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**IN THE SUPREME COURT OF FLORIDA**
**CASE NO.: SC13-1934**

**FROM THE**
**ELEVENTH COURT OF APPEALS CASE NO.: 12-14271**

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**FLORIDA VIRTUALSCHOOL**

**APPELLANT,**

**vs.**

**K12, INC., ET AL**

**APPELLEES.**

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**ON REVIEW OF A CERTIFIED QUESTION FROM THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT**

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# INITIAL BRIEF OF APPELLANT FLORIDA VIRTUALSCHOOL

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## STATEMENT OF THE CASE AND FACTS

This appeal arises from an October 10, 2013 opinion from the United States Court of Appeals Eleventh Circuit, which certified a question of Florida law to the Florida Supreme Court.[1] The lawsuit leading to the Eleventh Circuit appeal was initially filed in the Federal Court of the Middle District of Florida by Florida VirtualSchool ("FLVS")[2] on May 18, 2011. R 1. FLVS originated in a competition for online education solutions won by a teacher from the Orange County Public Schools named Julie Young in 1997, and Ms. Young is the President and Chief Executive Officer of FLVS to this day. From these humble beginnings, FLVS began to grow quickly. From over 10,000 students in its early days, (the 2002-2003 school year), FLVS grew rapidly to over 40,000 students in the 2005-2006 school year. R 55-1, ¶ 19; R 30-16, pgs. 17-18. By the 2010-2011 school year, FLVS had over 180,000 students enrolled and employed over 1,000 instructors. Id. and R 55-1, ¶ 9. The FLVS website receives over half a million unique visitors every month as of October of 2012 (R 55-1, ¶ 16), and it has developed a full K-12 curriculum available to both part-time and full-time students

[1] The Eleventh Circuit Briefs and the appellate record were transmitted to this Court. The briefs are referred to herein by the name of the brief and citations to the appellate record are referred to using the "R __" format that refers to the trial court's docket numbers for the record.

[2] FLVS was the appellant to the Eleventh Circuit and is, by agreement of the parties, the movant in these proceedings.

throughout the United States and more than 57 countries. R 55-1, ¶ 4; R 52-9, p. 15; R 52-10, p.3.

When FLVS was already well-established as the online education provider in Florida, Defendants K12, Inc. and its wholly-owned subsidiary, K12 Florida, LLC (collectively "K12") entered the Florida market in the 2003-2004 school year.[3] Despite knowing that FLVS was already providing educational services under the FLVS and FLORIDA VIRTUALSCHOOL marks[4] (R 55-16, pgs. 5-6), K12 adopted the nearly identical FLVA and FLORIDA VIRTUAL ACADEMY marks for their very similar educational services. R 55-1, ¶ 18-19. Although K12's program was initially very small and in a tightly-capped pilot program (R 55-1, ¶ 20), serious actual confusion began to occur as K12 expanded over time. Some of the best evidence of this actual confusion comes from K12's own employees, such as Lori Crunden, who made the following admission: "I know when you Google Florida virtual schools our [K12's] website pops up first so we get a lot of those calls of parents that are confused." R 55-2, p. 19, lns. 3-10; R 55-3, p. 3 (emphasis and parenthetical added). Her admission on this point is borne out by Defendants' call logs that show actual confusion occurring over and over. R

[3] Prior to this pilot test program, FLVS had been the exclusive online public education option in Florida. R 55-1, ¶ 17 - 19.

[4] These are referred to collectively as the "FLVS marks."

55-2, p. 36; R 55-4; R 55-2, p. 41; R 55-5; R 55-2, p. 45; R 55- 6; R 55-2, p. 53; R 55-7; R 55-2, p. 61; R 55-8.

Even one of FLVS' own employees was actually confused. When one employee asked FLVS why his daughter was not receiving sufficient attention, he had to be informed that his "daughter is not taking courses with FLVS, but with FLVA, our competitor in the full time space." R 55-1, ¶ 25 and 55-1, pgs. 12-16 (emphasis added). This confusion even spread to journalists who had to be "walked through the differences between FLVA and FLVS" by K12. R 55-12. Actual confusion was also confirmed with school district employees (R 55-10) and was confirmed by the Florida Department of Education. R 55-13, p. 72, l. 22 – p. 73, l. 10. K12, therefore, knew full well that the FLVA and FLORIDA VIRTUAL ACADEMY marks were causing actual confusion.

Despite such knowledge, Defendants selected the even more confusingly similar[5] FLVP and FLORIDA VIRTUAL PROGRAM names when they emerged from the pilot project and were allowed to compete generally in the State of Florida. R 55-1, ¶ 20; R 30-5, Answer 2. These changes continued the actual confusion and likely made it worse. After the change, K12 employee, Jessica Juliano, asked for a K12 website change in the "title tag for Florida from FLVP to

[5] There is evidence that at least some people were phonetically sounding out FLVA as "flayvah." (R 55-13, p. 63, lns. 17-21). No such distinction was available for the FLVP mark.

K12 Florida" because "[w]e have enough confusion between FLVP and FLVS." R 55-15, pgs. K12_0089496-497 (emphasis added). In addition to the confusingly similar names, K12 also copied the colors from FLVS' website, thus furthering the confusion caused by the names. R 55-1, ¶ 22. These choices have created widespread actual confusion, to K12's benefit and FLVS' detriment.[6]

If there were any remaining doubt that K12's intentional actions have resulted in widespread actual confusion, it is resolved by the consumer confusion study conducted at FLVS' request. After survey participants were shown pages from FLVS' website, K12's website and two other providers' websites, the survey demonstrated that a full third of the respondents seeing websites with K12's and FLVS' highly similar names believed they were the same entity. (Expert Report of Robert Klein at R 55-14, p. 17). Even after these numbers are adjusted for possible "noise" (i.e., people who might be confused by something other than the school names), the percentage of those confused remains a robust 26.3 percent, or 1 in every 4 consumers. Id., p. 17.

These actions by K12 left FLVS with little choice but to file a lawsuit against K12 for infringement of federally registered service marks under 15 U.S.C.

[6] There is strong evidence that K12 has misrepresented its performance and services. See the *Hoppaugh v. K12, Inc. et al*. 1:12-cv-00103-CMH-IDD case that was pending in the Eastern District of Virginia (a shareholder derivative suit against K12 for misrepresenting student performance) and *Johnson v. Burmaster*, 2008 WI App 4, P22-P23 (Wis. Ct. App. 2007).

§ 1114 (2013) for unfair competition under 15 U.S.C. § 1125 (2013) (Section 43(a)), and unfair competition under the common law of the State of Florida.[7] The district court had jurisdiction under 28 U.S.C. §§ 1331 and 1338 (2013).

Instead of responding to the lawsuit by explaining why it intentionally chose a series of marks that have led to so much actual confusion, K12 mounted a collateral attack on FLVS' standing using an erroneous interpretation of the FLVS statute in a motion to Dismiss and For Summary Judgment filed on May 5, 2012 (R 30). K12's argument is that the DOS, not FLVS, owns the FLVS marks on behalf of the State of Florida and that FLVS generally lacks the authority to protect its rights in court because the FLVS enabling statute (§1002.37, Fla. Stat. (2013)) does not include an express grant of the right to "sue and be sued." K12 then built on the DOS ownership argument by claiming the DOS' alleged failure to exercise control over the FLVS marks requires that they "be deemed abandoned, the licenses thereto should be deemed void, and the Registrations …should be cancelled." (R 42, pgs. 2-3). If K12 is correct, FLVS' extensive trademark rights and the wide-ranging commercial licenses granting rights in those marks and other intellectual property could be completely destroyed. The trial court, however, did not reach the abandonment issue or FLVS' standing to sue generally, and instead

[7] An additional count for cyberpiracy against Name Administration, Inc. was dismissed following settlement.

dismissed the case without prejudice after finding FLVS does not own the FLVS' marks. R 56.

On August 13, 2012, FLVS timely appealed the Summary Judgment Order to the United States Court of Appeals Eleventh Circuit. R 57. There were two central issues in dispute before the Eleventh Circuit: (1) whether FLVS holds the FLVS marks on behalf of the State of Florida as the owner of the marks and (2) whether FLVS has standing to protect the FLVS marks in litigation. Following full briefing and oral argument, the United States Court of Appeals for the Eleventh Circuit issued an opinion certifying a question to this Court (the "Certifying Order") on October 10, 2013.

It appears the Eleventh Circuit understands that the first question regarding trademark ownership should be resolved in FLVS' favor, as the Certifying Order notes that:

> Florida VirtualSchool's right to acquire, enjoy, use, license, and dispose of trademarks, as set forth in § 1002.37(2)(c), would appear to fully encompass the rights attendant to ownership[.]

Certifying Order, p. 6. Instead of certifying questions on both issues before it, the certified question relates only to the second issue being disputed before the Eleventh Circuit as follows:

> Does Florida VirtualSchool's statutory authority to "acquire, enjoy, use, and dispose of…trademarks and any licenses and other rights or interests thereunder or therein" necessarily include the authority to

bring suit to protect those trademarks, or is that authority vested only in the Department of State?

Following receipt of the Certifying Order, this Court issued a briefing schedule for the certified question, and this Initial Brief is being submitted to the Court in accordance with that schedule.

## SUMMARY OF ARGUMENT

The above certified question should be answered in the affirmative with a finding that FLVS has the right to bring suit to protect the FLVS marks. K12 is attempting to deprive FLVS of standing primarily by arguing that the FLVS enabling statute[8] does not expressly grant it the right to "sue or be sued," which allegedly indicates a legislative intent that FLVS not have the right to protect its commercial and intellectual property interests. This erroneous effort to divine legislative intent is entirely insufficient to deprive FLVS of standing to protect its rights. First, this Court has repeatedly held that public entities with broad commercial rights, such as FLVS, have the power to protect those rights in court without an express provision authorizing them to sue and be sued (Section I).

Second, the FLVS statute provides FLVS with "all the powers of a body corporate," and this Court has previously held that corporate powers include the power to bring suit. This grant of corporate powers is sufficient, by itself, to give FLVS standing to protect its marks in court, and there is no basis for interpreting

[8] § 1002.37, Fla. Stat. (2013).

"all the powers of a body corporate" to mean something less than all the powers. (Section II).

Third, the issue before the Court is not whether there is a remedy for infringement of the FLVS marks; it is, instead, who between FLVS and the Florida Department of State (the "DOS") has the right to pursue that remedy on behalf of the State of Florida. A finding that the FLVS marks are included in the marks owned and policed by the DOS creates irreconcilable conflicts between the rights granted to FLVS and to the DOS. To resolve that conflict, the Court should find that the later enacted, specific FLVS statute is an exception to the earlier enacted, general DOS statute. When the FLVS statute is properly construed as a specific exception to the DOS statutes, the DOS has no obligation to manage and police the FLVS marks. That authority lies solely with FLVS. (Section III).

Fourth, none of the arguments advanced by K12 and referenced in the Certifying Order[9] are sufficient to deprive FLVS of standing. Specifically, (1) the DOS statute cannot apply to the FLVS marks because such an interpretation creates conflicts between the FLVS and DOS statues (Section III), (2) there is no requirement for the FLVS statute to expressly grant the right to sue and be sued, as that power is necessarily implied in the broad grant to FLVS of the right to engage in commercial and intellectual property activities (Sections I and V), (3) the

[9] Certifying Order, pgs. 7-8.

comparison of the FLVS statute to other statutes provides no evidence of legislative intent where the statutes are so remarkably different (Section II(C)), and (4) nothing in the cited opinions from the Florida Attorney General conflicts with FLVS' positions (Section IV).

Fifth, the comprehensive grant to FLVS of the power to "acquire, enjoy, use and dispose of" trademarks[10] makes FLVS the owner of those marks on the State's behalf. Courts throughout the history of U.S. jurisprudence have found that this language defines what it means to be an owner, and K12 has failed to identify any authority where an entity with all of these rights is less than the owner. These ownership rights along with the right to license the marks, the exclusive right to financially benefit from the marks and "any other rights or interests thereunder or therein"[11] necessarily includes the power to protect each of those rights in court. (Section V).

Any one of these reasons is sufficient to find FLVS has standing to protect the FLVS marks in court, and such standing is necessary to avoid the grave consequences of a ruling in K12's favor. A ruling in K12's favor will create conflicts in the Florida statutes in which FLVS and other similarly situated entities will not know whether they or the DOS has the authority to take a variety of

[10] § 1002.37(2)(c), Fla. Stat. (2013).

[11] Id.

actions with respect to their intellectual property. Each of these entities will also run the risk that their intellectual property rights could be deemed abandoned, thus destroying highly valuable assets of the State, on the theory that the DOS should have been controlling and enforcing those assets but has failed to do so. A decision finding FLVS has the right to enforce the FLVS marks eliminates all of these problems, preserves valuable State assets and eliminates conflicts in the Florida Statutes.

## ARGUMENT

### I. The commercial and intellectual property rights granted to FLVS include the power to protect those rights in court.

There are no provisions anywhere in the FLVS statute affirmatively depriving FLVS of standing to litigate. Nor is there anything inherent in the language conveying the right to "acquire, enjoy, use and dispose of" intellectual property rights that deprives it of authority to protect those rights. To deprive FLVS of standing, K12 argues that an express grant of the power to "sue or be sued" is a *per se* requirement for a state entity in Florida to have standing to sue. Eleventh Circuit Response Brief, pgs. 23-24.[12] This Court has already considered

[12] K12 also argues that FLVS lacks standing because it is not the owner or even the exclusive licensee of the FLVS marks. Trademark ownership is not required to litigate unfair competition claims, and this argument would, at most, eliminate standing only for the first count of the complaint for infringement of a registered trademark. The reasons why K12's argument is wrong are addressed in Section V.

and repeatedly rejected this argument in a line of mostly school district cases dating back over 80 years. In *First Nat'l Bank v. Board of Public Instruction*,[13] the county school board raised the very argument being made by K12 in this litigation: that it was immune from suit "because there is no specific legislative authority authorizing such Board to sue and be sued." *First Nat'l Bank*, 93 Fla. at 189. This Court considered and rejected that argument:

> There is no specific statute authorizing the Board of Public Instruction to sue and be sued, but when the Legislature created this Board a corporation, and authorized it to contract, to borrow money, to create obligations and to deal as an entity with the business would within limitations prescribed, there are certain implied powers which flow to the corporation and implied obligations which rest upon the corporation as definitely and surely and as firmly as if the same had been specifically stated in Legislative enactment. It is undoubtedly true that legal contracts entered into with the Board of Public Instruction of a County may be enforced by the Board.

*First Nat'l Bank*, 93 Fla. at 190. Similarly, in *Klemm v. Special Road & Bridge Dist.*,[14] the issue was again whether state entities could be involved in litigation where "the statutes creating the districts do not in terms provide that they may sue or be sued[.]" *Klemm*, 139 Fla. at 324. Again, this Court found the state entity had the power to sue and be sued without any need for an express declaration of that right in the districts' enabling statutes:

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[13] 93 Fla. 182, 186 (Fla. 1927)
[14] 139 Fla. 323 (Fla. 1939).

> Because of the definite creation of the districts with the board of county commissioners as their governing authority or trustees and the broad powers vested in them for the districts, there is necessarily implied the power to sue and be sued[.]

*Klemm*, 139 Fla. at 326 (emphasis added). *See also Board of Public Instruction v. Knight & Wall Co.*, 100 Fla. 1649, 1654 (Fla. 1931) ("[W]hen the legislature created such a Board a corporation and authorized it to contract, borrow money, undertake obligations and deal with the business world as other legal entities, there necessarily follows the implication that it may be sued[.]") (emphasis added); *Roberts v. Board of Public Instruction*, 112 F.2d 459, 461 (5th Cir. 1940) (even though "there is no specific legislative authority authorizing such boards to sue and be sued," the Board of Public Instruction for Broward County is a "body corporate" with the power to seek relief in federal bankruptcy court).[15]

Arrayed against this line of authority, K12 has yet to identify a single case holding that a state entity in Florida lacks the power to litigate because there is no express grant of the power to "sue or be sued" in its enabling statute. Instead, K12 is forced to compare the FLVS statute to remarkably different statutes for other Florida entities that include an express grant of the right to sue or be sued and then

[15] That this authority existed long before enactment of Section 1002.37 is all the more important because the "legislature is presumed to know the existing law when a statute is enacted, including 'judicial decisions on the subject concerning which it subsequently enacts a statute." *Crescent Miami Ctr., LLC v. Fla. Dep't of Revenue*, 903 So. 2d 913, 918 (Fla. 2005) (quoting *Wood v. Fraser*, 677 So. 2d 15, 18 (Fla. 2d DCA 1996)).

contend that such a provision is required for standing to litigate. To accept this argument, the Court must overrule the above line of precedent holding that no express declaration is required where broad commercial rights necessarily imply the right to sue.

There is ample reason not to do so, particularly as it relates to FLVS. Just as the bricks and mortar school districts right to engage in commercial activities implies the right to sue, FLVS has been granted broad commercial and intellectual property rights that imply the power to protect those rights in court. The FLVS statute provides that FLVS "shall enter into agreements with distance learning providers,"[16] and that it "may enter into franchise agreements with Florida district school boards."[17] Because FLVS is an online school, its agreements primarily involve intellectual property rights such as copyright licenses to use its online courses and trademark licenses to refer to those courses as FLVS courses. This right to possess intellectual property and enter into intellectual property agreements is expressly granted in the FLVS statute which provides it with the rights to "acquire, enjoy, use and dispose of"[18] trademarks, and rights to "any licenses and other rights or interests thereunder or therein" relating to trademarks.

[16] § 1002.37(2)(c), Fla. Stat (2013).

[17] § 1002.37(2)(i), Fla. Stat. (2013).

[18] § 1002.37(2)(c), Fla. Stat. (2013).

§ 1002.37(2)(c), Fla. Stat. (2013). The FLVS statute further provides that "[a]ny funds realized from patents, copyrights, trademarks, or licenses shall …. shall be used to support the school's marketing and research and development activities[.]" § 1002.37(2)(c), Fla. Stat. (2013).

These extensive powers to create, license and exclusively commercialize trademarks must be supported by the power to enforce these contractual and trademark rights, as it would be pointless for FLVS to enter into contracts it has no power to enforce.[19] Even if FLVS did not have an express statutory grant of all corporate powers (see Section II), from its right to engage in a broad range of commercial activities, "there is necessarily implied the power to sue and be sued[.]" *Klemm*, 139 Fla. at 326.

## II. The grant to FLVS of "all the powers of a body corporate" includes the power to protect its marks in court.

The simplest, most straightforward basis for answering the certified question is provided by the provision granting FLVS "all the powers of a body corporate." §1002.37(2)(l), Fla. Stat. (2013). Where this Court has long held that the "capacity

[19] There is no statutory provision that provides the DOS with the right to litigate commercial issues such as breach of contract matters for FLVS. If FLVS has no authority to litigate in general (as K12 contends), it could be left with no remedy if its customer breaches a contract with FLVS. There is no basis for concluding the legislature intended there to be no remedy for breach of FLVS' contracts; and if FLVS can litigate breach of contract matters that will routinely involve trademark licenses, why can it not litigate the trademark rights themselves?

of suit is one of the essential and ordinary incidents to a corporation,"[20] a grant to FLVS of all the powers of a body corporate includes the well established corporate power to protect its interests in court. As demonstrated below, there is no basis for restricting this broad grant of all the powers of a body corporate to something less than all the powers. This comprehensive and unqualified grant of corporate powers is, therefore, sufficient to provide FLVS with the power protects its interests in court, and is dispositive of the certified question.

### A. Canons of construction cannot be used to narrow the plain, unambiguous grant of "all the powers of a body corporate."

To contradict the plain language granting FLVS "all the powers of a body corporate," K12 is forced to resort to two separate canons of construction and a range of extrinsic evidence. The first canon (*expressio unius*) is employed to argue that the omission of an express grant of the right to "sue and be sued" in a list of intellectual property rights is evidence that the legislature did not intend FLVS to sue; the second canon (specific controls over the general) is then employed to assert that a grant of all the powers of a body corporate does not include the commonly accepted corporate power to litigate because this general right was left out of the list of intellectual property rights.

The fundamental problem with this analysis is that K12 never establishes the need to resort to all of these interpretive tools. "Where the statute's language is clear or

[20] *First Nat'l Bank*, 93 Fla. at 191.

unambiguous, courts need not employ principles of statutory construction to determine and effectuate legislative intent." *Fla. Dep't of Children & Family Servs. v. P.E.*, 14 So. 3d 228, 234 (Fla. 2009) (quoting *Trinidad v. Fla. Peninsula Ins. Co*., 121 So. 3d 433 (Fla. 2013)). *See also Southwest Fla. Water Mgmt. Dist. v. Save the Manatee Club, Inc*., 773 So. 2d 594, 599 (Fla. 1st DCA 2000) (emphasis added) ( "A court may resort to extrinsic aids in determining legislative intent only if the language used in a statute is ambiguous.") (emphasis added). The "plain meaning of the statute controls unless the language is ambiguous or leads to absurd results." *United States v. McLymont*, 45 F.3d 400, 401 (11th Cir. 1995).

K12 has not even claimed, much less demonstrated, that interpretation of this phrase according to its plain meaning is ambiguous or would lead to absurd results. The plain meaning of this statute controls, and "all the powers of a body corporate" means "all the powers" including the power to bring suit. Because K12 cannot establish that this language is ambiguous or in need of construction, there is no reason for the Court to use canons of construction and extrinsic evidence to construe this provision.

### B. Canons of construction cannot convert all the powers of a body corporate into something less than all the powers.

Even if the Court were to stray from the well-settled principle that canons of construction are not employed where the statutory language is clear and unambiguous, the evidence does not support K12's limiting interpretation. K12 argues that the *expressio unius* canon should be employed to find that the absence of a specific provision

authorizing FLVS to sue and be sued as part of the intellectual property grant is evidence that FLVS cannot litigate. In general, "legislative silence is a poor beacon to follow in discerning the proper statutory route." *Zuber v. Allen*, 396 U.S. 168, 185 (U.S. 1969). It is an especially poor guide in this case, because K12 has not demonstrated that one would expect the right to sue generally to be included in a list of intellectual property rights:

> The principle of expressio unius simply says that when a legislature has enumerated a list or series of related items, the legislature intended to exclude similar items not specifically included in the list.

*Christian Coalition of Fla., Inc. v. United States*, 662 F.3d 1182, 1193 (11th Cir. 2011) (concluding that the omission of a remedy from a list of remedies was intentional) (emphasis added). Where the legislature enumerates a list of remedies, it may be reasonable to conclude that the omission of a specific remedy from that list was intentional. In this case, there is no enumerated list. Specifically, there is no reason to believe a general right to sue would be included in a list that is specific to intellectual property, and K12 makes no effort to explain why these should be considered related items.

To the extent K12 is making an *expressio unius* argument for the "all the powers" provision (Section 1002.37(2)(l)), this argument also fails. This provision's general grant of all the powers of a body corporate is not followed by any list of specific powers from which there could be an exclusion, much less one

that shows legislative intent. "Not every silence is pregnant,"[21] and this alleged silence most certainly is not.

After it attempts to manufacture legislative intent regarding the right to sue where none exists, K12 then employs the canon of construction that the specific controls over the general to argue that the alleged omission of a specific right to "sue and be sued" in FLVS' intellectual property provision trumps the general grant of "all the powers of a body corporate[.]" Eleventh Circuit Response Brief, pgs. 37-38. The fatal flaw in this argument is that there is no specific provision barring FLVS from bringing suit which could control over the general grant of all the powers of a body corporate. K12's argument is, therefore, that the absence of the specific controls over the general, but there is no such canon of statutory construction.

Moreover, other portions of the enabling statute specifically contemplate that FLVS may be a party to a suit when providing that the FLVS "board of trustees shall be a public agency entitled to sovereign immunity." § 1002.37(2), Fla. Stat. (2013). There is no need for sovereign immunity if FLVS cannot be sued. That the legislature granted sovereign immunity indicates it anticipated the possibility of FLVS being involved in litigation. Where the legislature included provisions in the FLVS statute contemplating litigation, there is no basis for

[21] *Illinois, Dep't of Public Aid v. Schweiker*, 707 F.2d 273, 277 (7th Cir. 1983)

manipulating multiple canons of construction to conclude that the legislature intentionally left provisions out of the FLVS statute to eliminate all possibility of litigation by implication.

### C. Comparisons to remarkably different enabling statutes provide no evidence of legislative intent.

In an effort to divine the legislature's intent, K12 compares several enabling statutes for other Florida entities to the FLVS statute. The problem in comparing the FLVS statute to other enabling statutes[22] is that each statute is so drastically different that no legislative intent can be discerned from K12's comparison. Perhaps it would be different if there were two statutes that were identical except that each enabled a different agency and one provided the right to sue while the other did not. While such a situation could provide a basis for discerning legislative intent, the statutes being compared in this case are simply too different to provide any evidence of legislative intent. Precisely the same statutory comparisons K12 uses to deprive FLVS of the right to sue would also deprive it of a host of other rights that could not have been intended.

For example, the Department of Citrus enabling statute[23] provides express authority for the Department of Citrus to "pay, or participate in the payment of, premiums for health, accident, and life insurance for its full-time employees" and to create a "40

[22] See listing of proposed statutes for comparison in the Certifying Order, pgs. 7-8.

[23] § 601.01 – 601.992, Fla. Stat. (2013).

hours per week" work week. § 601.10(3)(a) – (3)(b), Fla. Stat. (2013). If K12's statutory construction is employed, FLVS would be prohibited from providing employee health insurance or requiring a 40 hour work week because the FLVS statute does not contain provisions expressly authorizing these actions. According to K12's analysis, it does not matter that the FLVS statute contains a provision authorizing it to "determine the compensation, including salaries and fringe benefits, and other conditions of employment"[24] for personnel, because that general grant of authority cannot trump the absence of specific grant of power to provide insurance and mandate a 40 hour work week.

Similarly, the Department of the Lottery enabling statute[25] provides express authorization for the Department to "[a]dopt by rule a system of internal audits." § 24.105(5), Fla. Stat. (2013). Using K12's statutory construction, FLVS would be prohibited from conducting any internal audits because the FLVS statute does not contain any provision expressly authorizing them. According to K12's analysis, it would not matter that FLVS possesses all the powers of a body corporate (with corporation routinely conducting audits) because the omission of this specific grant of rights was intentional and trumps the general grant of corporate powers.

[24] §1002.37(2)(f)(1), Fla. Stat. (2013).

[25] § 24.101 – 24.124, Fla. Stat. (2013).

The Department of Transportation ("DOT") enabling statute[26] contains a provision immediately following its "sue and be sued" provision that provides the DOT with express authority "[t]o employ and train staff…" § 334.044, Fla. Stat. (2013). While the FLVS statute authorizes it to "maintain personnel programs" with "rules, policies and procedures,"[27] nothing in the statute expressly authorizes FLVS to train employees. According to K12's statutory analysis, FLVS would be prohibited from training its employee because the omission of an express employee training grant must have been intentional and trumps a general grant of authority to establish employment procedures. Each of these examples underscores how absurd it is to attempt to discern legislative intent by comparing statutes that are as remarkably different as these statutes.

To the extent there is a meaningful comparison to be made between these statutes, it is perhaps that none of the above statutes provide the state entity with a comprehensive grant of "all the powers of a body corporate." The closest any of these statutes come to such a comprehensive grant of corporate powers is the grant to the Department of Citrus of "all the powers of a body corporate <u>for all purposes necessary</u> for fully carrying out the provisions and requirements of this chapter." § 601.05, Fla. Stat. (2013) (emphasis added). This is a grant of only the corporate powers necessary to fulfill its statutory purpose and is significantly narrower than the unqualified grant to FLVS of "all the

[26] § 334.01 – 334.60, Fla. Stat. (2013).

[27] § 1002.37(2)(f), Fla. Stat. (2013).

powers of body corporate." With a narrower grant of powers in these other statutes, it was perhaps necessary for the legislature to more specifically grant corporate rights such as the right to sue to each entity. Such specific grants to FLVS is unnecessary where it has already been granted all the powers of a body corporate.

### D. K12's extrinsic evidence confirms that the power to litigate is one of the powers of a body corporate.

A review of a variety of statutes cited by K12 demonstrates that all the powers of a body corporate includes the power to litigate. Some statutes grant agencies or departments corporate powers without including a list of specific powers,[28] and the courts have long held that such corporate powers necessarily include the right to litigate. (*See* Section I). In other instances, the grant of "powers of a body corporate" is followed by examples that confirm the legislature's understanding that the power to sue is one of these powers. *See* § 1001.63, Fla. Stat. (2013) (providing the Florida College System with "all the powers and duties of a body corporate, including the power to…sue or be sued[.]"); § 1001.72, Fla. Stat. (2013) (providing each university board of trustees with "all the powers of a body corporate, including the power to … sue and be sued[.]"); § 1002.34(7) and (7)(b), Fla. Stat. (2013) ("A center is a body corporate and politic….The center may….sue and be sued."). In these statutes, the use of "the term 'including' is not one of all-embracing definition, but connotes simply an illustrative application of the general principle." *Federal Land Bank v. Bismarck Lumber Co.*, 314 U.S. 95, 100 (U.S.

[28] *See e.g.*, § 1009.971(1), Fla. Stat. (2013).

1941). Where the legislature provides illustrative examples of what it means to be a body corporate, it often includes the right to sue as a known right of a body corporate. K12, on the other hand, has failed to come forward with any statutes or other authority excluding the power to litigate from the recognized list of corporate powers. When FLVS is granted all the powers of a body corporate, without limitation, it has the right to sue.

## III. Finding the DOS owns and has the right to enforce the FLVS marks creates irreconcilable conflicts in the Florida Statutes.

No one disputes that there is a remedy for infringement of the FLVS marks. The dispute between the parties turns on which entity – FLVS or the DOS – has the right to pursue that remedy.[29] To conclude the DOS has the authority, the Court must find that the "state" in the FLVS enabling statute means the DOS and that "trademarks" as used in the DOS statute includes the FLVS marks. This conclusion creates irreconcilable and impermissible conflicts in the Florida statutes, conflicts which the Eleventh Circuit's own Certifying Order recognizes. *See e.g.*, Certifying Order, page 6, noting the "tension" between the statutes and page 7 noting that FLVS' license rights are in "conflict" with the exclusive licensing rights granted to the DOS if the statutes are read to provide the DOS with ownership of the FLVS marks.

[29] The trial court correctly noted that the "K12 Defendants and FLVS agree that all assets of the State of Florida are held by departments and agencies of the state" (R 56, p. 5) and are not held or enforce by just "the State of Florida."

Such conflicts between statutes occur frequently enough that there is an established canon of construction to resolve the conflict. Where there would otherwise be a conflict between statutes, the "statutory canon of construction that requires courts to find that a more specific statute would control over a general statute" should be applied to resolve the conflict. *State v. J.M.*, 824 So. 2d 105, 112 (Fla. 2002). *See also RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 132 S. Ct. 2065, 2071 (U.S. 2012) ("[I]t is a commonplace of statutory construction that the specific governs the general."); *ConArt, Inc. v. Hellmuth, Obata & Kassabaum, Inc*., 504 F.3d 1208, 1210 (11th Cir. 2007) ("[W]here two statutory provisions would otherwise conflict, the earlier enacted one yields to the later one to the extent necessary to prevent the conflict.").

This canon of construction has been employed on facts remarkably similar to those in this case. *See Punta Gorda v. McSmith, Inc*., 294 So. 2d 27, 29 (Fla. 2d DCA 1974). The trial court in *McSmith* found that the City of Punta Gorda had no standing to assert a counterclaim to enjoin proposed construction because the legislature had provided authority to seek such relief solely to the State Department of Health. The appellate court reversed because a later enacted statute that was specific to the county in which Punta Gorda is located[30] constitutes an exception to

[30] Charlotte County, Florida

the earlier, general statute vesting the Department of Health with standing. In doing so, the court noted:

> [the] general rule of legislative construction presumes later statutes are passed with knowledge of prior existing laws, and favors a construction which gives each a field of operation, rather than have one meaningless or repealed by implication….We conclude that standing to sue did exist.

*McSmith,* 294 So. 2d at 29 (internal citation omitted).

Statutory interpretation finding that the DOS owns the FLVS marks on the State's behalf violates this canon of construction because it creates a number of irreconcilable conflicts between the DOS and FLVS statutes including the following:

| DOS STATUTES | FLVS STATUTE |
|---|---|
| The "legal title and every right, interest, claim or demand of any kind in and to any …trademark …is hereby granted to and vested in the Department of State." § 286.021, Fla. Stat. (2013) | FLVS possesses the right to "acquire, enjoy, use, and dispose of ….trademarks and any licenses and other rights or interests thereunder or therein." § 1002.37(2)(c), Fla. Stat. (2013) |
| "[N]o person, firm or corporation shall be entitled to use the same [i.e., intellectual property rights] without the written consent of said Department of State." Id.<br><br>The DOS has the right "to license, lease, assign, or otherwise give written consent to any person, firm or corporation for the manufacture or use thereof." § 286.031, Fla. Stat. (2013). | FLVS possesses "any licenses or interests" in intellectual property and "shall enter into agreements with distance learning providers," and "may enter into franchise agreements with Florida district school boards." Id. |

| | |
|---|---|
| The DOS "is authorized to do and perform any and all things necessary to secure letters patent, copyright and trademark." Id. | The FLVS enabling statute conveys precisely these same rights to "acquire" intellectual property for FLVS. Id. |
| The DOS possesses the right to receive compensation from licensing the intellectual property of the DOS "on a royalty basis, or for such other consideration as said department shall deem proper" and "and to enforce the collection of any sums due the state and said department." Id. | The FLVS enabling statute provides that "[a]ny funds realized from patents, copyrights, trademarks, or licenses shall be considered internal funds" and "shall be used to support the school's marketing and research and development activities." Id. |
| The DOS has the right to "assign" and to "to sell any of the same and to execute any and all instruments on behalf of the state necessary to consummate any such sale" of intellectual property. Id. | FLVS has the right to "dispose" of FLVS' intellectual property. Id. |

In briefing before the Eleventh Circuit, FLVS challenged K12 to find any way to avoid these conflicts.[31] The most K12 could do was an attempt to resolve some of these conflicts by arguing that FLVS and the DOS have concurrent rights in the marks. Eleventh Circuit Response Brief, pgs. 38-42. For many of the conflicts, K12 made no effort whatsoever to resolve the conflicts, perhaps because there is no legitimate argument to made.

The irreconcilable conflicts are most readily apparent in the respective provisions granting intellectual property rights to each entity. K12 argues that the

[31] FLVS' Initial Brief at pages A listing of all of the conflicts between the FLVS and DOS statutes if the DOS statutes are interpreted to cover the FLVS marks

FLVS and DOS statutes provide each entity with non-exclusive rights in the FLVS marks, and that these concurrent rights eliminate the conflicts. Eleventh Circuit Response Brief, pgs. 38-42. In addition to granting "legal title" to trademarks to the DOS, the DOS statutes also grants it "every right, interest, claim or demand of any kind in and to any…trademark….owned and held by the state." § 286.021, Fla. Stat. (2013) (emphasis added). How can the DOS possess every right, interest, claim, or demand of any kind when even K12 admits numerous rights in the FLVS marks are expressly granted by statute to FLVS?

In its Eleventh Circuit Response brief section with a title acknowledging "FLVS' Rights,"[32] K2 repeatedly admits FLVS has rights, including the right to license the marks (Eleventh Circuit Response Brief, p. 38), the right to demand revenues be paid to it from use of the marks (Id.), the right to bring marks into existence (Id., p. 39), and the right to dispose of marks (Id., p. 39-40). Where K12 concedes, as it must, that FLVS has rights in the FLVS marks, this concurrent use theory directly conflicts with the DOS statutes' grant of every right to the DOS (at least for property subject to its statutes). This irreconcilable conflict alone – one K12 has not even attempted to resolve – is fatal to its concurrent rights theory, and demonstrates that K12's construction of the FLVS and DOS statutes is wrong.

[32] Eleventh Circuit Response Brief, Section I(D).

K12 also argues that the DOS and FLVS both have the right to license the FLVS marks because FLVS allegedly lacks "exclusive authority to issue licenses." (Eleventh Circuit Response Brief, p. 38). Where the FLVS statute provides FLVS with rights to "any licenses and other rights or interests"[33] in the FLVS marks, there is no basis for concluding its licensing authority is non-exclusive. The more fundamental problem with K12's argument, however, is that it ignores the DOS' exclusive licensing rights, i.e., that "no person, firm or corporation shall be entitled to use the same [i.e., intellectual property] without the written consent of said Department of State." § 286.021, Fla. Stat. (2013) (bracketed material and emphasis added). "[N]o person, firm or corporation" means exactly what it says. If the DOS is construed to be the owner of the FLVS marks, this exclusive grant of licensing rights to the DOS directly conflicts with the separate grant of licensing rights to FLVS.

K12 continues its concurrent rights argument by claiming both FLVS and the DOS can financially benefit from the FLVS marks. (Eleventh Circuit Response Brief, p. 38). To reach this conclusion, K12 is forced to ignore the exclusive financial rights granted to FLVS, i.e. that FLVS have the "full right of use and full right to retain the revenues derived" from trademarks and that "[a]ny funds realized from…trademarks, or licenses shall be ….used to support the

[33] § 1002.37(2)(c), Fla. Stat. (2013).

school's marketing and research and development activities." § 1002.37(2)(c), Fla. Stat. (2013). This provision could not be clearer: only FLVS can receive any financial benefit from the FLVS marks. If the DOS can also license and financially benefit from the FLVS marks (as K12 claims), the DOS' right to do so directly conflicts with FLVS' exclusive right to financially benefit from the FLVS marks.

K12 attempts to dismiss this fundamental problem by arguing that the legislature has broad authority to allocate the State's money. (Eleventh Circuit Response Brief, p. 34). There's no doubt it does; but when the legislature chose to grant FLVS all the financial rights in the FLVS marks, this confirms it intended FLVS to be the owner of those marks.

A single direct conflict between statutes makes it necessary to employ canons of construction to resolve the conflict In this case, the trial court's interpretation creates multiple, undisputable conflicts between the FLVS and DOS statutes, including those identified here and in FLVS' Initial Brief. As K12 correctly notes, it "is well established that 'a more specific statutory provision governs over a more general provision.'" (Eleventh Circuit Response Brief, p. 36). FLVS' unrebutted evidence demonstrates that conflicts exist, and K12 cannot dispute that the FLVS statute is more specific and later enacted. It is, therefore, appropriate to "read the specific statute governing Florida VirtualSchool, §

1002.37(2)(c), and the general statute concerning the Department of State, § 286.021, to be in tension with one another," as the Eleventh Circuit did. Certifying Order, p. 6 (emphasis added). Even though the FLVS statute does not contain an express provision excluding DOS ownership (which is included in certain other statutes), there is no way to reconcile the DOS and FLVS rights in a manner that leaves the DOS with ownership of the FLVS marks. The direct conflicts can only be resolved by finding the later-enacted, specific FLVS statute is an exception to the earlier enacted, general DOS statutes. When this canon is correctly applied, the DOS does not own the FLVS marks and has no statutory obligation to protect those marks in court. That power lies solely with FLVS.

## IV. The Florida Attorney General opinions interpreting the DOS statutes are consistent with FLVS' interpretation of the DOS and FLVS statutes.

The Certifying Order lists four arguments used by K12 to deprive FLVS of the power to protect its rights in court. Certifying Order, p. 8. The first three are addressed elsewhere in this Brief. The fourth and last argument concerns three opinions from the Florida Attorney General that the Eleventh Circuit believes "lend some support to K12's reading of §§ 286.021 and 286.031 [the DOS statutes]." Certifying Order, p. 8. None of these opinions address the relationship between the FLVS statute and the DOS statutes, nor are any of them inconsistent with FLVS' interpretation of these statutes.

The first opinion (Op. Att'y Gen. Fla. 00-13 (2000)) correctly explains that a "number of state agencies have specific statutory authority to hold and enforce trademarks" but "a state agency is not authorized to secure or hold a trademark in the absence of specific statutory authority to do so." Id. This opinion acknowledges that there are state entities other than DOS that have "authority to hold and enforce trademarks." This opinion provides no barrier to FLVS holding and enforcing trademarks because FLVS has the specific statutory authority to own trademarks , i.e., the authority to "acquire, enjoy, use and dispose of" trademarks. § 1002.37(2)(c), Fla. Stat. (2013).

Similarly, the second opinion (Op. Att'y Gen. Fla. 71-298 (1971)) states that patents entrusted to the DOS cannot be assigned to other state agencies or departments. However, nothing in this opinion addresses whether the FLVS marks were entrusted to the DOS in the first place. To the contrary, the very statutory language on which this opinions turns demonstrates that FLVS's marks could not have been entrusted to the DOS. The Attorney General found that the DOS cannot assign patents to other state entities because the legislature decided to vest the DOS with all rights in the patents including the right to assign (but only to private entities). This grant of rights to the DOS directly conflicts with the grant to FLVS of the right to "dispose of" trademarks (which could be by assignment) and the exclusive right to financially benefit from trademarks. Where these rights were

specifically granted to FLVS decades after the DOS statutes were enacted, there is no basis for concluding that the legislature intended to vest ownership of these rights in the DOS. Therefore, nothing in this opinion conflicts with FLVS' positions.

The third opinion (Op. Att'y Gen. Fla. 69-81 (1969)) provides that an earlier version of the DOS statutes vests authority for Florida patents in the Department of General Services, and that Department of Citrus does not possess rights to such patents because:

> neither Ch. 601, F. S., nor the reorganization act (Ch. 69-106, Laws of Florida) empowers the department of citrus to apply for, hold, or consent to the use of any patent, or to license, lease, or assign any patent to any person, or otherwise consent to the manufacture or use thereof on a royalty basis.

Id. The very reasons why the Department of Citrus may not have had authority over intellectual property (at least in 1969) is because the statutes relating to the Department of Citrus did not specifically provide it with rights to such patents. The FLVS statute, however, provides precisely the rights that the Attorney General noted were missing from the grant to the Department of Citrus, i.e., the right to "apply for" ("acquire" in the FLVS statute), "hold," ("enjoy, use" in the FLVS statute), "consent to the use of any patent, or to license, lease," and "otherwise consent to the manufacture or use thereof on a royalty basis" (license in the FLVS statute), "or assign" (dispose of in the FLVS statute). By virtue of its enabling

statute, FLVS is in a completely different position from what is described in this opinion, and nothing in this opinion is inconsistent with FLVS' interpretation of the statutes. To the contrary, where the Attorney General views these as exclusive rights of General Services (later the DOS), it provides further reason why the specific grant of these same rights to FLVS must be viewed as an exception to the earlier, general grant to the DOS.

## V. Ownership of the FLVS marks on behalf of the State necessarily includes the right to protect those marks.

The Eleventh Circuit's Certifying Order recognizes that:

> Florida VirtualSchool's right to acquire, enjoy, use, license, and dispose of trademarks, as set forth in § 1002.37(2)(c), would appear to fully encompass the rights attendant to ownership, including the right to protect those ownership interests.

Certifying Order, p. 6. The Eleventh Circuit's assessment of this issue is correct, as this exact statutory language has historically defined what it means to own property (see Section V(A) below). In addition to this grant of ownership rights, the FLVS statute also grants FLVS the "full right of use and full right to retain the revenues derived"[34] from the FLVS marks. As the only entity with the right to use the FLVS marks, and the only entity that can legally benefit from use of the marks, FLVS must be the owner of those marks on behalf of the State. These ownership

[34] § 1002.37(2)(c), Fla. Stat. (2013).

rights granted to FLVS can only be given effect in conjunction with the right to protect the FLVS marks in court. (See Section V(D)).

### A. The right to "acquire, enjoy, use, and dispose of" defines ownership.

Since the earliest jurisprudence in the United States, "acquire, enjoy, use and dispose of" has defined what it means to own property:

> The right of property in an article involves the power to sell and dispose of such article as well as to use and enjoy it. Any act which declares that the owner shall neither sell it nor dispose of it, nor use and enjoy it, confiscates it, depriving him of his property without due process of law.

*Bartemeyer v. Iowa*, 85 U.S. 129, 137 (U.S. 1874) (Field concurring) (emphasis added); *See also Tatum Bros. Real Estate & Inv. Co. v. Watson*, 92 Fla. 278, 289 (Fla. 1926) ("Property, in a legal sense, consists in the domination which is rightfully and lawfully obtained over a material thing, with the right to its use, enjoyment and disposition.") (emphasis added); *Bagur v. Commissioner*, 603 F.2d 491, 499 (5th Cir. 1979) ("In civil law, perfect ownership includes the right to use (Usus), to enjoy (Fructus), and to dispose of one's property (Abusus).") (applying the civil code of Louisiana); *Meakin v. Dreier*, 209 So. 2d 252, 254 (Fla. 2d DCA 1968) ("The value of an article to its owner, as Sedgwick points out, lies in his right to use, enjoy, and dispose of it. There are the rights of property which ownership vests in him…") (emphasis added); *Wynehamer v. People*, 13 N.Y. 378, 433 (N.Y. 1856) ("Property is the right of any person to possess, use, enjoy and

dispose of a thing.") (emphasis added). Where the law uses this formulaic language to define ownership – and the same language is used to define FLVS' rights in trademarks – this grant provides FLVS with ownership of the FLVS marks.

### B. FLVS' exclusive ownership rights cannot be reduced to a mere license.

One central assumption underlies all the trademark ownership arguments in K12's Eleventh Circuit Response Brief: that the FLVS statute "expressly distinguishes between the State's ownership rights and FLVS's limited rights as a licensee." Eleventh Circuit Response Brief, p. 40. This assumption is the basis for K12's claim that FLVS' supposedly "limited rights" (Id., p. 40) deprive it of the right to sue for trademark infringement. It is also the basis for K12's attempt to reconcile the FLVS and DOS statutes, by arguing that FLVS has only a license to use the marks, thus enabling FLVS and the DOS to use the marks concurrently.

This interpretation is fatally defective because there is no way to read the two statutory sentences K12 relies on in a manner that divides rights between FLVS and another entity. To the contrary, this provision provides FLVS with the right to:

> acquire, enjoy, use, and dispose of … trademarks and any licenses and other rights or interests thereunder or therein. Ownership of all such …trademarks, licenses, and rights or interests thereunder or therein shall vest in the state…

§ 1002.37(2)(c), Fla. Stat. (2013) (emphasis added). Each sentence addresses precisely the same "such" rights in "trademarks," "licenses" and "other rights or interests." These

two sentences cannot be read as granting certain limited license rights to FLVS with other rights granted to some other State entity. Precisely the same rights are addressed in each sentence K12's relies upon, and K12's inability to address this central problem is telling and fatal to its interpretation of the FLVS statute.

In spite of this fundamental defect, almost every page of the Eleventh Circuit Response Brief argues that FLVS has only "limited, enumerated powers" in the FLVS marks. (p. 14) Where does the FLVS statute identify these supposed limits? The words "limited," "non-exclusive," "enumerated," etc. do not appear anywhere in the language granting FLVS trademark rights. Instead, the language is broad and all-encompassing. To create these limits, K12 has to fundamentally re-write Section 1002.37(2)(c). Under its interpretation, the "full right of use" is reduced to a "limited right of use;" the grant of rights to "trademarks" generally (which is not qualified in any way in the statute) is reduced to a "nonexclusive license to trademarks;" and the catch-all grant of "any licenses and other rights or interests" is reduced to "some licenses and limited rights or interests." None of these interpretations can be reconciled with the actual language chosen by the legislature when enacting this statute.

The most striking defect in K12's interpretation is that it takes the complete bundle of trademark rights granted to FLVS and reduces them to a single right where "FLVS is merely a licensee of marks owned by the State—and a non-

exclusive licensee at that." Eleventh Circuit Response Brief, p. 26. This interpretation directly conflicts with the plain language of the statute that provides FLVS with the right to "acquire, enjoy, use, and dispose of…trademarks and any licenses…" § 1002.37(2)(c). Fla. Stat. (2013) (emphasis added). Where rights are granted to "trademarks," and separately to "any licenses," these two separate grants of rights cannot be reduced to a single grant of license rights.

In reducing FLVS' rights in "trademarks" to a mere trademark license, K12 is asking the Court to re-write this provision to grant FLVS the right to "acquire, enjoy, use, and dispose of… [a licenses] and any licenses." There is no basis for foisting this absurd construction on the FLVS statute. The FLVS statute means what it says, and a comprehensive grant of rights in "trademarks," "any licenses" and "other rights or interests thereunder or therein" cannot be reduced to a simple, non-exclusive license.

### C. The "state" ownership provision is a safeguard to ensure there is no dispute as to whether FLVS' marks belong to the State.

K12's principal attack on FLVS' interpretation of the FLVS statute is that the language vesting ownership in the "state" would be "utterly inoperative and meaningless" (Eleventh Circuit Response Brief, p. 27) if FLVS owns the FLVS marks on the State's behalf. However, nothing absurd results from this construction where the "K12 Defendants and FLVS agree that all assets of the State of Florida are held by departments and agencies of the state." (Trial Court Order at R 56, p. 5). K12 already agrees that the "state" in this provision means a political subdivision of the State holding assets on the State's behalf, but it has yet to advance any plausible reason why the DOS

can be the "state" while FLVS cannot.[35] Where no one disputes that there will be an agency or department holding the assets on the State's behalf, there is no conflict created by concluding that FLVS is that entity. It is only K12's attempt to vest ownership elsewhere that creates irreconcilable conflicts and renders statutory language meaningless. (*See* Section III).

Moreover, the legislature had good reason to confirm that FLVS' property is ultimately property of the State. The legislature was creating a new and unusual entity when it established FLVS. FLVS provides education, but it is not a traditional school district. It is created by the legislature but is a "body corporate"[36] with corporate rights to engage in commercial activities usually performed by private entities, including its right to "enter into agreements with distance learning providers"[37] and its right that "instructional staff may be loaned to, or exchanged with persons employed in like capacities by….by private industry."[38]

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[35] FLVS identified other statutes in which State-owned property is held for the State by an agency or department. Eleventh Circuit Initial Brief, pgs. 29-30. K12 argues that these statutes do not "equate other state agencies with the State of Florida itself." Eleventh Circuit Response Brief, p. 41. Even if K12 were correct (which it is not), it is not clear what point it is trying to make here where it already agrees that the "state" in the FLVS statute is equated with a department or agency.

[36] § 1002.37(2)(l) , Fla. Stat. (2013).

[37] § 1002.37(2)(c) , Fla. Stat. (2013).

[38] § 1002.37(2)(f)(2), Fla. Stat. (2013).

Each of these rights could raise potential questions concerning whether the fruits of FLVS' labors are public or private property. It is for this reason that the legislature wisely chose to include a provision in the FLVS statute confirming that property FLVS creates is public property of the state of Florida. The legislative history does not render this interpretation unreasonable. Eleventh Circuit Response Brief, pgs. 24-25. That a state ownership provision was added after initial drafting of the bill is as consistent with FLVS' interpretation as it is with K12's, and legislative history statements that merely reiterate the text of the statute itself do nothing to further illuminate legislative intent. Nor does the alleged rejection of FLVS' amendment, when that amendment was never incorporated into a bill, much less debated by the legislature. Instead of attempting to explain why FLVS' interpretation is not a meaningful or logical interpretation of the state ownership provision (and one that resolves the conflicts created by K12's interpretation), K12 simply reverts to its argument that the language would be meaningless.

### D. The nature of trademarks requires enforcement power to accompany all of the other powers granted to FLVS.

Exclusive control over marks is one of defining characteristics of trademark rights:

> Trademark law, like contract law, confers private rights, which are themselves rights of exclusion. It grants the trademark owner a bundle of such rights.

*K Mart Corp. v. Cartier*, 485 U.S. 176, 185-186 (U.S. 1988) (emphasis added). This crucial right of exclusion can only be effectuated through the power to

enforce trademark rights in court. Therefore, FLVS power to "acquire, enjoy, use and dispose of" trademarks, license them, and enjoy the exclusive financial benefit from them necessarily implies the power to protect those trademarks in court. Courts have repeatedly recognized not only the right of a trademark owner to enforce the trademark, but also the public interest served in doing so. "[T]he public has an interest in the enforcement of valid trademarks." *Ordonez v. Icon Sky Holdings LLC*, 2011 U.S. Dist. LEXIS 96939, *26 (S.D. Fla. 2011). The very nature of trademarks as property, therefore, necessarily includes the power to enforce exclusive control over that property.

FLVS' right to "acquire" trademarks provides an excellent example. Whether the acquiring is the creation of common law rights in a mark or registration of those rights, the power to enforce exclusivity is crucial to either type of acquisition. To even seek registration of a trademark, the applicant must submit a verified statement that the applicant has trademark rights as the exclusive user of the mark. 15 U.S.C. §1051(a)(3)(D) (2013). The registration issued on the application is "prima facie evidence of [ ] the registrant's exclusive right to use the registered mark." 15 U.S.C. §1115(a) (2013). For FLVS to accomplish its statutory right to acquire trademarks, it must have the power to ensure exclusive use. Where the mechanism for maintaining exclusive use is through litigation,

FLVS' acquisition of trademark rights necessarily includes the power to protect those rights in court.

Likewise, the failure to maintain and enforce trademark rights can, in certain circumstances, lead to a weakening of trademark rights, if not to arguments that the mark has been abandoned. "[C]ourts have found extensive third-party uses of a trademark to substantially weaken the strength of a mark." *Homeowners Group, Inc. v. Home Marketing Specialists, Inc.*, 931 F.2d 1100, 1108 (6th Cir. 1991), citing *Amstar Corp. v. Domino's Pizza, Inc.*, 615 F.2d 252, 259-260 (5th Cir. 1980). Similarly, the failure to exercise control over the mark by a licensor can lead to a finding that the mark has been abandoned. *See Moore Business Forms v. Ryu*, 960 F.2d 486, 489 (5th Cir. Tex. 1992)("Without adequate control of the licensee, a court may find that the trademark owner has abandoned the trademark, in which case the owner would be estopped from asserting rights to the trademark."). Indeed, late in the litigation, K12 filed a motion to add a defense of trademark abandonment, arguing that the licensing of the FLVS marks without control by the DOS led to trademark abandonment. The power to control and enforce control over marks through litigation is, therefore, indispensible for assuring the exclusivity that allows FLVS to enjoy and use trademarks. The Eleventh Circuit correctly recognized this point when noting that:

> the right to enjoy and use trademarks would be largely ethereal if Florida VirtualSchool could not protect against infringement.

Certifying Order, p. 7. The right to "acquire, enjoy, use and dispose of" trademarks is inextricably intertwined with their strength and value as a source identifier for the provider of goods or services. If FLVS is powerless to prevent others from using the marks as a source identifier, FLVS cannot actually experience these legislatively granted rights because the marks could cease to function as FLVS marks. Therefore, FLVS' right to "acquire, enjoy, use and dispose of" its marks necessarily includes the right to enforce the marks.

## VI. Ruling in FLVS' favor is the only way to avoid the disastrous potential consequences flowing from K12's interpretation of these statutes.

The trial court ruling that initial created this problem was attempting to resolve what it viewed as a conflict in the FLVS statute. R. 56. This decision, however, created far more problems and more serious problems than it could possibly resolve. Concluding that the DOS owns the FLVS marks on behalf of the State creates irreconcilable conflicts throughout the intellectual property rights grant and leaves it unclear who has the right to acquire, enjoy, use, license and dispose of FLVS' intellectual property. The DOS statute grants it these rights, while the same rights are granted to FLVS in its statute.

Far more troubling than the statutory conflicts, however, is K12's very next argument: that the DOS' alleged failure to exercise control over the FLVS marks requires that they "be deemed abandoned, the licenses thereto should be deemed

void, and the Registrations …should be cancelled." (R 42, pgs. 2-3). As a for profit company that competes with FLVS for the same students in Florida and across the country, K12 would greatly benefit from destroying FLVS' intellectual property rights and the extraordinarily valuable commercial agreements based on these rights. If this occurs, K12 would, at a minimum, be able to continue the trademark usage though which it is intentionally confusing parents and students regarding the school in which students are enrolled. Even further, if FLVS' trademark rights have been abandoned (as K12 claims), there would presumably be nothing to prevent K12 from calling itself Florida VirtualSchool and FLVS. These issues are not just FLVS problems. As the Eleventh Circuit noted, "this case is an important one, as it affects the respective rights of various Florida agencies and departments with respect to intellectual property." Certifying Order, p. 9. With a ruling in K12's favor, all of the problems K12 seeks to create for FLVS would be created for many other agencies and departments in the State of Florida.

## CONCLUSION

All of the above problems can be avoided with a remarkably simple ruling in FLVS' favor. The Court need only apply plain meaning, reinforced by extensive judicial interpretation, to find that "all the powers of a body corporate" means all the powers including the power to sue, and that the right to "acquire, enjoy, use and dispose of" trademarks means ownership. These simple, correct constructions resolve this entire appeal, and eliminate the conflicts between the FLVS and DOS statutes.

In contrast, K12 is forced to employ ever more tortured and convoluted interpretations of all the statutes using multiple levels of canons of construction and improper extrinsic evidence. To rule in K12's favor, the Court must find that a provision granting rights in "trademarks and any licenses" only grants a license; that "all the powers of a body corporate" means something less than all the powers; that a grant of rights in "any licenses and other rights or interests" means only some licenses and some rights; and that FLVS and the DOS share concurrent rights in the FLVS marks even though the DOS statute grants it "every right, interest, claim or demand of any kind." Each of these interpretations re-writes the statutory language to create statutes remarkably different from those enacted by the legislature, and every one of them is necessary for the Court to rule in K12's favor. K12's interpretations are fundamentally incompatible with the plain meaning of these statutes, and must be rejected. The certified question should, therefore,

be answered in the affirmative with a holding confirming that FLVS has the authority to protect the FLVS marks in court.

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on November 20, 2013, I electronically filed the foregoing using the Florida Supreme Court's electronic filing system, which will send a Notice of Electronic Filing to all counsel of record.

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## CERTIFICATE OF COMPLIANCE WITH THE FONT REQUIREMENTS OF THE FLORIDA RULES OF APPELLATE PROCEDURE

This Brief complies with the font requirements of the Florida Rules of Appellate Procedure because it has been prepared in a proportionally spaced typeface in Times New Roman 14-point type.

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