

ORIGINAL

IN THE SUPREME COURT OF OHIO

Hope Academy Broadway Campus, *et al.*, :
: Case No. 13-2050
Appellants, :
: On Appeal from the Franklin County
vs. : Court of Appeals, Tenth Appellant
: District
White Hat Management, LLC, *et al.*, :
: Court of Appeals Case No. 12AP-496
Appellees. :

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Table of Contents

	Page
Explanation of Why This Chase Is Not a Case of Public or Great General Interest	1
Statement of the Case and Facts	2
Legal Requirements Governing Community Schools	2
The Parties' Management Agreements	4
Interim Management Agreements Settle Underlying Claims	6
Legal Argument	7
<u>Proposition One Response:</u> The Schools' Proposition of Law No. 1 purports to identify sweeping legal principles concerning "public funds" in order to characterize their claims as involving issues of public concern.	7
<u>Proposition Two Response:</u> The Schools' Proposition of Law No. 2, purporting to provide that all property White Hat purchased under the Management Agreements was required to be titled in the names of the Schools, does nothing more than attempt to obviate a fundamental principle of contract law: that the plain, unambiguous terms of the parties' Management Agreements control.	9
<u>Proposition Three Response:</u> The Schools' Proposition of Law No. 3 purports to deviate from the requirements of R.C. Chapter 3314 and the express terms of the Management Agreements by asking the Court to create a fiduciary relationship between the parties.	11
Conclusion	14
Certificate of Service	15

EXPLANATION OF WHY THIS CASE IS NOT A CASE OF PUBLIC OR GREAT GENERAL INTEREST

In spite of Appellants' creative attempts to cast this controversy as one involving substantial fairness and policy issues, the fact remains that this is a breach of contract dispute, not a case of public or great general interest. The essence of this controversy was accurately stated by the Trial Court in its May 11, 2012, Order on Summary Judgment, which gave rise to this appeal:

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. (APX-23).

Both the Trial Court and the Court of Appeals properly concluded after extensive and detailed analysis that the contracts at issue were clear and unambiguous and should be enforced according to their terms. Appellants attempt to overcome the predictable results of interpreting unambiguous contracts by resorting to creative arguments completely lacking support in the law. The Court of Appeals pointed out on four (4) separate occasions in its Decision that the novel propositions advanced by Appellants were devoid of legal authority.¹

Appellants have not met the jurisdictional standard to establish that this matter is of "public or great general interest." Ohio Constitution, Article IV, Section 2; S.Ct.Prac.R. 2.1. As this Court long has held, "*the sole issue for determination ... is whether the cause presents a question or questions of public or great general interest as distinguished from questions of*

¹ "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." (APX-10). "The schools present no authority for the proposition that a contract cannot reference a defined variable outside of the contract." (APX-11). "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." (APX-12). "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, as we declined 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." (APX-16).

interest primarily to the parties.” *Williamson v. Rubich*, 171 Ohio St. 253, 254, 168 N.E.2d 876 (1960) (emphasis sic). Although Appellants purport to identify issues of general public concern, this matter merely presents a contract dispute that is of interest only to the parties. Moreover, where, as here, Appellants are “merely second-guessing the appellate court’s decision[,]” the jurisdictional threshold is not met. *Manigault v. Ford Motor Co.*, 96 Ohio St.3d 431, 2002-Ohio-5057, 775 N.E.2d 824, ¶ 18 (Lundberg Stratton, J., dissenting). “By rule and by necessity, that is not the role of this court.” *Id.*

STATEMENT OF THE CASE AND FACTS

The contract dispute presented in this case arises from Management Agreements between Appellants, Plaintiff Schools (the “Schools”),² and Appellees, Defendant White Hat entities (“White Hat”).³ Under the Management Agreements, White Hat served as the management company overseeing the day-to-day operations of 10 community schools.

Legal Requirements Governing Community Schools

Community schools are public schools which are privately-governed, independent of any school district. R.C. 3314.04(B). As such, they can tailor their programs to small student populations with specific educational needs. The operations and standards of community schools in fulfilling that mission are subject to the specific requirements under R.C. Chapter 3314.

² Appellants, Plaintiff-Schools, include Hope Academy Broadway Campus, Hope Academy Cathedral Campus, 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 of Lake Erie, n/k/a Lake Erie International.

³ Appellees, Defendant White Hat entities, include White Hat Management, LLC, WHLS of Ohio, LLC, 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.

Community schools are exempt from certain state laws, R.C. 3314.04, but they must comply with many state academic standards. R.C. 3314.03(A)(11). Contracts between community schools and their sponsors are subject to numerous specific requirements, including the school's educational programs, academic goals, performance and admission standards, teacher qualifications, facilities used and their locations, dismissal procedures, achievement of racial and ethnic balance within the community served, health care benefits for employees and disputes between the sponsor and the schools. R.C. 3314.03(A). The amount of money a community school can pay to its sponsor also is a function of law and is capped at 3% of the school's state funding. R.C. 3314.03(C). Community schools must present a comprehensive plan for the school to the sponsor. R.C. 3314.03(B).

Contracts for management services, including the Management Agreements between White Hat and the Schools, also are governed by specific laws. As reflects community schools' ability to tailor their programs, however, management contracts can be drafted to meet the needs of individual schools.

R.C. 3314.01(B) provides that a community school can contract for *any* service necessary for operation of the school. R.C. 3314.02(A)(8) provides for an "operator," or management company, like White Hat, to "manage[] the daily operations of a community school pursuant to a contract between the operator and the school's governing authority."

The amount a community school can pay to a management committee is not capped. Where, however, a management company provides services to a community school that amount to more than 20% of the annual gross revenues of the school, the management company is required to provide a detailed accounting in a footnote to the school's financial statements, which is subject to audit by the state auditor during the course of a regular financial audit of the school.

R.C. 3314.024. The termination of contracts between a management company and a community school is regulated under R.C. 3314.026. Under R.C. 3314.03, a community school is required to provide to its sponsor a comprehensive plan that specifies how the school will be managed and administrated, and the sponsor in turn is required to submit its contract with the school to the Superintendent of Public Instruction for approval.

Community schools, as opposed to their sponsors or management companies, retain responsibility for the school's academic, financial and regulatory performance. R.C. 3314.03; 3314.06.

The Parties' Management Agreements

The Management Agreements between the Schools and White Hat were entered into pursuant to the legal requirements of R.C. Chapter 3314. Under the Management Agreements, 95-96% of state funding to the Schools was to be paid to White Hat as management fees to operate the Schools. White Hat then was required to pay "*all costs* incurred" in operating the Schools. (APX-6). (emphasis added). The Management Agreements thereby shifted all the financial risk in operating the Schools to White Hat.

A significant part of the costs incurred by White Hat was the purchase of all equipment and fixtures used in operating the Schools. Specifically, the Management Agreements required White Hat to "purchase or lease all furniture, computers, software, equipment, and other personal property necessary for the operation of the School" and pay all costs "includ[ing], but not limited to, computer and other equipment, software, supplies" (APX-6).

Upon termination of the Management Agreement, the School could obtain all non-proprietary "personal property used in operation of the School . . . upon the School paying to [White Hat] an amount equal to the 'remaining cost basis' of the personal property on the date of

termination.” (APX-6-7). “[A]fter payment of the ‘remaining cost basis’ by the School,” White Hat was required to transfer title to or assign any leases in “any and all computers, software, office equipment, furniture and personal property” to the School. (APX-7) (emphasis added).

The Management Agreements recognized that certain property could be required by the funding source to be titled in the names of the Schools, not White Hat. In those instances, White Hat was required to purchase all such fixtures “on behalf of the School.” (APX-6). As opposed to property purchased by White Hat and titled to White Hat, any property purchased by the School would continue to be owned by the School. (APX-7).

The Schools now seek to circumvent the terms of these Management Agreements. As the Court of Appeals correctly determined, the terms of the Management Agreements at issue are unambiguous and provide that White Hat owns the personal property it purchased, subject to the Schools’ right under the agreements to acquire that property by paying the agreed-upon cost. (APX-9).

The Management Agreements expressly disclaimed creation of a partnership or joint venture. (APX- 16, 33). As the Court of Appeals determined, the Management Agreements did not create a fiduciary relationship between White Hat and the Schools. (APX- 16-17).

The Management Agreements fully complied with all laws regulating operators of community schools. As the Court of Appeals properly held, the terms of those Management Agreements are unambiguous. (APX-9). The Schools’ arguments are nothing more than an attempt to evade the terms of those Management Agreements and erroneously present an issue of contract interpretation with no application beyond the specific agreements between these parties as an issue of great public interest.

Interim Management Agreements Settle Underlying Claims⁴

On July 1, 2012, five of the Plaintiff Schools – 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, and Hope Academy West, n/k/a West Prep – entered into Interim Management Agreements (“Interim Agreements”) with Defendant White Hat. The terms of the Interim Agreements were substantively identical to each other and provided for White Hat to operate the facilities from July 1, 2012 to June 30, 2013. (Page 1). The Interim Agreements specified that they were intended to “replace and be a substitute for” the Management Agreements. (Page 1).

The Interim Agreements completely resolved the issues that formed the basis of this litigation by determining property ownership of real and personal property. The schools paid a “continuing fee” of 90% of the school’s state funding to White Hat to operate the schools. (Page 7). White Hat was required to pay “all costs” incurred in operating the schools. (Page 7). Under the Interim Agreements, each school “specifically disclaim[ed] any possessory interest in the School Facility beyond the term of this Agreement.” (Page 3). Property purchased with school funds would be titled in the name of the school and none of the continuing fee or any other funds of White Hat could be used to purchase school-titled property. (Pages 4 & 6). The Interim Agreements further specified that “*all property purchased by [White Hat] shall remain [White Hat]’s sole property at all times.*” (Page 8). (emphasis added).

The schools and White Hat agreed that “nothing in [the interim agreements] in any way prejudices their respective claims and defenses in [this case], *except for* [the schools]’ claims to possess the School Facility beyond the term of this Agreement or the [schools]’ possession of

⁴ The Interim Agreements have not been appended to this Memorandum in compliance with S.Ct.Prac.R. 7.03(B). They will be promptly submitted to the Court upon request.

personal property, *whenever acquired*, purchased by [White Hat] with non-grant or [White Hat] funds.” (Page 17). (emphasis added). By their express terms, the Interim Management Agreements render moot the very disputes between these entities and White Hat that the Schools now seek to bring before this Court.

LEGAL ARGUMENT

PROPOSITION ONE RESPONSE

The Schools’ Proposition of Law No. 1 purports to identify sweeping legal principles concerning “public funds” in order to characterize their claims as involving issues of public concern.

The Schools’ broad generalizations concerning “public funds,” however, ignore the simple fact that the Schools’ payment of funds to White Hat and White Hat’s duties upon receiving those funds are governed by the parties’ Management Agreements. The Management Agreements provided for payment of management fees to White Hat, from which White Hat would pay all costs associated with operating the day-to-day functions of the Schools. The laws regulating management of community schools permit such an arrangement. R.C. 3314.01(B) allows community schools to contract for “*any* services necessary for the operation of the school” and does not limit the terms or conditions of such contracts. R.C. 3314.01(B) (emphasis added).

Contracts between public and private entities, ““unless limited by positive provisions of statute law, are governed by the same principles as apply to contracts between individuals.”” *Cincinnati ex rel. Ritter v. Cincinnati Reds, L.L.C.*, 150 Ohio App.3d. 728, 2002-Ohio-7078, 782 N.E.2d 1225, ¶ 37 (1st Dist.) (quoting *Phelps v. Logan Natural Gas & Fuel Co.*, 101 Ohio St. 144, 148, 128 N.E. 58 (1920)). The terms of the parties’ Management Agreements therefore

control the relationship between the Schools and White Hat. *S&M Constructors, Inc. v. Columbus*, 70 Ohio St.2d 69, 71, 434 N.E.2d 1349 (1982) (“A Government contract should be interpreted as are contracts between individuals, with a view to ascertaining the intention of the parties and to give it effect accordingly, if that can be done consistently with the terms of the instrument.”) (quoting *Hollerbach v. United States*, 233 U.S. 165, 171-72, 34 S.Ct. 553, 58 L.Ed. 898 (1914)). The Schools offer nothing more than second-guessing of the Trial Court’s and Court of Appeal’s interpretation of those agreements. The Schools’ desire to avoid the terms of the Management Agreements affects White Hat and the relationship of the parties, but does not create an issue of general public interest.

The Schools do not identify a single law out of the entire chapter governing community schools to support their argument. Indeed, the Schools cannot identify any such law, because the Management Agreements between the Schools and White Hat were permitted under R.C. Chapter 3314. Instead, the Schools rely on *Oriana House v. Montgomery*, 108 Ohio St.3d 419, 2006-Ohio-1325, 844 N.E.2d 323, which held that the state auditor could conduct an audit of a private entity providing day-to-day management services to a correctional facility. Significantly, the director of the private entity in *Oriana House* also served as director for the public agency, which is not the case here. White Hat provided management services to the Schools; it did not replace the Boards of the Schools. In any event, the holding of *Oriana House* is inapplicable here because it is undisputed that White Hat – and other management companies performing services that amount to more than 20% of a community school’s state funding – is subject to audit by the state auditor under R.C. 3314.024 and was audited as provided by the statute.

The Schools do not, and cannot, assert that White Hat failed to comply with the terms of the audit statute, nor do the Schools explain why the statutory audit requirements are inadequate

to account for funds paid to management companies providing services to community schools. As this Court has recognized, “a court has nothing to do with the policy or wisdom of a statute. That is the exclusive concern of the legislative branch of the government.” *State ex rel. Ohio Congress of Parents & Teachers v. State Bd. of Educ.*, 111 Ohio St.3d 568, 2006-Ohio-5512, 857 N.E.2d 1148, ¶ 20 (holding that the community school statutes are constitutional; quoting *State ex rel. Bishop v. Mt. Orab Village Sch. Dist. Bd. of Edn.*, 139 Ohio St. 427, 438, 40 N.E.2d 913 (1942)). Had the Legislature wanted to provide for additional oversight beyond the numerous regulations it already imposed on community schools and their operators, it clearly could have. *Id.* at ¶¶ 5-10 (recognizing the extensive regulatory framework governing community schools and the frequent amendments to R.C. Chapter 3314 since enactment).

The Schools have identified no authority that would support their attempted end run around the extensive legal framework governing community schools nor the parties’ Management Agreements entered into pursuant to those laws. The Schools’ smoke-and-mirrors arguments cannot obscure the fact that they simply are trying to evade the terms of the Management Agreements. Their claim therefore is nothing more than a dispute over an unambiguous contract, which has no broader public application.

PROPOSITION TWO RESPONSE

The Schools’ Proposition of Law No. 2, purporting to provide that all property White Hat purchased under the Management Agreements was required to be titled in the names of the Schools, does nothing more than attempt to obviate a fundamental principle of contract law: that the plain, unambiguous terms of the parties’ Management Agreements control.

The Schools’ unsupported contention that all property purchased by White Hat for use in operating the Schools was required to be titled in the names of the Schools is contrary to the

terms of the Management Agreements, which expressly provide for the property to be titled in White Hat's name. The agreements further provide that the Schools can *obtain* title to such property by paying the agreed-upon cost. The Schools' argument does nothing more than seek to rewrite the parties' agreements, in violation of basic principles of contract interpretation. *Fultz & Thatcher v. Burrows Gp. Corp.*, 12th Dist. Warren No. CA 2005-11-126, 2006-Ohio-7041, ¶ 30 ("Principles of contract interpretation preclude a court from rewriting the contract by reading into it language or terms that the parties omitted.") (citation omitted).

The Management Agreements unambiguously provide that White Hat owns the property it purchased and that the Schools may obtain such property only by paying for it. This is the same outcome mandated by the July, 2012, Interim Agreements, which settled the claims of the five aforementioned schools by affirming White Hat's ownership of the personal property. As this Court repeatedly has held, "When the terms included in an existing contract are clear and unambiguous, we cannot create a new contract by finding an intent not expressed in the clear and unambiguous language of the written contract." *Hamilton Ins. Servs. v. Nationwide Ins. Cos.*, 86 Ohio St.3d 270, 273, 714 N.E.2d 898 (1999). *Accord Martin Marietta Magnesia Specialties, L.L.C. v. PUC of Ohio*, 129 Ohio St.3d 485, 2011-Ohio-4189, 954 N.E.2d 104, ¶ 25 (upholding "plain language" of the parties' agreements); *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 2003-Ohio-5849, 797 N.E.2d 1256, ¶ 11 ("When the language of a written contract is clear, a court may look no further than the writing itself to find the intent of the parties."); *Aultman Hosp. Ass'n v. Comm. Mut. Ins. Co.*, 46 Ohio St.3d 51, 55, 544 N.E.2d 920 (1989) (where "the parties following negotiations make mutual promises which thereafter are integrated into an unambiguous contract duly executed by them, courts will not give the contract a construction other than that which the plain language of the contract provides.") (citation omitted).

The Schools identify no authority that would prevent this fundamental principle of contract law from applying to the parties' Management Agreements. Indeed, this Court "ha[s] reiterated the importance of this concept as it applies to *education* . . . 'The right to contract freely with the expectation that the contract shall endure according to its terms is as fundamental to our society as the right to write and to speak without restraint.'" *Cincinnati City Sch. Dist. Bd. of Educ. v. Conners*, 132 Ohio St.3d 468, 472, 2012-Ohio-2447, 974 N.E.2d 78, ¶ 15 (emphasis added, quoting *Lake Ridge Academy v. Carney*, 66 Ohio St.3d 376, 381, 613 N.E.2d 183 (1993)).

The Management Agreements -- like any other contract -- are subject to enforcement pursuant to their terms. The Schools cannot, and do not, offer any authority under which this Court should deviate from this most basic principle of contract law.

PROPOSITION THREE RESPONSE

The Schools' Proposition of Law No. 3 purports to deviate from the requirements of R.C. Chapter 3314 and the express terms of the Management Agreements by asking the Court to create a fiduciary relationship between the parties.

The Schools contend that a fiduciary relationship between the Schools and White Hat was created "by contract and statute." That statement is incorrect as to both points. The parties' Management Agreements expressly provided that White Hat was an "independent contractor" and that the agreements did not create a partnership or joint venture between the parties. (APX-16, 33). Nor does the statute allowing a community school to contract with a management committee provide for the creation of a fiduciary relationship between the entities. *See* R.C. 3314.01 (allowing such contracts); 3314.024 (providing for audit by the state auditor of financial information of certain management companies).

Indeed, the Schools' contention that "[t]he management agreements placed White Hat in a position of superiority over the Schools, forcing the [S]chools to place their trust in them" is contrary to the requirements of R.C. Chapter 3314 and the parties' Management Agreements, which complied with those laws. Under the law, the Schools' governing authority – not White Hat – remained responsible for the Schools' academic, financial and regulatory performance. *See* R.C. 3314.03 (governing authority must adopt attendance policy, purchase liability insurance and annually prepare reports on activities and financial status of school); 3314.06 (requiring governing authority to adopt admission procedures). The terms of the Management Agreements complied with these legal obligations, providing that the Schools retained their governing authority and were solely responsible for overseeing the Schools, entering contracts on their own behalf, collecting and allocating their own revenues, maintaining their own business records and employing their own staff. The Schools prepared their own financial statements for submission to the State Auditor and even employed their own fiscal officer, who exercised judgment, wholly independently of White Hat, as to the Schools' business affairs.

The Schools accordingly do not, and cannot, point to any express provision of the Management Agreements or the community school laws to support their argument. The Schools instead ask the Court to go outside the terms of the agreements – and the requirements of R.C. Chapter 3314 – to create a fiduciary relationship between the parties. As this Court has recognized, however, *both* parties must “understand that a special trust or confidence has been reposed” for a fiduciary relationship to form. *Hoyt v. Nationwide Mut. Ins. Co.*, 10th Dist. Franklin No. 04AP-941, 2005-Ohio-6367, ¶ 30. To conclude, as the Schools urge, that despite the law and the unambiguous terms of the Management Agreements White Hat owed the Schools fiduciary duties would render the parties' expressed intent meaningless and impose fiduciary

duties on virtually any business relationship. *Id.* at ¶ 30 (“Ordinarily, a business transaction where the parties deal at arm’s length does not create a fiduciary relationship.”); *see also Slovack v. Adams*, 141 Ohio App.3d 838, 846, 753 N.E.2d 910 (6th Dist. 2001) (an ordinary business relationship between an insurance agent and client does not create a fiduciary relationship).

The Schools’ argument that White Hat was an agent and therefore fiduciary of the Schools likewise is unavailing. The existence of an agency relationship is evaluated by looking at “various factors,” which are applied within the context of the parties’ actions. *Hanson v. Kynast*, 24 Ohio St.3d 171, 175, 494 N.E.2d 1091 (1986). Although the Schools gloss over the express terms of the Management Agreement that provide that White Hat was an independent contractor, those terms are the critical factor in determining the parties’ understanding of the nature of their relationship. *See* 1 Restatement of the Law 2d, Agency, Section 220(i) (1958) (considering, “[i]n determining whether one is a servant or an independent contractor[,] . . . whether or not the parties believe they are creating the relation of master and servant.”)

Moreover, an agency relationship does not necessarily equate to a fiduciary relationship, as the Schools argue. As the Court of Appeals determined in *Constr. Sys., Inc. v. Garilikov & Assocs., Inc.*, 10th Dist. Franklin No. 11AP-802, 2012-Ohio 2947, ¶ 39, even where an entity acted as an agent, it “did not have decision-making power or authority” on behalf of the principal, “and thus a fiduciary relationship was not created.” *Accord Slovack*, 141 Ohio App. at 846 (insurance agent was not a fiduciary). The Schools’ contention also ignores the conduct of the parties, which did not engage in the types of actions that characterize an agency relationship. Significantly, the Schools were not parties to agreements White Hat made to purchase property for use in operating the Schools. Yet “one of the most important factors of the agency relationship is that the principal itself becomes a party to contracts that are made on its behalf by

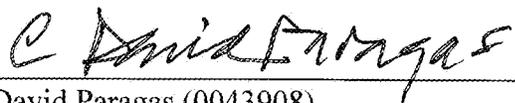
the agent.” *Cincinnati Golf Mgmt v. Testa*, 132 Ohio St. 3d 299, 2012-Ohio-2846, 971 N.E.2d 929, ¶ 23 (citing 2 Restatement of the Law 3d, Agency, Sections 6.01-6.03 (2006)). White Hat purchased the property, and accordingly held it in its own name, not as agent for the Schools.

The Schools’ argument is contrary to law and to the plain terms of the parties’ Management Agreements. Their attempt to use this Court to manufacture a fiduciary relationship the parties never intended does not present an issue of public or great general interest.

CONCLUSION

For the foregoing reasons, the Schools have not met the required jurisdictional standard to establish that this matter is of public or great general interest. The Court accordingly should decline jurisdiction.

Respectfully Submitted,



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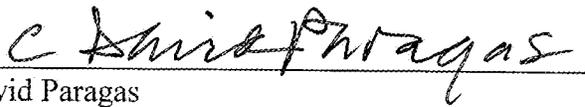
CERTIFICATE OF SERVICE

It is hereby certified that a copy of the foregoing was served via U.S. mail this 28th day of January, 2014, upon:

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