

ORIGINAL

IN THE SUPREME COURT OF OHIO

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

BRIEF OF AMICI CURIAE: LEADINGAGE OHIO, OHIO ASSOCIATION OF COMMUNITY ACTION AGENCIES, OHIO ASSOCIATION OF NONPROFIT ORGANIZATIONS, AND OHIO COMMUNITY CORRECTIONS ASSOCIATION IN SUPPORT OF APPELLEES WHITE HAT MANAGEMENT, LLC, ET AL.

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STATEMENT OF THE CASE AND FACTS

The Amici Curiae, LeadingAge Ohio, the Ohio Association of Community Action Agencies, the Ohio Association of Nonprofit Organizations, and the Ohio Community Corrections Association (collectively, “the Amici”), adopt the Statement of the Case and Facts which White Hat Management, LLC, *et al.* (“White Hat”) has submitted in its Merit Brief to this Court.

INTRODUCTION

This matter presents two important questions of public policy: whether the laws enacted by the General Assembly will be upheld as written, and whether valid contracts will be enforced according to their unambiguous terms. In the interests of the Amici and public policy, the Court should answer yes to both questions.

STATEMENT OF INTEREST OF THE AMICI

A. LeadingAge Ohio

LeadingAge Ohio is a nonprofit organization that represents approximately 400 nonprofit long-term care organizations located in more than 150 Ohio towns and cities, as well as those providing ancillary health care and housing services. Its mission is to ensure the success of not-for-profit providers serving frail and older adults. Member organizations serve more than 50,000 elderly Ohioans daily and employ more than 20,000 persons statewide. Not-for-profit providers of senior services include senior housing, both subsidized and market rate, adult day care, home- and community-based services, assisted living and skilled nursing. A majority of members are faith-based and provide many or all of these services. The majority of the members of LeadingAge Ohio receive public monies.

B. Ohio Association of Community Action Agencies

The Ohio Association of Community Action Agencies (“OACAA”) represents the interests of Ohio’s fifty community action agencies (“CAAs”) with the State of Ohio including the General Assembly and various state departments, as well as with the federal government both in the region and in Washington, D.C. CAAs provide education and training, emergency services, and other assistance programs to over 800,000 Ohioans annually, administering more than \$480 million in resources and employing more than 6,000 people. OACAA exists to support its members and to strengthen a unified community action presence in Ohio. This means working to keep Ohio’s CAAs in the lead in the fight against poverty through quality training programs, raising awareness of poverty in Ohio, and awareness of the successful programs member agencies have used to battle the causes and effects of poverty. All CAAs in Ohio receive public money through grants and contracts.

C. Ohio Association of Nonprofit Organizations

The Ohio Association of Nonprofit Organizations (“OANO”) was formally incorporated in 1994 in response to the needs of Ohio's nonprofit sector. Since then, OANO has served as a voice for nonprofits in public arenas; as a conduit of information about public policy issues that affect the nonprofit sector; as a resource for training and technical assistance; and as a source for affordable products and services. OANO's mission is to provide leadership, education, and advocacy to enhance the ability of Ohio's nonprofit organizations to serve their communities. OANO is the only statewide membership association that reflects the full diversity of the nonprofit sector in Ohio. OANO's members represent organizations of all sizes and mission areas, including arts and culture organizations, historical societies, homeless and battered women's shelters, agencies that provide services to children and families, community

development organizations, libraries, museums, food banks, and many other types of nonprofits. The majority of OANO's members receive public money through grants and contracts.

D. Ohio Community Corrections Association

The Ohio Community Corrections Association ("OCCA") is a professional organization that advocates for and assists community corrections providers to function more effectively. OCCA (formerly known as the Ohio Halfway House Association), was incorporated in 1973 to represent community corrections facilities throughout the state of Ohio, the needs of the courts, the Ohio Department of Rehabilitation and Correction, the offenders, and their communities. OCCA membership includes twenty-three member agencies that operate halfway houses and three Community Based Corrections Facilities. All of the OCCA's member agencies receive public monies.

Amici have direct interest in upholding statutory law and the enforceability of their contracts with public entities. The state routinely contracts with private entities to provide services, from road construction to community corrections to nursing home or hospital services. At no point have these contracts traditionally turned private entities into public officials. Nor have the public agencies receiving such services had the unlimited right to claw back payment for those services at their sole and arbitrary discretion.

The Court of Common Pleas and the Court of Appeals both properly held that the unambiguous terms of the Management Agreements between Appellants Hope Academy Broadway Campus, *et al.* ("the Schools") and Appellees White Hat are enforceable. The interests of Amici and other parties entering into valid contracts in Ohio dictate that same result. The Court of Appeals also properly held that once funds are paid to White Hat for the services it provides, those funds are private and subject to the statutorily-provided public accountability of

an audit. This Court likewise should uphold the statutory scheme governing the Management Agreements and decline the Schools' invitation to legislate from the bench.

LEGAL ARGUMENT

Response to Proposition of Law No. 1: The laws enacted by the General Assembly governing community schools should be upheld as written. There are strong public policy reasons to uphold statutory law, and this Court consistently refuses to legislate from the bench. It should do the same here.

Contrary to the Schools' assertions, there *is* public accountability for the funds paid to and spent by White Hat—its detailed accounting, including the nature and costs of the services it provided, was included in an annual audit by the state auditor. R.C. 3314.024. This is entirely consistent with the laws governing other private entities contracting with the state and the prescribed functions of the state auditor. *See* R.C. 117.10.

Moreover, the community school laws provide for even more accountability than the audit. The Schools themselves are subject to an annual audit and the Schools plan of operation, including its contract with White Hat, was required to be submitted to the Schools' sponsor and approved by the Superintendent of Public Education. R.C. 3314.03(A)(8). The Schools' sponsor also was required to meet regularly with the Schools' governing authority or independent treasurer to review the Schools' financial records. R.C. 3314.023. And the Schools' sponsor, not White Hat, was responsible for overseeing financial controls, as well as the educational standards — qualifications of teachers, academic goals and admission standards. R.C. 3314.03 and 3314.06.

Oriana House, Inc. v. Montgomery, 108 Ohio St.3d 419, 2006-Ohio-1325, 844 N.E.2d 323 (*Oriana House I*), despite the Schools' contention, does not mandate any result other than enforcing the community school laws as enacted. In *Oriana House I*, this Court upheld the

traditional function of the state auditor to audit a private entity receiving public funds in exchange for providing contracted-for services. Moreover, the Schools blatantly ignore this Court's parallel ruling in *State ex rel. Oriana House, Inc. v. Montgomery*, 110 Ohio St.3d 456, 2006-Ohio-4854, 854 N.E.2d 193 (*Oriana House II*), which held that under the functional-equivalency test, Oriana House was *not* a public entity for purposes of the Public Records Act. Therefore, *Oriana House I* and *Oriana House II* can only stand for the proposition that receipt of public funds may subject a private entity to audit by the state auditor, but does not render the private entity a public official for all purposes. This result is wholly consistent with the legal framework the General Assembly enacted to govern community schools.

By insisting White Hat, a management company, is a public official, the Schools seek to blur (and nearly eliminate) the line between a private entity and public entity created by the General Assembly. It is undisputed that a community school is a public office; it has a public official associated with it — its governing authority, which “may carry out any act and ensure the performance of any function that is in compliance with the Ohio Constitution, this chapter, other statutes applicable to community schools, and the contract entered into under this chapter establishing the school.” R.C. 3314.01(B). To stretch a community school's management company into a public official allows the governing authority to avoid its responsibilities in contravention of the statutory framework established by the General Assembly.

This Court should reject the Schools' vast expansion of public official status as it would undoubtedly impact other government contractors that receive public funds from a public office. For example, a private construction company or a nonprofit entity providing care for the frail elderly, when in receipt of public funds or grant money used to build a road or develop programming for the elderly, would be viewed as public officials according to the Schools. Such

clearly is a profound extension of the well-established, well-founded line between public and private and would result in unsettling other public entity and private entity relationships.

The Schools have identified no law that would allow them to usurp the functions of the state auditor or otherwise rewrite the laws governing community schools. Indeed, both the Schools and amicus curiae Ohio School Boards Association (“OSBA”) argue for community schools to receive substantially the same treatment under the law as traditional public schools. Yet community schools, by design of the General Assembly, are subject to an entirely different set of laws and are exempt from the laws and rules governing traditional public schools, except for those laws and rules granting rights to parents. R.C. 3314.04. Community schools were implemented specifically to provide for innovative educational options that would be free from the cumbersome restrictions governing traditional public schools. Community schools are expressly authorized to contract for *any* service they need to fulfill their missions, and beyond the audit requirement, there is nothing in the community school laws providing for operators to be treated differently from any other service providers. Indeed, the flexible framework for community schools to contract with an operator is precisely the flexible approach the General Assembly intended to promote in ““experimental educational programs[.]”” *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, ¶ 6, quoting Am.Sub.H.B. No. 215, Section 50.52, Subsection 2(B), 147 Ohio Laws, Part I, 2043.

The Schools are simply asking this Court to do what it routinely declines to do — legislate from the bench. As this Court recently held, however, “[i]t is not the role of the courts to establish legislative policy or to second-guess policy choices the General Assembly makes.” *Ohio Neighborhood Fin., Inc. v. Scott*, 2014-Ohio-2440, ¶ 38, citing *Kaminski v. Metal & Wire*

Prods. Co., 125 Ohio St.3d 250, 2010-Ohio-1027, 927 N.E.2d 1066, ¶ 61. The Court should rule similarly here. Public policy dictates no less. *Johnson v. Microsoft Corp.*, 106 Ohio St.3d 278, 2005-Ohio-4985, 834 N.E.2d 791, ¶ 14 (“The Ohio General Assembly, and not this court, is the proper body to resolve public policy issues.”) citing *State v. Smorgala*, 50 Ohio St.3d 222, 223, 553 N.E.2d 672 (1990).

Response to Proposition of Law No. 2: Valid contracts are enforceable pursuant to their unambiguous terms. Public policy requires the protection of contractual rights.

A. Public policy mandates enforcing contracts according to their unambiguous terms.

The private right to contract is fundamental, and this Court has recognized its “duty to defend the right to private contract.” *Hayes v. Oakridge Home*, 122 Ohio St.3d 63, 2009-Ohio-2054, 908 N.E.2d 408, ¶ 29. Parties do not lose those protections merely because a public entity is one of the contracting parties; contracts between private entities ““unless limited by positive provisions of statute law, are governed by the same principles as apply to contracts between individuals.”” *City of Cincinnati ex rel. Ritter v. Cincinnati Reds, LLC*, 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, 122 N.E. 58 (1920).

As the Court of Common Pleas and the Court of Appeals both held, the parties’ Management Agreements are enforceable by their unambiguous terms. Nothing in the law limited the parties’ right to contract, and the Management Agreements did not violate any laws.

The Court should not rewrite the terms of the parties’ lawful Management Agreements. Even where parties later regret the terms of their contracts or stand to lose money under the contract, this Court has zealously protected the enforcement of the contract. *See, e.g., Aultman Hosp. Assn. v. Community Mut. Ins. Co.*, 46 Ohio St.3d 51, 54–55, 544 N.E.2d 920 (1989)

(enforcing contract even where the hospitals “stand to lose significant amounts of money in the absence of judicial intervention” because “[i]t is not the responsibility or function of this court to rewrite the parties’ contract to provide for such circumstances.”). Nothing presented before this Court mandates an opposite result here, and the interests of parties in the finality and enforceability of their contracts presents significant public policy issues in favor of enforcing the Agreements.

Contracts between public entities and private entities are subject to the same protections as contracts between purely private entities, and public policy mandates the protection of their contractual rights and the enforcement of contracts pursuant to their unambiguous terms.

Moreover, the Schools’ request that this Court override the parties’ Management Agreements and title property in the Schools’ name in contravention of the parties’ agreements is nonsensical and unworkable. Allowing a public entity to claw back property purchased by the private entity to carry out its contractual obligations is disruptive to both entities. For example, a nursing home must purchase property such as beds and medical equipment to care for its elderly clients. Following completion of a contract with the Ohio Department of Medicaid, the nursing home cannot be expected to return that property simply because it received public funds as payment for services provided to those elderly clients. The nursing home’s ability to run its business would be severely hampered by this revolving door of equipment and it cannot be said that the Ohio Department of Medicaid has a practical interest in receiving the property, storing it, managing it, and somehow transferring it to a different user. Written agreements preserve stability in the market and outline a common expectation of outcomes. When the parties assign risk and obligations pursuant to agreement, they should be able to rely on their agreement.

Indeed, the result contemplated by the Schools and OSBA would turn public policy on its head by providing for the arbitrary result that a public entity, in its sole discretion, determines when a private entity “earns” a profit for the services it provides. Although Ohio courts consistently have held that contracts between public and private entities are subject to the same protections as contracts between private entities, the Schools’ proposed rule would wholly negate this long-standing principle. Contract terms between public entities and private companies would never be final; the fee paid to a private entity for services would be subject to a claw back by a public entity, in that entity’s sole discretion. This is contrary not only to the Court of Appeals’ holding in the analogous *State ex rel. Yovich v. Bd. of Edn. of Cuyahoga Falls City School Dist.*, 10th Dist. Franklin No. 91AP-1325, 1992 Ohio App. LEXIS 3323 (June 23, 1992) that fees paid to a private entity for services become private funds, but also public policy. No private entity will contract to provide services under such uncertain terms. Public policy encourages public entities to contract with private entities to provide services efficiently and cost-effectively. The Schools’ approach would have the opposite effect as private entities would be forced to raise their fees to account for the risk that the public entity, at any point, would decide the private entity could not earn a profit for its services.

Of course, the result urged by the Schools is unnecessary. Under traditional principles of contract law, the Schools (and any other public entity) have a remedy to enforce the private entity’s obligations under the contract — a lawsuit for breach of contract. Nothing in the community school laws nor traditional contract law requires a different result.

Failure to enforce the parties’ agreements according to their unambiguous terms globally threatens the long-standing relationship between government and private entities and will disincentivize private entities from such agreements. This disincentive will be detrimental to

Ohioans should private entities refrain from entering into agreements to provide services to Ohioans. Private entities, through contracts with public entities, provide a multitude of services to this State’s citizens—there is a long-standing partnership between private entities and public entities in meeting the needs of Ohioans. For example, public entities contract with: (1) community action agencies to provide child care and early childhood education programs, meals on wheels, and programs and facilities for senior citizens; (2) churches and other community agencies to operate food pantries; (3) halfway houses to manage corrections and addiction services in the community; and (4) hospitals, long term care facilities, home health agencies and other medical and social service providers to care for the indigent, sick, and the elderly. Without these agreements, these services and the needs of Ohio’s citizens (in some cases, Ohio’s most vulnerable citizens) are at risk. If this Court holds as the Schools request, these private entities and the Amici can have no confidence that their valid agreements will be enforced. It is in no one’s interest—private entities or public entities—to disincentivize private entities from contracting with public entities when a court may refuse to enforce plain, legally-sound, unambiguous agreements.

B. Valid contracts entered into between sophisticated parties are in no way “unconscionable.”

Amicus curiae OSBA urges this Court to find the parties’ Management Agreements “unconscionable,” both procedurally and substantively. Both arguments ignore the realities and risk involved in the Management Agreements.

The Schools were not financially naïve entities, nor were they mere instrumentalities of White Hat. The Schools had their own treasurer, prepared their own financial statements, had regular financial reviews by their sponsor, and made their own reporting to the state auditor. Indeed, the Schools do not raise an unconscionability argument, likely acknowledging that the

independent financial and legal advice they received from their treasurer and other professionals, including Board members, *was* sufficient.

Ohio courts consistently have held that contracts between sophisticated parties are not unconscionable. *See, e.g., Cleveland Constr., Inc. v. Gatlin Plumbing & Heating, Inc.*, 11th Dist. Lake No. 99-L-050, 2000 Ohio App. LEXIS 3215 (July 14, 2000); *4746 Dressler, LLC v. Fitzpatrick Enters.*, 5th Dist. Stark No. 2008 CA 00155, 2009-Ohio-4001, ¶ 38 (sophisticated business entities did not have unequal bargaining power). Indeed, this Court will guard private contract rights so zealously that even contracts between less sophisticated individuals and business entities are enforceable unless a party can prove a “quantum of both procedural and substantive unconscionability.” *Hayes*, 122 Ohio St.3d 63, 2009-Ohio-2054, 908 N.E.2d 408, ¶ 30 (upholding contract between 95-year old resident and nursing home as neither procedurally nor substantively unconscionable). Any suggestion that the Schools, armed with financial and legal advice from an independent treasurer and counsel could not appropriately enter into the Management Agreements, is contrary to well-settled precedent.

Further, OSBA’s plea that the Agreements were unconscionable ignores the effect of the Agreements to shift all financial risk of loss for operating the Schools from the Schools to White Hat. Such a result clearly benefitted the Schools both financially and legally. Nor did the Agreements violate any law. No legal precedent supports a finding that lawful contracts between sophisticated entities are procedurally or substantively unconscionable.

Response to Proposition of Law No. 3: A private entity providing services under contract with a public entity does not automatically become a fiduciary or agent of the public entity.

A. The parties' independent contractor relationship did not create a bilateral fiduciary relationship between them.

The Schools and White Hat provided in their Management Agreements that White Hat served as an independent contractor to manage the Schools. Nothing in the unambiguous terms of these Agreements created a bilateral fiduciary relationship between the parties, and public policy mandates enforcing the Agreements as written and upholding the business relationship as established by the parties.

The Schools' and OSBA's argument is that White Hat is an agent of the Schools and owed the Schools a fiduciary duty because of the type of services White Hat provided — operating community schools. The parties did not contract for a fiduciary relationship, however, and ordinary business relationships do not give rise to a fiduciary relationship. *Hoyt v. Nationwide Mut. Ins. Co.*, 10th Dist. Franklin No. 04AP-941, 2005-Ohio-6367, ¶ 30. Because a fiduciary relationship involves creation of special confidence and trust, its creation must be mutual, such that *both* parties “understand that a special trust or confidence has been reposed.” *Id.*

White Hat contracted with the Schools to provide a specific service — day-to-day management of the Schools. As such, White Hat was no different from numerous other vendors contracting to provide a specified service to a public entity, whether a construction company contracting to build a road, a halfway house contracting to manage corrections and addiction services on behalf of a local community, or a private bus company contracting to manage transportation services to school children. Nothing in these types of contracts creates an agency or fiduciary relationship, and finding that a private entity contracting to supply services to a

public entity is automatically a fiduciary, against all available evidence, would violate the plain terms of numerous otherwise valid, lawful contracts between private and public entities. It is in the interest of public entities to contract with private entities to efficiently and effectively provide services, and applying additional duties to private entities simply because they have contracted with a public entity would chill competition. Additional obligations come at an additional cost, which will ultimately be borne by the taxpayer, with minimal corresponding benefit.

To support their claim of a fiduciary relationship, the Schools and OSBA urge the Court to apply *Health Alliance of Greater Cincinnati v. Christ Hosp.*, 1st Dist. Hamilton No. C-070426, 2008-Ohio-4981. Unlike here, however, where the parties expressly disclaimed creation of a partnership or joint venture, the parties in *Health Alliance* specifically contracted for a joint venture. Of course, a joint venture, unlike an independent contractor relationship, *does* impose on each party special duties of trust and confidence. A joint venture, however, is a very different kind of relationship than an independent contractor relationship and by its operation creates an agency relationship. *State ex rel. Ohio Civ. Serv. Emps. Assn. v. State*, 10th Dist. Franklin No. 12AP-1064, 2013-Ohio-4505, 2 N.E.2d 304, ¶ 34 (stating a joint venture is an association of persons with intent, by express or implied contract, to engage in and carry out a single business adventure for joint profit, and each coadventurer is a principal, as well as agent, to each of the other coadventurers) citing *Al Johnson Constr. Co. v. Kosydar*, 42 Ohio St.2d 29, 325 N.E.2d 549 (1975), paragraph one of the syllabus, quoting *Ford v. McCue*, 163 Ohio St. 498, 127 N.E.2d 209 (1955), paragraph one of the syllabus. It is undisputed that a joint venture was not created by these parties, and *Health Alliance* accordingly is wholly inapplicable.

B. A private entity with no power to bind a public entity is not an agent of the public entity.

The Schools and OSBA contend that White Hat was an agent of the Schools, yet agency principles preclude this result.

As an initial matter, the Schools and OSBA have identified no evidence that the parties intended to create an agency relationship. *Berge v. Columbus Community Cable Access*, 136 Ohio App.3d 281, 301, 736 N.E.2d 517 (10th Dist.1999). Indeed, the best evidence of the parties' intent is the plain language of their contract, providing that White Hat was an independent contractor — and “an independent contractor need not be an agent.” *Id.*

Nor did the Schools exert the level of control over White Hat's services to establish agency. Public entities routinely contract with private entities to provide a wide variety of services, and those contracts do not create an agency relationship without actual indicia that the public entity controlled the means — not merely the object — of those services. *Compare id.* (CCCA was not an agent of the city even though the city provided the majority of its funding because CCCA, not the city, had authority over its programs and staff actions); *Hughes v. Ry. Co.*, 39 Ohio St. 461, 475 (1883) (private company hired by railway to construct a portion of a railroad was not the agent of the railroad company where railroad provided the specifications for the work and required the company to perform the work as described subject to the “direction from time to time, of the [railway's] engineer or his assistants”); *with City of Cincinnati v. Scheer & Scheer Dev.*, 169 Ohio App.3d 101, 2006-Ohio-1221, 862 N.E.2d 122, ¶¶ 25, 26 (1st Dist.) (company was an agent of the city where the city exercised “complete contractual oversight,” including sending “inspectors on the job every day to approve the work” and controlling the financial allocations and “the mode and manner of the work to be performed”).

Here, the Schools contracted with White Hat to administer the day-to-day operations of the Schools, including requiring White Hat to incur all costs for the purchase of the property it needed to manage the Schools — desks, computers, books and software. White Hat, not the Schools, had authority as to what property was purchased, from what vendors the property was purchased and at what price the property was purchased. The Schools remained interested in the ultimate result — operation of the Schools — but not the manner in which White Hat purchased the property it needed to administer the Schools.

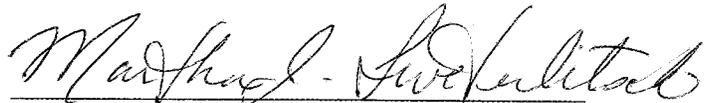
Significantly, White Hat never had authority to bind the Schools to the contracts for the purchase of the property, nor could White Hat's actions subject the Schools to third-party liability. As such, no agency relationship was established. “[O]ne of the most important features of the agency relationship is that *the principal itself becomes a party to contracts* that are made *on its behalf* by the agent.” (Emphasis added.) *Cincinnati Golf Mgt., Inc. 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). Here, White Hat purchased property in its own name and was solely responsible for paying the costs for that property. The Schools never had any liability for the property and were not bound by the contracts for the purchase of the property. Indeed, the Schools never listed the property as assets on the Schools' balance sheets nor identified any liabilities for balances due for the purchase of the property. Of course, that is because contracts routinely require private companies to provide (and pay for) the equipment needed to perform services for public entities. Food service vendors provide their own cooking equipment, refrigerators and gloves; janitorial services supply their own buckets and mops; road construction companies provide their own trucks, traffic cones and digging equipment; bus companies provide their own buses and garages. Once those contracts conclude, the public

entity does not (and legally cannot) claim ownership in those trucks, buses or mops. The result is no different here where White Hat purchased the desks and computers.

CONCLUSION

The Propositions of Law urged by the Schools are contrary to public policy, established precedent and threaten the interests of the undersigned Amici Curiae in contracting to provide much-needed services to public entities. The Amici Curiae urge this Court to affirm the decision of the Court of Appeals.

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 4th day of August, 2014, upon:

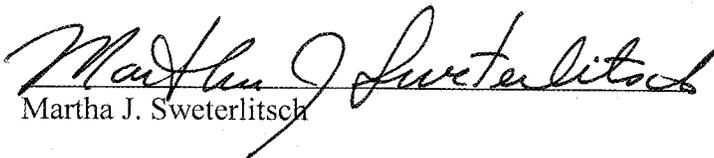
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