IN THE COURT OF COMMON PLEAS
FRANKLIN COUNTY, OHIO

STATE ex rel. OHIO ATTORNEY GENERAL,	)	Case No. 18 CV 007094
Plaintiff,	)	Judge Kimberly Cocroft
Vs.	)	**REPLY BRIEF OF DAYTON PUBLIC AND LOGAN HOCKING LOCAL SCHOOL DISTRICTS TO MOTION OF DISTRICTS TO INTERVENE**
WILLIAM LAGER, et al.	)	
Defendants.	)	

I. The School Districts have standing.

The AG opposes intervention on grounds that the School Districts lack standing because they are not a real party in interest. The justification for the AG's position is that the claims asserted belong to ECOT, and any recovery on the claims will go to ECOT's creditors.[1] The AG's argument fails on several fronts.

A real party in interest is the party "who possesses the right to be enforced." *Alternatives Unlimited-Special, Inc. v. Ohio Dep't of Edn.*, 168 Ohio App.3d 592, 600, 2006-Ohio-4779, 861 N.E.2d 163, 169, ¶19 (10th Dist.) (citing *In re Highland Holiday Subdivision* (1971), 27 Ohio App.2d 237, 240, 56 O.O.2d 404, 273 N.E.2d 903 (4th Dist.)). While ECOT does possess rights to be enforced, ECOT's closure accords these rights to the School Districts pursuant to O.R.C. § 3314.074(A), which authorizes distributions of the assets of a closed community school to the public school districts of students enrolled in that school.

[1] AG's Memo in Opposition to Intervention, p. 4.

Moreover, ECOT is not the only injured party here. The School Districts suffered their own injuries, which are specifically acknowledged and described in the AG's Complaint:

- "[ECOT] was **entrusted with immense amounts of public money, most of which came from other public schools.**" Complaint, p. 3 (emphasis added).
- "Real harm resulted from [ECOT's overbilling] – **every dollar of state funding ECOT received from overbilling came from school districts in this State.** *See* R.C. 3314.08." *Id.* (emphasis added).
- "The overbilling totaled more than **$79,640,000** since July of 2015 and **had real impacts on real districts.**" *Id.* (emphasis added).
- "The amount Groveport Madison [Schools] lost could have funded 15 teachers at its average salary level during the 2015-2016 school year. South-Western [Schools] had enough diverted to fund 26 teachers. The amount taken from Columbus [Schools] could have paid a whopping 130 teachers. Real kids suffered real deprivations." *Id.* at p. 4.
- Community schools operate on two types of public monies, one of which is State operating funds. **State operating funds "are transferred from the traditional school districts where the community schools' students reside.**" *Id.* at p. 5 (emphasis added).
- The Complaint seeks to distribute amounts recovered pursuant to O.R.C. § 3314.074, which dictates that the funds of a closed community school go to pay private creditors, the retirement funds of school employees, **and then the public school districts of students enrolled in the school** on a *pro rata* basis. *Id.* at p. 25 (emphasis added).

After making these statements less than two months ago, the AG's current contention that the School Districts do not have standing is absolutely absurd.

The AG further argues that the School Districts lack standing by painting his Complaint narrowly - claiming that the only causes of action being prosecuted lie only with ECOT. However, the AG's Complaint contradicts this assertion, by specifically conceding that not all of the claims in the Complaint belong to ECOT: "To the extent that the claims brought here belonged to ECOT …." *Id.* at p. 9.

II. The School Districts have demonstrated the requisite grounds for intervention of right pursuant to Rule 24(A).

A. The School Districts have a direct interest in the subject matter of this action.

The AG contends that the School District's interest in this case is remote and contingent and, therefore, is not sufficient to satisfy the direct interest in the subject matter of the litigation requirement of Civil Rule 24(A)(2). In making this assertion, the AG ignores that Rule 24 is to be liberally construed in favor of intervention. *State ex rel. Merrill v. Ohio Dep't of Natural Res.*, 130 Ohio St.3d 30, 2011-Ohio-4612, 955 N.E.2d 935, ¶41.

The primary case relied on by the AG is a 28 year old Franklin County Court of Appeals decision, *Fairview Gen. Hosp. v. Fletcher*, 69 Ohio App.3d 827, 591 N.E.2d 1312 (10th Cir. 1990).[2] *Fairview* held that a competing hospital did not have the interest necessary to intervene in Fairview's declaratory judgment action seeking a ruling that Certificate of Need law was not applicable to its request to re-designate its Neonatal Intensive Care Unit ("NICU"). The competing hospital's interest was that it might lose business if Fairview was granted permission to operate a NICU. *Id.* at 832, 591 N.E.2d at 1315. The competing hospital's interest was found to be too speculative to intervene because Fairview could only make its request for the NICU depending on how the declaratory judgment action concluded. *Id.* Unlike the interests in *Fairview*, there is nothing precluding the School Districts from pursuing these claims now.

The case at hand is much more similar to a recent decision in this court, *State ex rel. Walgate v. Kasich*, 2012 Ohio Misc. LEXIS 5354 (Franklin Cty. Common Pleas 2012). *Walgate* was

[2] *Fairview Gen. Hosp. v. Fletcher* relies on federal, not state, case law because in 1990, when the case was decided, there was very limited Ohio case law construing Civil Rule 24(A)(2). *Fairview Gen.*, 69 Ohio App.3d at 831, 591 N.E.2d at 1314. In 2018, a dearth of Ohio case law construing Rule 24(A)(2) is not an issue.

a declaratory judgment and writ of mandamus action against Governor Kasich, the State of Ohio, the Ohio Lottery Commission, the Ohio Casino Control Commission, and others, alleging that certain Ohio statutes governing lotteries were unconstitutional. The proposed intervenors were casinos and racetracks.

Walgate held that the proposed intervenors had sufficient and legitimate pecuniary interests as they had invested time and money, and denying the request to intervene would remove their ability to protect their investments. *Id.* Also noted by the *Walgate* court as relevant to its decision that the intervenors had an interest sufficient to intervene was that the relators-plaintiffs "would not suffer any harm by the addition of the intervenors." *Id.* at *9.

The School Districts' claims here are neither remote nor contingent. Like the intervenors in *Walgate*, they have lost massive amounts of money to ECOT since 2012, and denying their request would remove their ability to protect those funds. Further, the relator-plaintiff will not suffer any harm by the addition of the School Districts.

B. The AG will not adequately represent the School Districts herein.

1. The fact that Defendants William Lager, Altair Learning Management I, Inc. and IQ Innovations, LLC oppose the School Districts' Motion is evidence that the School Districts will be more zealous advocates than the AG.

Defendants William Lager, Altair Learning Management I, Inc., and IQ Innovations, LLC also oppose the Motion to Intervene, contending that the School Districts' participation will "unnecessarily strain and complicate these proceedings."[3] However, unnecessary strain and

[3] Memorandum Contra to Motion to Intervene.

complication are not among the factors to be considered when ruling on a motion for intervention as of right. Ohio Civ.R. 24(A)(2).[4]

Further, the mere fact that the Defendants oppose intervention by the School Districts because of "unnecessary strain" bolsters the School Districts' position that the AG will not adequately represent their interests. It appears that even some of the Defendants do not believe the AG will be as zealous an advocate for the School Districts as the Districts will be for themselves.

2. The AG is not even in the process of revoking ECOT-related professional educator licenses.

The public record of the AG's allegedly excellent job prosecuting claims against charter schools (attached to the AG's Memo Opposing Intervention as Exhibits 1A – 1D) cuts against him. Exhibit 1D touts the AG's success in revoking professional licenses based on misappropriations of charter school funds.

If the AG was truly out to help the School Districts, he would already be in the process of revoking professional licenses of educators associated with ECOT's misappropriations. Despite the fact that ECOT's overbilling totaled more than $79,640,000 and that it has been closed since January 18, 2018,[5] not a single ECOT-related educator license is the subject of revocation proceedings. The AG's professed zeal on behalf of public schools in this state for misappropriations of the School Districts' monies to ECOT is not genuine.

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[4] Undue delay or prejudice may be considered in addressing a motion for permissive intervention, not under intervention as of right. *State ex rel. Merrill v. Ohio Dep't of Natural Res.*, 130 Ohio St.3d 30, 39, 2011-Ohio-4612, 955 N.E.2d 935, ¶45. However, requests for permissive intervention also are to be liberally construed. *Freedom Mtge. Corp. v. Milhoan*, 7th Dist. No. 13 CO 15, 2014-Ohio-881, ¶63. *See also Merrill*, 2011-Ohio at ¶41 (citations omitted).

[5] Complaint, pp. 3, 14.

3. The AG has a history of deserting public schools in this type of proceeding, as shown by his inaction in another large community school fraud case.

In response to the School Districts' contention that the AG deserted them in a prior charter school mismanagement case, the AG distorts his performance to this Court. The AG claims he did not participate in the *Hope Academy Broadway v. White Hat Management* appeal to the Ohio Supreme Court because the Tenth District Court of Appeals held that his client, the Ohio Department of Education, was not a party to that appeal.[6] This is a blatant misrepresentation by the AG, as is evidenced by the ruling, which is attached hereto as Exhibit E.

Not only does that ruling fail to state that the AG is not a party, it denies White Hat's Motion to Strike the Department of Education's Brief and orders that the Department's Brief be considered as an *amicus* brief.[7] When the 10th District's ruling was subsequently appealed to the Ohio Supreme Court, the AG failed to even submit an *amicus* brief. Conveniently, the AG does not mention that the reason White Hat even moved to strike the ODE Brief was because ODE had not filed anything with the trial court in support of the Plaintiffs' summary judgment motion. *See* Exh. F, attached hereto. In other words, the AG's neglect in the *White Hat* case started before that case was even on appeal.

The School Districts do not want anything akin to what happened in the *White Hat* litigation to occur in this litigation. The School Districts will not randomly abandon these

[6] AG's Memo in Opposition, p. 8.
[7] A copy of the entry ruling on the Motion to Strike is attached.

claims like the AG did in the *White Hat* Action. Accordingly, the School Districts should be permitted to intervene.

4. Arguments made by the AG at a gubernatorial debate last week are further evidence that the AG is not an adequate representative of public school districts with respect to their claims against ECOT.

Mike DeWine succeed Richard Cordray as Ohio Attorney General, taking office in January of 2011. DeWine has been the AG for the past 7-1/2 years.

At a gubernatorial debate on October 8, 2018, the AG criticized Cordray for not taking action against ECOT in 2010 when Cordray was Ohio's Attorney General.[8] According to DeWine, a state audit from December 2009 should have prompted Cordray to sue ECOT in 2010.[9]

A necessary corollary to this reasoning by DeWine (that Cordray should have gone after ECOT back in 2010) means that DeWine failed the public schools in this state by not pursuing ECOT back when he took office in 2011. DeWine, moreover, waited 7-1/2 years - until August of 2018 - to do so. By waiting so long, the AG permitted ECOT and its officers to continue to bilk the School Districts and the children of this state of many millions of dollars of lost educational opportunities.

It is painfully obvious why the School Districts do not find the AG to be an adequate representative.

Respectfully submitted,

[8] https://www.dispatch.com/news/20181014/capitol-insider-cordray-dewine-both-trip-over-facts-during-cleveland-debate
[9] *Id.*

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CERTIFICATE OF SERVICE

I hereby certify that on the 16th day of October, 2018, a copy of the foregoing was filed electronically. Notice of this filing will be sent to all parties who have made an appearance by operation of the Court's electronic filing system and those parties may access the filing through the Court's system. I hereby certify that a copy of the foregoing also was sent by regular U.S. mail to the following:

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IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Hope Academy Broadway Campus et al.,	:	
Plaintiffs-Appellants/ [Cross-Appellees],	:	
	:	No. 12AP-496
White Hat Management, LLC et al.,	:	(REGULAR CALENDAR)
Defendants-Appellees/ [Cross-Appellants].	:	

JOURNAL ENTRY

The November 20, 2012 motion of the Ohio Coalition for Quality Education for leave to file a brief, amicus curiae, on behalf of appellants is granted. Appellees' November 20, 2012 motion to strike the brief of the Ohio Department of Education is denied. The Ohio Department of Education's brief shall be considered by the court as an amicus brief. The Ohio Department of Education will not be permitted to argue on behalf of appellants' positions absent agreement by all parties.

Judge Judith L. French

Judge G. Gary Tyack

Judge Lisa L. Sadler

cc: Clerk, Court of Appeals
Chad A. Readler, Esq.
Kenneth M. Grose, Esq.

EXHIBIT
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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[redacted]960000
   Document Title: 11-20-2012-MOTION FOR LEAVE TO FILE
   Disposition: 3201

2. Motion CMS Document Id: 12AP0004962[redacted]940000
   Document Title: 11-20-2012-MOTION TO STRIKE
   Disposition: 3200

IN THE COURT OF APPEALS OF FRANKLIN COUNTY, OHIO
TENTH APPELLATE DISTRICT

HOPE ACADEMY BROADWAY CAMPUS, et al.,	:	
Appellants,	:	Court of Appeals Case No. 12APE-496
v.	:	(REGULAR CALENDAR)
WHITE HAT MANAGEMENT, LLC, et al.,	:	Appeal from Franklin County Common Pleas
Appellees.	:	Case No. 10-CVC-05-7423

APPELLEES' MOTION TO STRIKE OHIO DEPARTMENT OF EDUCATION'S MERIT BRIEF

Appellees, by and through their counsel, respectfully move this Court pursuant to Appellate Rule 15, to strike the filing of the "Merit Brief" filed by Ohio Department of Education on October 9, 2012. A memorandum in support of this motion is attached.

Respectfully submitted,

/s/ Charles R. Saxbe

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MEMORANDUM IN SUPPORT

I. Introduction

Ohio Department of Education ("ODE") is a defendant in the trial court, Case No. 10-CVC-05-7423. On June 11, 2012, Plaintiff-Appellants Hope Academy Broadway et al. (hereinafter "Plaintiffs" or "Plaintiff School Boards") filed a Notice of Appeal from the trial court's Decision (the "Decision") filed May 11, 2012, which resolved a summary judgment motion filed by Plaintiffs on February 21, 2012. ODE did not file a motion, and it not join in Plaintiffs' motion. ODE filed no memorandum in the trial court regarding that motion.

Although ODE did not file a notice of appeal from the Decision, it nevertheless filed a "Merit Brief" supporting the position of Appellants on Oct. 9, 2012. ODE is not a party to this appeal, and has neither sought nor received leave to file an amicus brief. Thus, ODE, under the circumstances, cannot be afforded an opportunity to file a brief. This Court should strike ODE's brief as it is improperly before this Court.

II. Law and Argument

"If two or more persons are entitled to appeal from a judgment or order of a trial court and their interests are such as to make joinder practicable, they may file a joint notice of appeal, or may join in appeal **after** filing **separate** notices of appeal * * *." Ohio Rules App. P. 3(B) (emphasis added.) ODE's interests on appeal, as in the trial court, align with Appellants. Therefore, if ODE wished to perfect an appeal, it could have filed a joint notice of appeal with Plaintiffs, or filed its own notice of appeal. ODE did neither. The fact ODE is a party in the trial court does not automatically make it a party to this appeal.

The appellate rules allow for an appellant's brief, an appellee's brief, and a reply brief. Ohio R. App. P. 16. ODE is neither an appellant nor an appellee. As a non-party, it has no standing to file a brief.

Moreover, ODE did not file as an amicus curiae, as it did not follow the proper procedure. "A brief of amicus curiae may be filed only if accompanied by written consent of all parties, or by leave of the court granted on motion * * *." Ohio Rules App. P. 17. ODE neither sought the consent of the parties nor leave of this Court.

III. Conclusion

ODE is not a party to this appeal. It filed its brief without any authority. This Court should therefore strike ODE's Merit Brief, as it is not properly before this Court.

Respectfully submitted,

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A copy of the foregoing was served via the Court's electronic filing system this 20th day of November, 2012, upon the following:

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