EXHIBIT
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STATE OF SOUTH CAROLINA	)	COURT OF COMMON PLEAS
	)	
COUNTY OF ORANGEBURG	)	FIRST JUDICIAL CIRCUIT
	)	
Directory Assistants, Inc.,	)	
	)	2011-CP-38-00853
Plaintiff,	)	
	)	
Dennis Shay, d/b/a Marsch Chiropractic Center,	)	
	)	
Defendant.	)	

ATTEST: TRUE COPY
Winnie B. Clark
CLERK OF COURT
ORANGEBURG COUNTY, SC

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CLERK OF COURT
ORANGEBURG, S.C.

2014 FEB 26 PM 12:57

ORDER DENYING PLAINTIFF'S MOTION TO ALTER OR AMEND JUDGMENT

On September 30, 2013 this Court entered an Order granting Defendant relief from Plaintiff DAI's filing of a Connecticut judgment against them in South Carolina. DAI now moves to Alter or Amend the Order granting relief. The Court declines to alter or amend its previous ruling, and finds that Plaintiff's motion should be denied.

FACTS & PROCEDURAL HISTORY

The Plaintiff, Directory Assistants, Inc., (DAI) is a Connecticut corporation. In 2009, DAI obtained an arbitration award for $34,582.00 against "Dennis Shay, d/b/a Marsch Chiropractic Center" from the "American Dispute Resolution Center," also based in Connecticut. After converting the award to a judgment in Connecticut Superior Court, DAI filed it in this Court on July 20, 2011.

After receiving notice of filing, Defendant timely filed an objection in this Court and moved to amend or vacate the judgment as provided by §15-35-940 (Uniform Enforcement of Foreign Judgments Act).

On September 30, 2013, following a hearing on the matter, the Court found Defendant Shay was entitled to relief from filing the Judgment under the Act (as adopted in both South Carolina and Connecticut) under Rule 60 SCRCP. *Erickson v. Boykin,* 383 S.C. 497 (2009). Specifically, the Court found that the intended beneficiary of the "Consulting Contract" relied upon by DAI was not Dennis Shay individually, but a wholly separate legal entity, "Dennis J. Shay, PA d/b/a Marsch Chiropractic." DAI's contract expressly identified Marsch as the "Advertiser", referred repeatedly DAI's providing "business" services, and referenced Shay only as the "Person Authorized to Contract for advertiser." It was clear Shay was not himself a party to the contract, and that the actual party to the contract was Dennis J. Shay, PA. Accordingly, the Court found that Shay was entitled to relief under Rule 60 on

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grounds of mistake.

As an additional ground for relief, the Court found that no court had ever determined whether a valid arbitration agreement existed *before* the arbitration took place. Prior to arbitration, Shay protested he had not entered into any agreement with DAI. In such cases, both Connecticut and South Carolina law are clear: a court – not an arbitrator – must determine the existence of a valid arbitration agreement before a party can be compelled to arbitrate. See, *Reiss v. Chase Bank USA, N.A.*, 2008 Conn. Super. LEXIS 1959 (Conn. Super. Ct. July 30, 2008); *MBNA Am. Bank, N.A. v. Christianson*, 377 S.C. 210 (S.C. Ct. App. 2008; (aff'd Feb. 1, 2010).[1] In Shay's case, the arbitrator ignored this requirement and proceeded with arbitration.[2]

As more specifically set forth in the Court's prior Order, Defendant's Motion for Relief was granted, and DAI's South Carolina judgment was vacated. On October 10, 2013, Plaintiff DAI moved to Alter or Amend this Order.

DISCUSSION

DAI contends in its motion that the Federal Arbitration Act (FAA) prevents this Court from providing relief from the Connecticut judgment. To support this argument DAI relies on *e.spire Communications, Inc. v. CNS Communications*, 39 Fed. Appx. 905 (4th Cir. 2002). The Court disagrees. While the FAA is applicable in this situation, the decision in *e.spire* is distinguishable.

In *e.spire*, two telecommunications firms entered into a series of agreements, including a Master Services Agreement (MSA). The MSA contained an arbitration clause. A dispute later arose between the parties. In this dispute, CNS contested arbitration, contending the MSA was not a "final" contract. This dispute was resolved, however, by the parties' entry into a Settlement Agreement. In the latter Settlement Agreement the parties expressly agreed to arbitrate their dispute before the American Arbitration Association.

After signing the Settlement Agreement, however, a new dispute arose over the location where the arbitration would be held. CNS refused to attend the

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[1] (FN – likewise, the Federal Arbitration Act, upon which DAI's instant motion is based, expressly provides for court determination when one party disputes the existence of an agreement to arbitrate. See, 9 USC Section 4, which states: *A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court ... for an order directing that such arbitration proceed.... If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default ..., the court shall hear and determine such issue.... [If a jury trial is demanded and] the jury find[s] that no agreement in writing for arbitration was made ... the proceeding shall be dismissed.*

[2] Of further concern to the Court is the fact that there is no record of an arbitration hearing for the Court to review. Thus, while the arbitration record shows that Shay appeared in the arbitration proceeding through counsel and objected to the jurisdiction of the arbitrator, it is unclear if even the arbitrator himself considered Shay's objection.

arbitration and an award was entered against it in its absence. CNS moved to vacate the award, relying on its original argument that "no valid agreement to arbitrate" existed under the MSA.

The Court found that CNS's reliance on its original argument over the meaning of the MSA was misplaced, as CNS could not dispute it entered knowingly into the later Settlement Agreement, which expressly provided for arbitration. Under such circumstances, the Court found CNS was not entitled to relief. 39 Fed. Appx. 905 (4th Cir. 2002).

The present case is distinguishable. In contrast to *e.spire,* the present case involved a dispute as to whether a valid arbitration agreement ever existed (in Connecticut or elsewhere). No agreement was reached on this issue and it was never put before a Court. Rather, the evidence presented by Shay, which the court found credible, demonstrated he did not knowingly enter into an agreement to arbitrate (particularly on his own behalf) and that he expressly disputed the arbitration. There was no determination by any court – including a South Carolina Court (which would have otherwise had jurisdiction over this dispute) - that a valid arbitration agreement existed.

Contrary to DAI's argument, the requirement for prior judicial review fully follows the requirements of the FAA. See, 9 U.S.C.A. § 4. Despite the fact that FAA procedure for prior review was not complied with (in any court) DAI nevertheless argues that the FAA precludes this Court from providing relief under Rule 60. The Court disagrees. While the FAA allows for review by a District Court, "general contract principles of state law apply in a court's evaluation of the enforceability of an arbitration clause" even if same is governed otherwise by the FAA. *Munoz v. GreenTree,* 343 S.C. at 539, 542 S.E.2d at 364. See also, *Christianson, supra.* This issue was properly before the Court on Shay's motion for relief.[3]

In summary, the Court reaffirms its finding that this case was submitted to a Connecticut arbitrator without prior judicial review, and with no showing that Shay had agreed to forfeit access to the judicial system in the state where he resides and where the contract was entered into and was to be performed.

ORDER

Based on the foregoing, the Court DENIES DAI's Motion to Alter or Amend its prior Order granting relief to Shay.

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[3] As an additional matter, the Court notes that traditionally, a Defendant has the right to defend himself in his home state. There is nothing in the record that indicates Shay received any bargained-for consideration under the contract to give up this constitutional right. The contract was executed in South Carolina, to be performed in South Carolina, for business done in South Carolina. There are no "minimum contacts" with Connecticut apart from the arbitration clause in the contract. This Court will not deprive Defendant of his right to defend himself against these claims in the courts based on these facts.

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AND IT IS SO ORDERED.

Edgar W. Dickson, Judge
1st Judicial Circuit

January 31, 2014

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