage in a way that could not have been contemplated at the time of drafting, and which therefore was not resolved explicitly by the parties." *National/RS, Inc. v. Huff*, 10th Dist. No. 10AP-306, 2010-Ohio-6530, ¶18, quoting *Ed Schory & Sons, Inc. v. Society National Bank*, 75 Ohio St.3d 433, 433-434, 1996-Ohio-194. However, there "can be no implied covenants in a contract in relation to any matter specifically covered by the written terms of the contract itself." *Id.*, ¶19, quoting *Hamilton Ins. Servs. v. Nationwide Ins. Cos.*, 86 Ohio St.3d 270, 274, 1999-Ohio-163, citing *Kachelmacher v. Laird* (1915), 92 Ohio St.324, paragraph one of the syllabus. Thus, the implied duty of good faith and fair dealing does not pertain to matters specifically covered by the terms of a written contract. *Id.*

A "fiduciary" is one who has "a duty, created by his undertaking, to act primarily for the benefit of another in matters connected with his undertaking." *Strock v. Pressnell*, 38 Ohio St.3d 207, 216 (1988). A "fiduciary relationship" is one "in which special confidence and trust is reposed in the integrity and fidelity of another and there is a resulting position of superiority or influence, acquired by virtue of this special trust." *Ed Schory & Sons v. Francis*, 75 Ohio St.3d 433, 442, 1996-Ohio-194, quoting *In re Termination of Employment of Pratt*, 40 Ohio St.2d 107, 115 (1974).

A fiduciary relationship can be created formally by an express agreement, or informally by the conduct of the parties. *Hoyt v. Nationwide Mut. Ins. Co.*, 10th Dist. No. 04AP-941, 2005-Ohio-6367, ¶31-32. A fiduciary relationship can only be created

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informally when both parties understand that a special trust or confidence has been placed; it cannot be unilateral. *Id.* at ¶31, citing *Eller Media Co. v. DGE, Ltd.*, 8th Dist. No. 83273, 2004-Ohio-4748, ¶54. Whether or not a fiduciary relationship exists depends on the facts of each case. *Nichols v. Schwendeman*, 10th Dist. No. 07AP-433, 2007-Ohio-6602, ¶15 (citations omitted).

For example, a joint venture is a type of contract in which the parties intend to carry out a common business purpose and does create a fiduciary relationship between the parties. *Hoyt*, ¶33. However, the relationship between a borrower and a bank is ordinarily not a fiduciary relationship, notwithstanding the difference in economic power, because a bank and its customers ordinarily deal at arm's length; either is free to walk away from the transaction. *Groob v. KeyBank*, 128 Ohio St.3d 348, 2006-Ohio-1189, ¶22. Where parties deal with each other at arm's length in a commercial context, each protecting his or her respective interests, a fiduciary relationship does not arise. *Nichols*, ¶18.

Here, the parties' relationship was not created informally; they executed 16-page contracts defining their rights and duties. In Section 13, the parties expressly agree to hold each other harmless for losses the other might cause. The last sentence of Section 14 states: "Nothing contained herein shall be construed to create a partnership of joint venture between the parties." The language the parties used does not support the Plaintiff Schools' claim that the contracts created a formal general fiduciary relationship between the parties.*

* This ruling that a formal general fiduciary relationship was not created by the contracts does not preclude a subsequent ruling, after all the evidence is heard, that a general fiduciary relationship was created by the conduct of the parties.

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However, the contracts created a limited fiduciary duty on the part of the White Hat Defendants to use their best efforts to assist the Plaintiff Schools in obtaining assignments of existing leases under the same terms and conditions. If the White Hat Defendants own the buildings, the contracts require the White Hat Defendants to allow the Plaintiff Schools to lease them at fair market value as determined by an independent appraiser.

IV. Conclusion

For the reasons set forth above, the motion of the Plaintiff Schools for summary judgment declaring the property rights of the parties is granted in part and denied in part.

Pursuant to Sections 8(a)(i) and 12(b) of the contracts, the Plaintiff Schools have (1) the right to purchase the personal property upon payment of the reduced cost basis to the White Hat Defendants, and (2) the right to possession of existing facilities by either assuming the existing leases of facilities that are owned by third parties under the current terms and conditions, or by entering into new leases of facilities that are owed by the White Hat Defendants at fair market value.

SO ORDERED.

Franklin County Court of Common Pleas

Date: 05-11-2012
Case Title: HOPE ACADEMY BROADWAY CAMPUS -VS- WHITE HAT
MANAGEMENT LLC
Case Number: 10CV007423
Type: MOTION GRANTED

It Is So Ordered.



/s/ Judge John F. Bender

Electronically signed on 2012-May-11 page 15 of 15

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Court Disposition

Case Number: 10CV007423

**Case Style: HOPE ACADEMY BROADWAY CAMPUS -VS- WHITE HAT
MANAGEMENT LLC**

Final Appealable Order: No

Motion Tie Off Information:

1. Motion CMS Document Id: 10CV0074232 [REDACTED] 930000

Document Title: 02-21-2012-MOTION FOR SUMMARY JUDGMENT

Disposition: MOTION GRANTED IN PART

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IN THE COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO
CIVIL DIVISION

Hope Academy Broadway Campus, et al.,	:	
	:	
Plaintiffs,	:	
	:	Case No. 10CVH-05-7423
v.	:	
	:	Judge John F. Bender
White Hat Management, LLC, et al.,	:	
	:	
Defendants.	:	

**AMENDED DECISION AND ENTRY
ON JURISDICTION AND DISCOVERY**

BENDER, J.

After further review of the White Hat Defendants' objections to the Plaintiff Schools' discovery requests and motion for reconsideration, the court finds that its December 23, 2011 decision contains errors which must be corrected.¹ Therefore, the January 4, 2012 decision and entry denying the White Hat Defendants' motion for reconsideration is vacated.²

On February 2, 2012, the court held a hearing on the White Hat Defendants' motion and objections; the parties filed stipulations of facts and exhibits which were admitted into evidence. Joseph R. Weber, also testified for the White Hat Defendants. Based on the evidence and the arguments presented, the December 23, 2011 decision is amended to reflect the proper factual basis for the court's decision on jurisdiction and the application of R.C. 3314.024, which reaches

¹ At the court's request, the parties submitted briefs on the extent of its jurisdiction and the role of the Auditor of State. The White Hat Defendants submitted financial reports for each Plaintiff School as exhibits to their brief. Because the White Hat Defendants submitted these reports, the court incorrectly presumed they also prepared and submitted them to the Auditor of State. In fact, the Plaintiff Schools' fiscal officer prepared them, as called for in the parties' contract.

² Any court order or decision may be revised at any time before a final order that resolves all claims and determines the rights and obligations of all the parties is entered. Civ.R. 54(B).

the same conclusions of law. In the second section, the court addresses the White Hat Defendants' objections to the Plaintiff Schools' modified discovery requests.

I. *Jurisdiction and R.C. 3314.024*

A. Summary of the Issues

Plaintiffs Hope Academy Broadway Campus, et al. ("the Plaintiff Schools") entered into management contracts with defendants White Hat Management, LLC, et al. ("the White Hat Defendants") to operate community schools.³ The Plaintiff Schools are funded entirely with state and federal tax dollars through the Ohio Department of Education. The management contracts require the Plaintiff Schools to pay 96% of the state funds (and 100% of the federal funds) they receive to the White Hat Defendants; the other 4% is split between the Plaintiff Schools (3.5%) and their sponsor (0.5%), the Ohio Consortium of Community Schools.⁴

Shortly after this lawsuit was filed, the Plaintiff Schools asked the White Hat Defendants to provide specific financial information about each school. Although the White Hat Defendants disclosed some information, the Plaintiff Schools claim it is not detailed enough to allow them to fulfill their duties as the schools' governing authorities. When the parties were unable to resolve their disagreement, the Plaintiff Schools asked the court to order the White Hat Defendants to turn over the requested financial records.⁵

The White Hat Defendants contend ordering them to produce more records is unwarranted for two reasons. First, the White Hat Defendants insist the public funds that the Plaintiff Schools receive from the Department of Education are no longer public funds when the

³ Also known as charter schools.

⁴ The Ohio Consortium of Community Schools is not a party to this case.

⁵ When this case was filed the Plaintiff Schools sought a temporary restraining order. Given the nature of the request, which was made shortly before the management contracts were to expire, the court stated that it may be necessary to appoint a receiver to manage the schools until the dispute could be resolved. Later that day, the parties executed a standstill agreement that extended the management contracts for one year and asked for time to resolve this matter without further court involvement. After those efforts failed, on March 23, 2011 the parties extended the standstill agreement for another year and sought the court's involvement.

Plaintiff Schools pay them to the White Hat Defendants as a "monthly continuing fee" under the management contracts. Second, as the Auditor of State has accepted the Plaintiff Schools' financial reports (which include the financial disclosures required from the White Hat Defendants) and has not made a finding that anything is improper, it would be unduly burdensome to require the White Hat Defendants to produce more detailed information and respectfully suggest that the court lacks jurisdiction to require them to do so.

"Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action." Civ.R. 12(H)(3). After an October 26, 2011 status conference, the court ordered the parties to submit briefs on the extent of its jurisdiction by December 5, 2011. At the court's invitation the Auditor of State submitted a brief as an amicus curia, which includes an overview of R.C. 3314.024.

B. Scope of the Court's Jurisdiction

"Jurisdiction connotes the power to hear and decide a case on its merits." *New York Chicago & St. Louis Rd. Co. v. Matzinger*, 136 Ohio St. 271, 276 (1940). By statute, a "court of common pleas is a court of general jurisdiction. It embraces all matters at law and in equity that are not denied to it." *Schucker v. Metcalf*, 22 Ohio St.3d 33, 34 (1986), quoting *Saxton v. Seiberling*, 48 Ohio St. 554, 558-559 (1891). R.C. 2721.03 permits any person whose rights are affected by a statute or a contract to ask a court to determine its meaning or validity. *Victory Academy of Toledo v. Zelman*, 10th Dist. No. 07AP-1067, 2008-Ohio-3561, ¶8. Clearly, this court has jurisdiction to declare the Plaintiff Schools' rights under R.C. 3314.024 and under the management contracts with the White Hat Defendants. The only real question is whether ordering the White Hat Defendants to produce more detailed financial information impermissibly interferes with the duties of the Auditor of State, which are established by the legislature.

The legislature provides that "the Auditor of State *shall* audit each public office at least once every two fiscal years," unless federal law or another Ohio law requires an annual audit. R.C. 117.10(A). The Auditor of State "*may* conduct an audit of a public office at any time when so requested by the public office or upon the Auditor of State's own initiative if the Auditor of State has reasonable cause to believe that an additional audit is in the public interest." R.C. 117.11(B) (Emphasis added).

A "public office" is an organized body or entity "established by the laws of this state for the exercise of any function of government." R.C. 117.01(D). In *Cordray v. International Preparatory School*, 128 Ohio St.3d 50, 2010-Ohio-6136, the Supreme Court of Ohio held that community schools are public offices because they are "legislatively created as part of Ohio's constitutionally required system of common schools[.]" *Id.*, ¶22. Because the Plaintiff Schools are public offices, they are subject to mandatory audits by the Auditor of State.

Although the White Hat Defendants operate public schools, which are a function of government, they are Nevada limited liability companies.⁶ Because they were not established by the laws of Ohio, the White Hat Defendants are not public offices subject to mandatory audits by the Auditor of State.

The Auditor of State *may* audit private institutions, associations, boards, and corporations "receiving public money for their use" and may require them to file annual reports. R.C. 117.10(B). As private corporate entities, the White Hat Defendants are only subject to audit by the Auditor of State if they receive public money for their use. More importantly, the decision to

⁶ Answer of Defendants White Hat Management, LLC and WHLS of Ohio, LLC, ¶11; Answer and Counterclaim of Defendants HA Broadway, LLC, HA Lincoln Park, LLC, HA Chapelside, LLC, HA University, LLC, HA Cathedral, LLC, HA Brown Street, LLC, LS Cleveland, LLC, LS Akron, LLC, LS Lake Erie, LLC and HA West, LLC, ¶11-21.

audit private corporate entities belongs exclusively to the Auditor of State; no provision in the Revised Code allows a court to order the Auditor of State to conduct a non-mandatory audit.

C. Analysis of R.C. 3314.024

A management company that provides services to a community school that amounts to more than twenty per cent of the annual gross revenues of the school shall provide a detailed accounting including the nature and costs of the services it provides to the community school. This information shall be included in the footnotes of the financial statements of the school and be subject to audit during the course of the regular financial audit of the community school.

R.C. 3314.024 ("Detailed accounting by management company; audits").

The White Hat Defendants contend R.C. 3314.024 only requires them to provide a detailed accounting to the Auditor of State, which is to be submitted in the footnotes of the Plaintiff Schools' financial statements. The Plaintiff Schools and the Department of Education insist R.C. 3314.024 requires the White Hat Defendants to provide the Plaintiff Schools with a detailed accounting, which the Plaintiff Schools shall submit to the Auditor of State in the footnotes of their financial statements. The question is whether the legislature intended R.C. 3314.024 to benefit the Plaintiff Schools and the Auditor of State, or the Auditor of State alone.

According to the Auditor of State, "the *sole* purpose of the required 'accounting' is to allow the school to prepare the Footnote for the Auditor's review, *not* to aid the school in conducting an independent evaluation of how the management company is using its resources." Auditor's Brief, p. 5 (Emphasis sic). The Auditor further states that R.C. 3314.024 does not provide a community school with a basis to demand additional financial information from a management company beyond what it has already furnished to the Auditor. "Despite the use of the phrase in the statute, R.C. 3314.024 does not actually require a management company to provide a 'detailed accounting' to the schools it serves." Id.

Long-standing rules of statutory construction mandate the opposite result. With very few exceptions, and this is not one of them, when the legislature enacts a statute it says what it means and means what it says.

A court's paramount concern in construing a statute is giving full effect to the legislature's intent. *State Farm Mut. Auto. Ins. Co. v. Grace*, 123 Ohio St.3d 471, 2009-Ohio-5934, ¶25. To determine the legislature's intent, a court looks to the language it used in the statute. *Rice v. CertainTeed Corp.*, 84 Ohio St.3d 417, 419, 1999-Ohio-361. A statute's language must be considered in context; its words and phrases must be construed according to customary rules of grammar and common usage. *State ex rel. Stoll v. Logan Cty. Bd. of Elections*, 117 Ohio St.3d 76, 2008-Ohio-1288, ¶34. No words may be disregarded; every word must be given its usual and ordinary meaning unless the legislature supplied a different definition. *Carter v. Youngstown Div. of Water*, 146 Ohio St. 203 (1946), paragraph one of the syllabus. A court must apply a statute as the legislature wrote it unless it is ambiguous. *Summerville v. City of Forest Park*, 128 Ohio St.3d 221, 2010-Ohio-6280, ¶18. A statute is ambiguous only if it is subject to more than one reasonable interpretation. *Clark v. Scarpelli*, 91 Ohio St.3d 271, 274, 2001-Ohio-39. R.C. 3314.024 is not ambiguous.

R.C. 3314.024 states a management company "shall provide" a detailed accounting; this information "shall be included" in the community school's financial statements and submitted to the Auditor of State. If the legislature intended the detailed accounting to benefit the Auditor of State exclusively, it need only have stated the detailed accounting "shall be included" in the community school's financial statements. That is simply not what the legislature said.

The language of R.C. 3314.024 clearly requires two actions. First, a management company receiving more than twenty percent of a community school's annual revenues must

provide a detailed accounting including the nature and costs of the services it provides. Second, the information must be included in a footnote to the community school's financial statements and be subject to audit during the course of the community school's regular financial audit.

The Supreme Court holds that a community school is a public office; it is accountable for how public funds are spent. *Cordray*, ¶12-22. The legislature requires a community school to keep the same financial records as other public schools. R.C. 3314.03(A)(8). A community school that does not hire a management company does not need to be provided with a detailed accounting; it spent those funds itself. However, when a community school pays a management company more than twenty percent of the public funds it receives from the Department of Education, that management company must provide the community school with a detailed accounting of how those funds were spent because the community school must account to the Auditor of State for them.⁷

The White Hat Defendants argue that because they provided the summary information to the Plaintiff Schools in the form required by the Auditor of State, and the Plaintiff Schools included it in their financial reports, and the Auditor of State accepted the Plaintiff Schools' financial reports, R.C. 3314.024 does not require them to provide the Plaintiff Schools with more detailed financial information. This view is flatly incorrect.

Certainly, to date there is no basis to suggest there is anything improper in the Plaintiff Schools' financial reports or in the information the White Hat Defendants provided in the footnote. However, as the Auditor's acceptance letter attached to each financial report makes clear, his acceptance means just that and nothing more:

⁷ Nothing prevents a community school from hiring more than one management company and paying more than twenty percent of its annual gross revenues to each. Thus, there is no question that the detailed accounting required by R.C. 3314.024 must be provided to the community school, because it can file only one financial statement with the Auditor of State.

We have reviewed the *Independent Auditor's Report* of the [Plaintiff School], * * * for the audit period July 1, 2009 through June 30, 2010. Based upon this review, we have accepted these reports in lieu of the audit required by Section 117.11, Revised Code. The Auditor of State did not audit the accompanying financial statements and, accordingly, we are unable to express, and do not express an opinion on them.

Our review was made in reference to the applicable sections of legislative criteria, as reflected by the Ohio Constitution, and of the Revised Code, policies, procedures, and guidelines of the Auditor of State, regulations and grant requirements. The [Plaintiff School] is responsible for compliance with these laws and regulations. (Emphasis added).

The parties responsible for compliance with laws and regulations on how public funds are spent and for the information in the Plaintiff Schools' financial reports submitted to the Auditor of State, are the Plaintiff Schools, not the White Hat Defendants. From this it necessarily follows that the White Hat Defendants must provide a detailed accounting to the entity legally responsible for spending those funds only as the law allows – the Plaintiff Schools.

The Auditor of State's Advisory Bulletin 2004-0009 defines how this "information shall be included in the footnotes of the financial statements of the [community] school[.]" However, R.C.3314.024 does not mean a community school cannot also use that information, or any other financial or non-financial information it requires, to independently review the performance of the management company. There is absolutely no reason for a community school or a management company to involve the Auditor of State in a dispute over how a contract has been performed. The Auditor of State's sole mission is to be sure public funds are spent *legally*. However, a community school, its sponsor and the Department of Education are additionally charged with making sure public funds are spent *properly* to provide a quality education to Ohio's children.

D. Summary of Section One

The White Hat Defendants receive more than twenty percent of the Plaintiff Schools' annual gross revenues. Therefore, R.C. 3314.024 requires the White Hat Defendants to provide the Plaintiff Schools with a detailed accounting of the funds it received including the nature and costs of the services it provides. Moreover, the Plaintiff Schools have an absolute right to all information the White Hat Defendants used to prepare the required footnote to their financial statements, and any other financial or non-financial information the plaintiff schools require to determine that public money was spent properly to educate the children who attend these schools.

While the Auditor of State has accepted the Plaintiff Schools' financial reports, including the information the White Hat Defendants supplied for the required footnote, the Auditor of State's acceptance letter makes it crystal clear that the Plaintiff Schools remain legally responsible for all financial information. The Auditor of State's acceptance of the reports including the required footnotes does not mean the information used to prepare them is no longer relevant or subject to discovery.

II. The White Hat Defendants' Objections to Discovery Requests

The White Hat Defendants' objections to the Plaintiff Schools' discovery requests fall into two general categories: (1) they are unduly burdensome, and (2) the information they seek is proprietary or confidential.

Generally, parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject involved in the pending action if the information sought appears reasonably calculated to lead to the discovery of admissible evidence. Civ.R. 26(B)(1). While the scope of discovery is broad, it is not unlimited; the court may make any order that justice

requires to protect a party from undue burden or expense, including limiting the methods of discovery or requiring confidential information to be disclosed only in a designated manner. Civ.R. 26(C). In order to rule on the White Hat Defendants' objections, it is important to note the legal context in which the Plaintiff Schools' discovery requests are made.

A. The Legislative Framework of Community Schools

At the February 2, 2012 hearing, the White Hat Defendants highlighted two sentences from this court's twelve-page August 2, 2011 decision and entry. At the end of a two-page discussion on the framework authorizing community schools, the court stated: "Beyond these parameters, the law is largely silent on an operator's duties and on the role of an operator, if any, in the relationship between a community school's governing authority and its sponsor. In the absence of any law on the subject, that relationship is defined only by the contract between the operator and the governing authority."

The White Hat Defendants incorrectly take these sentences to mean this court has already ruled their relationship with the Plaintiff Schools is governed exclusively by their contracts. In the two quoted sentences, "that relationship" refers to "the role of an operator, if any, in the relationship between a community school's governing authority and its sponsor." This case has nothing to do with the relationship between a community school's governing authority and its sponsor, which is governed by R.C. 3314.03. (The Plaintiff Schools' sponsor is not a party to this case.)

This case is about management contracts between the Plaintiff Schools and the White Hat Defendants, which are authorized by R.C. 3314.01(B). A community school may "contract for any services necessary for the operation of the school," which means the duties of those who provide services are defined by their contract. However, the freedom to contract is not absolute

and these contracts do not exist in a vacuum; they can only exist within the comprehensive framework the legislature established for community schools:

1. The Department of Education administers the state's program of public education. R.C. 3301.13.
2. A community school is a public school and is part of the state's program of public education. R.C. 3314.01(B).
3. A community school must have a contract with a sponsor approved by the Department of Education. The contents of that contract are extensive and mandatory. R.C. 3314.03(A)(1)-25), (B)(1)-(5), (C), (D)(1)-(6), (E), (F).
4. A sponsor is charged with monitoring a community school's compliance with the contract, all applicable laws, and its academic and fiscal performance. R.C. 3314.03(D).
5. The Department of Education is charged with overseeing sponsors and with providing community schools and sponsors with technical assistance to help them comply with the terms of their contracts and applicable laws. R.C. 3314.015.
6. A community school is funded entirely by state and federal revenues administered by the Department of Education. R.C. 3314.08(D).
7. Any entity established by the laws of this state for the exercise of any function of government is a "public office." R.C. 117.01(D).
8. A community school is a public office. *Cordray*, ¶22.
9. Any officer, employee, or duly authorized representative or agent of a public office is a "public official." R.C. 117.01(E).

B. Independent Contractors or Public Officials

The White House Defendants continue to insist they are not public officials based on language in their management contracts with the Plaintiff Schools:

14. Relationship of the Parties. The parties hereto acknowledge that their relationship as that of an *independent contractor*. No employee of either party shall be deemed an employee of the other party. Nothing contained herein shall be construed to create a partnership or joint venture between the parties. (Emphasis added.)

Laws in effect when a contract is made automatically become part of that contract. *Doe v. Ronan*, 127 Ohio St.3d 188, 2010-Ohio-5072, ¶18, fn. 3, citing *Eastman Machinery Co. v. Peck*, 161 Ohio St. 1, 6-7 (1954); *Palmer & Crawford v. Tingle*, 55 Ohio St. 423 (1896), paragraph three of the syllabus. See also, *Bell v. Northern Ohio Tel. Co.*, 149 Ohio St. 157, 158 (1948) (“It is elementary that no valid contract may be made contrary to statute, and that valid, applicable statutory provisions are part of every contract.”). When a provision of a contract conflicts with a statute, the statute prevails. *Holdeman v. Epperson*, 111 Ohio St.3d 551, 2006-Ohio-6209, ¶18.

The Plaintiff Schools are governing authorities for community schools. The Plaintiff Schools are accountable for the performance of community schools through their sponsor and the Department of Education. The Plaintiff Schools may operate community schools themselves or may hire a management company to do so. The Plaintiff Schools entered into management contracts with the White Hat Defendants to operate community schools on their behalf.

Absent these management contracts, the White Hat Defendants have no legal authority to operate community schools, which are public schools; they can only operate them as the Plaintiff Schools' "duly authorized representative or agent." Therefore, the White Hat Defendants are public officials as R.C. 117.10(E) defines the term, notwithstanding the language in the management contracts characterizing them as independent contractors.

C. Public or Private Money

Section 8a of the management contracts requires the Plaintiff Schools to pay the White Hat Defendants a monthly "continuing fee" of ninety-six percent (96%) of the revenue received from the Department of Education. Joseph Weber, a vice-president of a number of White Hat corporate entities, testified extensively about how this payment structure evolved over time due

to the lack of start-up funding for community schools and their inability to borrow money or issue bonds against anticipated tax revenues. He also testified that the management contracts require the White Hat Defendants to pay all costs associated with operating each Plaintiff School, including salaries, textbooks, computers and supplies along with building payments, maintenance and capital improvements.

However, when Mr. Weber was asked how much a particular EMO spent for these items he declined to itemize those costs, stating only that they were "included in the continuing fee." The White Hat Defendants maintain that the public money the Plaintiff Schools receive from the Department of Education is no longer public money when they pay it to the White Hat Defendants as a monthly "continuing fee."

"Public money' means *any* money received, collected by, or due a public official under color of office, as well as any money collected by any individual on behalf of a public office or as a purported representative or agent of the public office." R.C. 117.01(C) (Emphasis added). By definition, public money is not limited to funds from the state's general revenue fund; it includes any money from any source received by a public official under the color of office.

"Color of office' means actually, purportedly or allegedly done under any law, resolution, order, or other pretension to official right, power, or authority." R.C. 117.01(A). The legislature authorized the Plaintiff Schools to operate schools as part of the state's public education program. R.C. 3314.03. The legislature authorized the Plaintiff Schools to contract for any services necessary for the operation of the school. R.C. 3314.01(B). The White Hat Defendants operate public schools as the Plaintiff Schools' duly authorized representatives under contracts issued pursuant to a legislative grant of authority. The White Hat Defendants operate the Plaintiff Schools under color of office.

The Plaintiff Schools receive public money from the Department of Education under color of office. *Cordray*, ¶27. The White Hat Defendants operate public schools under color of office, as duly authorized representatives of the Plaintiff Schools. Public money includes any money received by public officials under color of office. Therefore, the money the White Hat Defendants receive from the Plaintiff Schools is public money, regardless of how the White Hat Defendants choose to characterize it under the management contracts.

Public property and public money in the hands or control of public officials "constitute[s] a trust fund, for which the official as trustee should be held responsible to the same degree as the trustee of a private trust." *Cordray*, ¶12, quoting *Crane Twp. ex rel. Stalter v. Secoy*, 103 Ohio St. 258, 259-260 (1921). Although the White Hat Defendants are private corporate entities, under Ohio law they are also public officials who received money under color of office, i.e., public money, for which they are accountable. R.C. 9.39.

D. Proprietary Information

Mr. Weber also testified the White Hat Defendants have a proprietary interest in their business model and the White Hat corporate structure. The White Hat Defendants formed a separate limited liability company ("LLC") as an Education Management Organization ("EMO") for each school: HA Broadway, LLC; HA Lincoln Park, LLC; HA Chapelside, LLC; HA University, LLC; HA Cathedral, LLC; HA Brown Street, LLC; LS Cleveland, LLC; LS Akron, LLC; LS Lake Erie, LLC; and HA West, LLC. WHLS of Ohio, LLC owns each EMO (and other Ohio-based EMOs that are not parties to this case). White Hat Management, LLC provides administrative services to each EMO (and other Ohio-based EMOs that are not parties to this case). White Hat Ventures, LLC owns WHLS of Ohio, LLC and White Hat Management, LLC. See Defendants' Exhibit 5 (Condensed Organization Chart). Mr. Weber stated that transactions

between the EMOs and other White Hat entities were part of the White Hat Defendants' business model that had been developed with years of hard work.

This "business model" appears to be an organization of corporate entities affiliated with each other, which have many of the same persons as owners or beneficiaries, and which receive public money from the Plaintiff Schools either directly or indirectly. This type of corporate organization is not at all uncommon, is in no way proprietary and is in no way related to providing a quality education to the children enrolled in the schools operated by the defendants. Accordingly, the request to withhold or limit the disclosure of transactions between the EMOs and other White Hat affiliates and entities is not well taken.

E. Information from Non-Parties

Mr. Weber was asked about transactions between the EMOs and a number of other corporate entities, including White Hat Realty, LLC; Teragram Realty, LLC; Lumen Chapelside Realty; Hope Realty, LLC; WHM Realty, LLC; Lumen Lincoln Park Realty; Lumen West Realty; Lumen West 41 Realty, LLC; Lumen University Realty; Lumen Cathedral Realty; Lumen Neo Realty, LLC; Lumen Broadway Realty; Lumen Arlington Realty, LLC; Brennan Holdings, LLC; Brennan Holdings, Inc.; and David L. Brennan. Neither David L. Brennan nor any of these corporate entities are parties to this lawsuit.

Mr. Weber's testimony suggests the EMOs paid public money to at least some of these non-parties for expenses such as school building rents and other services. The testimony also suggests that these non-parties may be affiliated with the White Hat Defendants, or that principals or officers of some or all of the White Hat Defendants may have a financial interest in them. There is reason to believe that disclosure of this information may be forthcoming voluntarily with the White Hat Defendants' discovery responses. If this information is not

forthcoming voluntarily, the Plaintiff Schools may obtain deposition testimony, the production of documents and inspection of records (including electronically stored information) and tangible things through the procedures in Civ.R. 45.

F. Specific Discovery Objections

1. Transactions with affiliates, subsidiaries or related entities

The White Hat Defendants shall provide the Plaintiff Schools with copies of general ledger accounts that represent transactions between each EMO and any White Hat affiliates, subsidiaries or related entities, along with any requested supporting documentation. Questions about the meaning of "affiliates, subsidiaries, or related entities" will be resolved pursuant to R.C. 1336.01(G).

2. Building Leases

The White Hat Defendants shall provide the Plaintiff Schools with copies of the documents that entitle each Plaintiff School to present possession of the school premises, including the amount each Plaintiff School is charged for the right to present possession, the entity/entities which those payments are made, and whether the entity/entities is/are a White Hat affiliate(s), subsidiary(ies) or related entity(ies).

3. Footnote Disclosures

The White Hat Defendants shall identify for the Plaintiff Schools how the amounts the White Hat Defendants submitted in the footnotes to the Plaintiff Schools' financial statements were determined.⁸ The White Hat Defendants' argument that this request seeks to "usurp the authority of the Auditor of State" is wholly unfounded and devoid of legal merit.

⁸ Merely providing the Plaintiff Schools with a computer print-out stating "it's all in there" is patently unacceptable.

4. Individual School Accounts

The White Hat Defendants shall disclose all purchases made by each EMO for the benefit of each Plaintiff School, any depreciation schedules or other documents showing valuation including the method used to determine the respective amount, and records reflecting the efforts to improve the performance of each Plaintiff School, including but not limited to training, operating strategies, and staffing levels, and whether the purchased property is still located at the Plaintiff School for which the EMO purchased it.

5. Tax Returns

The White Hat Defendants shall provide the Plaintiff Schools with the requested tax returns under seal. The information is for attorneys' eyes only; its disclosure in any form without prior written leave of court is strictly prohibited.

6. Deadline

This information shall be provided within thirty days.

7. Reciprocal Obligations

Neither the Plaintiff Schools nor the Department of Education has objected to the White Hat Defendants' discovery requests. Therefore, the Plaintiff Schools and the Department of Education shall provide complete responses to the White Hat Defendants discovery as soon as practicable, and in any event within thirty days.

E. Summary of Section Two

The framework the legislature established to govern community schools, which are public schools in all respects, includes the Department of Education, their sponsors, and their governing boards (in this case, the Plaintiff Schools). The legislature did not include management companies in that framework. A management company operates a community

school as its governing board's duly authorized representative or agent; thus, it is a public official. A management company operates a community school under contract from its governing board pursuant to a grant of authority from the legislature, thus, it operates under color of office. The money a management company is paid to operate a community school is received under color of office; thus, it is public money.

Public money must be accounted for. The Auditor of State, who is charged with seeing that public money is spent legally, has accepted the Plaintiff Schools' financial reports and has not made any findings that any money has been spent illegally. However, the Plaintiff Schools, their sponsor and the Department of Education are also charged with spending public money properly. Moreover, as public officials who receive public money under color of office, the White Hat Defendants are charged with showing how they spent the public money they received.

It is hard to imagine a case where the parties could disagree more strongly. In that light, the parties and their respective counsel are to be commended for the professionalism with which they have conducted themselves during this lawsuit. This case will next come before the court on March 7, 2012 at 1:30 p.m. to review the progress made in discovery and to set a new case management order.

SO ORDERED.

Service list on following page

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Copies to:

James D. Colner, Esq.
Shumaker, Loop & Kendrick, LLP
41 South High Street, Suite 2400
Columbus, OH 43215
Counsel for Plaintiffs

Karen S. Hockstad, Esq.
Smith Haughey Rice & Roegge, P.C.
213 South Ashley Street, Suite 400
Ann Arbor, MI 48104
Counsel for Plaintiffs

Charles R. Saxbe, Esq.
Chester, Willcox & Saxbe LLP
65 East State Street, Suite 1000
Columbus, OH 43215
Counsel for Defendants

Todd R. Marti, Esq.
Assistant Attorney General
30 East Broad Street, 17th Floor
Columbus, OH 43215
Counsel for Ohio Department of Education

Aaron D. Epstein, Esq.
Assistant Attorney General
30 East Broad Street, 16th Floor
Columbus, OH 43215
Counsel for Amicus Curia
Ohio Auditor of State

0A212 - I57

Franklin County Court of Common Pleas

Date: 02-06-2012
Case Title: HOPE ACADEMY BROADWAY CAMPUS -VS- WHITE HAT
MANAGEMENT LLC
Case Number: 10CV007423
Type: ORDER

It Is So Ordered.

A handwritten signature in cursive script, reading "J. Bender", is written over a circular official seal. The seal contains text around its perimeter, including "FRANKLIN COUNTY OHIO" and "CLERK OF COURTS OF THE COMMON PLEAS".

/s/ Judge John F. Bender

E IN THE COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO
CIVIL DIVISION

Hope Academy Broadway Campus, et al., :
 :
 Plaintiffs, :
 :
 v. :
 :
 White Hat Management, LLC, et al., :
 :
 Defendants. :

Case No. 10CVH-05-7423

Judge John F. Bender

FILED
CLERK OF COURTS
OCT - 7 AM 10:00
FRANKLIN COUNTY

DECISION AND ENTRY
DENYING MOTION OF WHITE HAT DEFENDANTS TO DISMISS
CROSS-CLAIMS BY DEFENDANT OHIO DEPT. OF EDUCATION

Filed August 17, 2010

And

GRANTING IN PART AND DENYING IN PART
MOTIONS OF PLAINTIFF SCHOOLS
AND DEPARTMENT OF EDUCATION
FOR PARTIAL SUMMARY JUDGMENT

Filed October 19, 2010

BENDER, J.

I. Procedural Posture

In this lawsuit, plaintiffs Hope Academy Broadway Campus, et al. ("the Plaintiff Schools") ask the court to declare their rights and obligations under Management Agreements they signed with defendants White Hat Management, LLC, et al. ("White Hat Defendants"). The Plaintiff Schools named the Ohio Department of Education as a defendant because it administers the state's public school system, of which they are a part.

With its answer, the Department of Education filed counterclaims against the Plaintiff Schools and cross-claims against the White Hat Defendants. The White Hat Defendants moved to dismiss the Department of Education's cross-claims. The Plaintiff

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Schools and the Department of Education moved for summary judgment on some of their claims against the White Hat Defendants. These motions are fully briefed and are now before the court for determination.

II. Motion to Dismiss

The White Hat Defendants move to dismiss the Department of Education's cross-claims for (a) lack of subject matter jurisdiction, (b) failure to state a claim for which the law can grant relief, and (c) failure to join a necessary party. Civ.R. 12(B)(1), (6) and (7), respectively.

A. Subject-Matter Jurisdiction

Subject-matter jurisdiction is a court's power to hear and decide the merits of a case. *State ex rel. Jones v. Suster*, 84 Ohio st.3d 70, 75, 1998-Ohio-275, citing *Morrison v. Steiner* (1972), 32 Ohio St.2d 86, paragraph one of the syllabus. When ruling on a Civ.R. 12(B)(1) motion to dismiss for lack of subject-matter jurisdiction, a court must determine whether the pleading raises any cause of action that it has the authority to decide. *Robinson v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. No. 10AP-550, 2011-Ohio-713, ¶15; *Temple v. Ohio Attorney General*, 10th Dist. No. 06AP-988, 2007-Ohio-1471, ¶10; *State ex rel. Bush v. Spurlock* (1989), 42 Ohio St.3d 77, 80. "Jurisdiction does not relate to the rights of the parties, but to the power of the court." *Suster*, quoting *Executors of Long's Estate v. State of Ohio* (1st Dist. 1926), 21 Ohio App. 412, 415.

Before an Ohio court can consider the merits of a legal claim, the party seeking relief must establish standing to sue. *Carl L. Brown, Inc. v. Lincoln Natl. Life Ins.*, 10th Dist. No. 02AP-225, 2003-Ohio-2577, ¶32, citing *Ohio Contractors Assn. v. Bicking* (1994), 71 Ohio St. 3d 318, 320, 1994-Ohio-183. "The issue of standing is a threshold test that, once met, permits a court to determine the merits of the questions presented."

Id., citing *Tiemann v. Univ. of Cincinnati* (10th Dist. 1998), 127 Ohio App. 3d 312, 325. In order to have standing, the party seeking relief must demonstrate an actual injury sufficiently traceable to the conduct of the defendant. Id., citing *Fraternal Order of Police v. City of Cleveland* (8th Dist. 2001), 141 Ohio App. 3d 63, 75.

The White Hat Defendants claim the Department of Education lacks standing to challenge its Management Agreements with the Plaintiff Schools because it is not a party to them. Only a party to a contract or an intended third-party beneficiary has standing to bring an action on that contract. *Grant Thornton v. Windsor House, Inc.* (1991), 57 Ohio St.3d 158, 161. "A third-party beneficiary is one for whose benefit a promise has been made in a contract but who is not a party to the contract." *Maghie & Savage, Inc. v. P.J. Dick Inc.*, 10th Dist. No. 08AP-487, 2009-Ohio-2164, ¶40, quoting *Chitlik v. Allstate Ins. Co.* (8th Dist. 1973), 34 Ohio App.2d 193, 196. An intended third-party beneficiary need not be expressly named in the contract, but it must have been contemplated by the parties and be sufficiently identified. *West v. Household Life Ins. Co.*, 170 Ohio App. 3d 463, 2007-Ohio-845, ¶13 (10th Dist.), citing *Chitlik*, supra.

Where the performance of a promise under the contract satisfies a duty owed by the promisee to a third-party, that third-party is an intended beneficiary. Where the performance of a promise merely confers some benefit on a third-party but does not satisfy a duty owed by the promisee, that third-party is an incidental beneficiary. *Transcontinental Ins. Co. v. Exxcel Project Mgmt.*, 10th Dist. No. 04AP-1243, 2005-Ohio-5081, ¶20 "To find that a third party is an intended beneficiary, 'there must be evidence on the part of the promisee of an intent to directly benefit the third party, and not simply that some incidental benefit was conferred on an unrelated party by the promisee's actions under the contract. There must be evidence that the promise

assumed a duty to the third party." *Maghie & Savage, Inc.* at ¶41, quoting *TRINOVA Corp. v. Pilkington Bros., PLC*, 70 Ohio St.3d 271, 289, 1994-Ohio-524. While an intended third-party beneficiary has enforceable rights under the contract, an incidental third-party beneficiary does not. *Id.* at ¶40, citing *Hill v. Sonitrol of Southwestern Ohio* (1988), 36 Ohio St.3d 36, 40.

In the Management Agreements, the Plaintiff Schools promised to pay money to the White Hat Defendants, who in return promised to provide services to the Plaintiff Schools. Although the White Hat Defendants have no direct contract relationship with the Department of Education, their obligations under the Management Agreements are unquestionably intended to meet or exceed duties that the Plaintiff Schools owe to the Department of Education. Thus, the White Hat Defendants' performance of their contractual obligations confers a direct benefit not only to the Plaintiff Schools, but also to the Department of Education.

A contract is a set of promises that the law can enforce. *Kostelnik v. Helper*, 96 Ohio St.3d 1, 2002-Ohio-2985, ¶16. "Essential elements of a contract include an offer, acceptance, contractual capacity, consideration (the bargained-for benefit and/or detriment, a manifestation of mutual assent and legality of object and of consideration." *Id.* (citation omitted). The construction of a written contract is a matter of law for the court. *Id.* at ¶42, citing *Alexander v. Buckeye Pipe Line Co.* (1978), 53 Ohio St.2d 241, paragraph one of the syllabus.

Section 15 of the Management Agreements states:

No Third Party Beneficiaries. This Agreement and the provisions hereof are for the exclusive benefit of the parties hereto and not for the benefit of any third person, nor shall this Agreement be deemed to confer or have conferred any rights, express or implied, upon any third person.

The White Hat Defendants bargained-for benefit, i.e., consideration (without which no contract can exist) amounts to 96% of the revenue per student received by the School from the State of Ohio Department of Education. Management Agreements, Section 8(a) (Emphasis added). The White Hat Defendants receive 100% of funds from federal grants, which the Department of Education also administers. *Id.*, Section 8(b). Simply put, without the Department of Education there is no money to pay the White Hat Defendants. To suggest that the Department of Education is not an intended third-party beneficiary of the Management Agreements flies in the face of the reality of the statutory framework under which they were executed and is nothing more than a thinly-veiled attempt to "have one's cake and eat it, too." See *Nationwide Mut. Ins. Co. v. Marsh* (1984), 15 Ohio St.3d 107, 111 (refusing to enforce an insurance policy provision calling for "binding arbitration" while at the same time allowing the insurer to treat the arbitration as "non-binding" if the award exceeded statutory minimum coverage limits).

Notwithstanding the language in Section 15, the Department of Education is an intended third-party beneficiary of the Management Agreements between the Plaintiff Schools and the White Hat Defendants; it therefore has enforceable rights under them. Accordingly, the White Hat Defendants' motion to dismiss the Department of Education's cross-claims for lack of subject matter jurisdiction is overruled.

B. *Failure to Join a Necessary Party*

A party that is necessary for a just resolution of a claim should be added to the case either by amending the complaint or by joining it as a necessary party. Civ.R. 15(A), 19(A). A dismissal for failure to join a necessary party is only warranted as a last resort. *Spurlock*, *supra* at 81.

The White Hat Defendants contend that the Department of Education's cross-claim must be dismissed because it has not joined a necessary party, namely the Auditor of State. Their argument is based on the incorrect premise that an "audit" under R.C. 3314.03(B)(8) and an "accounting" under R.C. 3314.024 are one and the same.

A charter school must keep the same financial records that the Auditor of State requires of school districts and authorizes the Auditor of State to conduct regular audits. R.C. 3314.03(B)(8). If a charter school pays a management company more than twenty per cent of its annual gross revenue, the management company "*shall provide a detailed accounting including the nature and costs of the services it provides to the [charter] school.*" This information shall be included in the footnotes of the financial statements of the school and be subject to audit during the course of the regular financial audit of the community school." R.C. 3314.024 ("Detailed accounting by management company; audits") (Emphasis added).

Statutes must be construed as a whole and interpreted to give effect to every word and clause. *Proctor v. Orange Barrel Media, LLC*, 10th Dist. No. 06AP-762, 2007-Ohio-3218, ¶16. "No part should be treated as superfluous unless that is manifestly required, and the court should avoid a construction which renders a provision meaningless or inoperative." *State ex rel. Myers v. Bd. of Edn. of Rural School Dist. of Spencer Twp., Lucas Cty, Ohio* (1917), 95 Ohio St. 367, 372.

R.C. 3314.03(B)(8) applies to all charter schools. R.C. 3314.024 applies only if a management company receives more than twenty per cent of the charter school's annual gross revenue. If so, the management company must (1) provide the charter school with a detailed accounting of those funds, including the nature and costs of the services it provides, and (2) include it in the information subject to audit by the Auditor of State.

These statutes exist independently of each other. To interpret them any other way would render R.C. 3314.024 superfluous, a result that the law does not allow.

Determining whether the White Hat Defendants provided the Plaintiff Schools with a detailed accounting pursuant to R.C. 3314.024 does not require the Auditor of State to be a party to this case. Accordingly, the White Hat Defendants' motion to dismiss for failure to join a necessary party is overruled.

C. *Failure to State a Claim*

A motion to dismiss pursuant to Civ.R. 12(B)(6) (failure to state a claim) is a procedural device to test the legal sufficiency of a complaint or cause of action. *State ex rel. Hanson v. Guernsey Cty. Bd. of Commrs.*, 65 Ohio St.3d 545, 548, 1992-Ohio-73. When reviewing a Civ.R. 12(B)(6) motion, the court must presume that all factual allegations of the complaint or cause of action are true and must make all reasonable inferences in favor of the non-moving party. *Mitchell v. Lawson Milk Co.* (1988), 40 Ohio St.3d 190, 192. Before the court may dismiss a complaint, it must appear beyond doubt that the plaintiff can prove no set of facts to support its claim that would entitle it to recovery. *O'Brien v. Univ. Community Tenants Union* (1975), 42 Ohio St.2d 242, 245.

The Department of Education has rights under the management agreements that are enforceable in court. It has not failed to join a necessary party. Therefore, when the Department of Education's cross-claims are viewed in the light most favorable to it, as they must be for purposes of this motion, it has stated claims for which the law can grant relief. Accordingly, the White Hat Defendants' motion to dismiss the Department of Education's cross-claims for failure to state a claim is overruled.

III. *Motions for Partial Summary Judgment*

Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Civ.R. 56(C). All evidentiary material must be viewed in a light most favorable to the nonmoving party. *Temple v. Wean United, Inc.* (1977), 50 Ohio St. 2d 317. Summary judgment is appropriate only when, after viewing the evidence most strongly in favor of the nonmoving party: (1) no genuine issue of material fact remains for trial; (2) the moving party is entitled to judgment as a matter of law; and (3) reasonable minds can come to but one conclusion, which is adverse to the nonmoving party. *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64, 66. Because summary judgment terminates litigation without a formal trial, courts should award it cautiously. *Norris v. Ohio Std. Oil Co.* (1982), 70 Ohio St.2d 1, 2.

A. *Summary of the Parties' Arguments*

The Plaintiff Schools and the Department of Education contend that some provisions of the management agreements "impermissibly delegate the Plaintiff Schools' decision-making authority" to the White Hat Defendants and ask the court to declare them void. The Plaintiff Schools also claim that they own the personal property, along with any leasehold improvements and fixtures purchased with federal grants, and have the right to assume the leases for the facilities at the management agreements' end. Although the Plaintiff Schools and the Department of Education filed separate summary judgment motions, each later filed a memorandum in support of the other's motion. Because the motions are interrelated, they will be addressed together.

B. Delegation of Statutory Authority

In *Perkins v. Bright* (1923), 109 Ohio St. 14, a school board awarded a contract to the lowest bidder even though the bid form did not list separate prices for labor and materials, as the statute required. The Supreme Court held that though the board had some discretion, the statutory bid requirements had to be satisfied before it could exercise that discretion to award a contract. "If any discretion is granted to the board, the phraseology of the statute, employing language mandatory in character, leaves that discretion to be exercised solely within the limited degree permitted by the statute." *Id.*, p. 18. "Boards of education are creations of statute, and their duties and authority are marked by legislation, and those who contract with them must recognize the limitations placed by law -- by the power that created such boards." *Id.*, p. 21.

In *Educational Servs. Inst., Inc. v. Gallia-Vinton Educational Serv. Ctr.*, 4th Dist. No. 03CA6, 2004-Ohio-874, a school board's contract with a corporation allowed the corporation to select and hire the district superintendent; the Supreme Court ruled the contract was invalid because the statute required the board itself to hire that person:

While the legislature may have intended to give school boards flexibility in filling the superintendent position, any flexibility must be exercised within the bounds of the board's statutory authority. The need for flexibility cannot justify board action that exceeds the powers granted to it by statute.

Id., ¶13. No matter how well intended the board's reasons for its actions may have been, the statute simply did not allow it to delegate its duty. Moreover, the Supreme Court expressly rejected the argument that the board's action was permissible because nothing in the Revised Code prohibited it:

This argument ignores the nature of a school board's authority. Under appellant's argument, a school board has the power to act unless a specific statutory restriction

prohibits it. However, as indicated, a school board's authority is limited to those powers expressly granted to it by statute, or clearly implied from it.

Id., at ¶15, citing *Hall v. Lakeview Local School Dist. Bd. of Edn.* (1992), 63 Ohio St.3d 380, 383.

In *Hamilton Local Bd. of Edn. v. Arthur* (Jul. 24, 1973), 10th Dist. No. 73AP-179,¹ a school board entered into a collective bargaining agreement that included a provision for binding arbitration. The Tenth District Court of Appeals held that although the law generally favors enforcement of arbitration provisions, a school board "may not, in the absence of statute, contract away its rights to make the ultimate determination of school policies, including those matters of salary, program, personnel, fringe benefits and others as set forth in the professional agreement with the attendant binding arbitration provisions as we have before us." Because at that time no law authorized a school board to enter into binding arbitration, the court ruled the contract provision was invalid.² See also, *Chagrin Falls Edn. Assn. v. Chagrin Falls Exempted Village School Dist. Bd. of Edn.* (Dec. 30, 1979), 8th Dist. No. 39992.³

A duty imposed by statute cannot be delegated. For example, a county treasurer cannot delegate a statutory duty to invest county funds. *Columbiana Cty. Bd. of Commrs. v. Nationwide Ins. Co.* (7th Dist. 1998), 130 Ohio App. 3d 8, 19. A city cannot delegate its duty to keep its roads safe. *Lattea v. Akron* (10th Dist. 1982), 9 Ohio App.3d 118, 121. A taxpayer cannot delegate the duty to timely file tax returns; while a taxpayer can hire someone to prepare a return, a failure to timely file always falls on the taxpayer, not on the preparer. *Tom Kelsey Motor Sales v. Limbach* (Mar. 29, 2001), 6th Dist. No.

¹ 1973 Ohio App. LEXIS 1777.

² In 1984, the General Assembly granted school boards the authority to enter into collective bargaining agreements that included binding arbitration. Sec. R.C. 4117.

³ 1979 Ohio App. LEXIS 11228.

L-90-024.⁴ Where a statute vests authority to remove employees in a village council, it could not delegate to the police chief the decision of which police officer to lay off due to budget cuts. *Toth v. Elmwood Place* (1st Dist. 1984), 20 Ohio App.3d 188, 190. A court cannot delegate its duty to determine what is in a child's best interest, notwithstanding the terms of the parties' shared parenting contract. *Jean-Paul L. v. Michelle M.*, 6th Dist. No. WD-06-040, 2007-Ohio-1042, ¶21.

Under the framework the General Assembly established for charter schools, the Department of Education approves, oversees and provides technical assistance to a charter school's sponsor. R.C. 3314.015. A charter school's curriculum, management, administration, financial controls, qualifications for teachers, and its plan to monitor academic and fiscal performance are among the many standards set by contract between its sponsor and its governing authority. R.C. 3314.03(A)(1)-(25). While a charter school's governing authority can contract with a management company for necessary services, the charter school's governing authority and its sponsor, not its management company, are accountable to the Department of Education for its performance. *State ex rel. Rogers v. New Choices Community School*, 2nd Dist. No. 23031, 2009-Ohio-4608, ¶56.

C. *Ownership of Property*

The parties disagree about ownership of personal property used in the charter schools' daily operations.⁵ Section 8(a) of the Management Agreements states:

Management, Consulting and Operation Fee. The School shall pay a monthly continuing fee (the "Continuing Fee") to the Company of Ninety Six Percent (96%) of the revenue per student received by the School from the State of Ohio

⁴ 1991 Ohio App. LEXIS 1339.

⁵ "Personal property" includes every tangible thing that is the subject of ownership, whether animate or inanimate, * * * that does not constitute real property * * *." R.C. 5701.03(A).

Department of Education pursuant to Title 33 and other applicable provisions of the Ohio Revised Code (the "Code") plus any discretionary fees paid under the Discretionary Bonus Program identified in paragraph 8(c) (the "Qualified Gross Revenues").

- i. Payment of costs. Except as otherwise provided in this Agreement, all costs incurred providing the Educational Model at the School shall be paid by the Company. Such costs shall include, but shall not be limited to, compensation of all personnel, curriculum materials, textbooks, library books, computer and other equipment, software, supplies, building payments, maintenance, and capital improvements required in providing the Educational Model. *It is understood that at the School's election, upon termination of this Agreement all personal property used in the operation of the school and owned by the Company or one of its affiliates and used in the operation of the school, other than proprietary materials owned by the Company, may become the property of the School free and clear of all liens or other encumbrances upon the School by paying to the Company an amount equal to the "remaining cost basis" of the personal property on the date of termination. In the event that School purchases the personal property it must purchase all of said personal property, except any proprietary materials, and must also exercise the School's option to lease the School facility pursuant to Section 12(b).*
- ii. Property owned by the School. *The property purchased by the School shall continue to be owned by the School. (Emphasis added.)*

The White Hat Defendants argue that this language means the personal property belongs to them at the end of the Management Agreements, but the Plaintiff Schools can buy it at its depreciated value, or "remaining cost basis." The Plaintiff Schools and the Department of Education argue that this interpretation is incorrect and unenforceable. The Department of Education urges the court to declare that the personal property is subject to a "public trust" because it was paid for with public funds.

Although a charter school does not belong to a school district and is subject to fewer regulations, it is by definition a political subdivision of the state. R.C. 2744.01(F); *State ex rel. Rogers* at ¶27. "The General Assembly has made it clear in R.C. 3314.01(B) that [charter] schools are public schools[.]" *Cordray v. International Preparatory School*, 128 Ohio St. 3d 50, 2010-Ohio-6136, ¶24 (Emphasis sic).

A "public office" is "any state agency, public institution, political subdivision, or other organized body, office, agency, institution, or entity established by the laws of this state for the exercise of any function of government." R.C. 117.01(D). As an entity established by the laws of this state for the exercise of a function of government, namely education, a charter school is a public office.

A "public official" is "any officer, employee, or duly authorized representative or agent of a public office." R.C. 117.01(E). Because a charter school is a public office, any officer, employee or duly authorized representative or agent is a public official. See, *Cordray*, ¶24, 25.

"All public officials are liable for all public money received or collected by them or their subordinates under color of office." R.C. 9.39. "Color of office" means "actually, purportedly, or allegedly done under any law, ordinance, resolution, order or other pretension to official right, power or authority." R.C. 117.01(A). Persons or entities in control of public funds are strictly liable. *Id.* Gt ¶12-13, citing *Seward v. Natl. Surety Co.* (1929), 120 Ohio St. 47, 49; *Crane Twp. ex rel. Stalter v. Secoy* (1921), 103 Ohio St. 258, 259-260. Public officials can still be held liable "even though illegal or otherwise blameworthy acts on their part were not the proximate cause of the loss of public funds." *Id.* at ¶14, quoting *State v. Herbert* (1976), 49 Ohio St. 2d 88, 96.

A governing authority may operate a charter school itself or may hire a management company to do so. R.C. 3314.01(B). Because a management company has no statutory authority of its own, its only source of authority is its contract with the charter school's governing authority. A charter school's management company is its duly authorized representative or agent; therefore, as a matter of law it is also a public official. R.C. 117.01(E).

The public funds a charter school receives from the Department of Education are "received or collected" under color of office. *Cordray*, ¶127. The funds a management company receives from a charter school are also public funds "received or collected" under color of office. As a public official that receives public funds under color of office, a management company of a charter school is liable for them. R.C. 9.39.

There is no dispute that the personal property at issue was purchased with public funds. Whether that personal property belongs to the Plaintiff Schools or to the White Hat Defendants when the Management Agreements end turns on a very precise legal issue: whether the purchasing authority that the Plaintiff Schools granted to the White Hat Defendants by contract can also serve to transfer title to the property from the Plaintiff Schools to the White Hat Defendants. This issue is not addressed in the parties' briefs. Each party shall file a supplementary brief on this issue within fourteen days of this entry, limited to ten pages (exclusive of authorities).

D. *Discretionary Bonus Program*

Section 8(c) of the Management Agreements provides for a discretionary bonus of "up to One Percent (1%) of the revenue per student received by the School from the State of Ohio Department of Education pursuant to Title 33 of the Ohio Revised Code." There is no evidence that any such bonus has been, or is about to be, paid. Thus, the

issue of whether this provision of the Management Agreements is enforceable is not ripe for adjudication. Accordingly, it will not be further addressed, as courts do not issue advisory opinions.

IV. Summary

For the reasons set forth above, the White Hat Defendants' motion to dismiss the Department of Education's cross-claims is overruled. The Plaintiff Schools' and the Department of Education's motions for partial summary judgment are sustained in part and overruled in part. Duties the General Assembly imposes by statute may not be delegated. A charter school is a public school, paid for with public funds. A charter school is a public office. A charter school's governing authority and its management company are public officials. The public funds paid to operate a charter school are received or collected under color of office. There is no need for the court to declare a "public trust" in favor of the Department of Education because the law already holds public officials accountable for the use of public funds.

Questions of fact remain on the Plaintiff Schools' claims for breach of contract and breach of fiduciary duty, and on the Department of Education's counterclaims and cross-claims for improper delegation of governmental authority and breach of grant conditions. A separate order will follow shortly scheduling this case for trial.

SO ORDERED.



John F. Bender, Judge

Service list on following page

Copies to:

James D. Colner, Esq.
Shumaker, Loop & Kendrick, LLP
41 South High Street, Suite 2400
Columbus, OH 43215
Counsel for Plaintiffs

Karen S. Hockstad, Esq.
Smith Haughey Rice & Roegge, P.C.
213 South Ashley Street, Suite 400
Ann Arbor, MI 48104
Counsel for Plaintiffs

Charles R. Saxbe, Esq.
Chester, Willcox & Saxbe LLP
65 East State Street, Suite 1000
Columbus, OH 43215
Counsel for Defendants

Todd Marti, Esq.
Assistant Attorney General
30 East Broad Street, 17th Floor
Columbus, OH 43215
Counsel for Ohio Department of Education