ATTACHMENT A

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SC Court of Appeals

STATE OF SOUTH CAROLINA COUNTY OF GREENVILLE The NEXT School, Inc., a Public, Not-for-Profit Corporation Incorporated & Existing under the Laws of the State of South Carolina, Plaintiff, vs. AT-NET Services-Charlotte, Inc., a Private Corporation Incorporated & Existing under the Laws of the State of North Carolina, and American Arbitration Association, Inc., a Not-for-Profit Corporation Incorporated & Existing under the Laws of the State of New York, Defendants.	)	IN THE COURT OF COMMON PLEAS THIRTEENTH JUDICIAL CIRCUIT C. A. No. 2019-CP-23-06745 **ORDER**
AT-NET Services-Charlotte, Inc., Plaintiff, vs. The NEXT School, Inc., Defendant.	)	C. A. No. 2020-CP-23-00969

This matter came before me for a hearing on May 26, 2020 on three motions filed in two separate matters – in 2019-CP-23-6745 The NEXT School, Inc.'s ("NEXT") motion for judgment on the pleadings and motion to dismiss; in 2020-CP-23-00969 NEXT's motion for relief from foreign judgment. Present at the hearing on behalf of the NEXT was Steven Edward Buckingham of the Law Office of Steven Edward Buckingham, LLC. Present at the hearing on behalf of the

AT-NET Services-Charlotte, Inc. ("AT-NET") was Adam C. Bach of the law firm Eller Tonnsen Bach, LLC.

Background

On July 2, 2015, AT-NET and NEXT entered into a Master Services Agreement (the "Contract") for the provision of certain IT services by AT-NET to NEXT. The Contract provides that it is governed by North Carolina law and that all disputes related to the agreement are to be arbitrated with the American Arbitration Association. NEXT failed to comply with the Contract and AT-NET filed suit in Mecklenburg County, North Carolina Superior Court.

On September 19, 2017, then-counsel for NEXT, David Rothstein, contacted North Carolina counsel for AT-NET, Matthew Holtgrewe, concerning the North Carolina lawsuit. Mr. Rothstein and Mr. Holtgrewe then engaged in an email correspondence during which Mr. Rothstein demanded that the parties submit the dispute to arbitration as provided for by the Contract. Rothstein was explicit in communicating NEXT's demand for arbitration, "My client [NEXT] is not willing to waive arbitration in this matter. I would request that you voluntarily dismiss the complaint in Mecklenburg County, without prejudice, and submit the matter to arbitration as required by the contract." *Id*.

Based on NEXT's demands, AT-NET agreed to dismiss the North Carolina lawsuit without prejudice and proceed to arbitration. AT-NET commenced the arbitration proceeding with the American Arbitration Association in November 2018. While reserving their objections to "jurisdiction and/or venue" NEXT consented to hold the arbitration in Charlotte. An arbitration hearing was conducted in Mecklenburg County on May 2, 2019. A final arbitration award in favor of AT-NET was issued on May 23, 2019.

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On October 7, 2019, AT-NET moved to confirm the arbitration award in the Mecklenburg County Superior Court pursuant to the North Carolina Uniform Arbitration Act, N.C.G.S. § 1-569.1, *et. seq*. (the "NC Arbitration Act"). The NC Arbitration Act provides that a party who wishes to challenge an arbitration award must file a motion seeking to vacate the award "within 90 days after the moving party receives notice of the award." N.C.G.S. § 1-569.23. As noted by the Superior Court, "[t]he time to file an application to modify, vacate, or correct the Final Arbitration Award has passed, and no such application has been filed with the Court." On November 21, 2019, a hearing was held in Mecklenburg County on AT-NET's motion to confirm the arbitration award. NEXT did not attend the hearing or contest confirmation. On November 26, 2019, the Superior Court confirmed the award, thereby making the arbitration award a judgment of the North Carolina court. *See* N.C.G.S. § 1-569.25.

Two days prior to the hearing, NEXT filed its declaratory judgment action in South Carolina asking a South Carolina court to declare that the arbitration award is *void ab initio*, C.A. No. 2019-CP-23-6745 (the "6745 Action"). On February 17, 2020, AT-NET filed a notice of filing of foreign judgment in Greenville County, South Carolina pursuant to the Uniform Enforcement of Foreign Judgments Act, S.C. Code § 15-35-900, *et. seq*. (the "UEFJA"), C.A. No. 2020-CP-23-00969 (the "969 Action").

NEXT filed a motion for judgment on the pleadings seeking judgment in its favor as to its declaratory judgment action 6745 Action, a motion to dismiss AT-NET's counterclaim in the 6745 Action, and a motion for relief from the North Carolina judgment in the 969 Action.

Order

The plaintiffs' raise one argument in support of their motion for judgment on the pleadings and their motion for relief from a foreign judgment: they are a state actor that is only subject to

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suit in South Carolina and, therefore, the arbitration award is invalid because the North Carolina arbitration panel lacked subject matter jurisdiction. The plaintiffs, however, failed to raise this argument before the Superior Court in North Carolina prior to confirmation of the arbitration award.

"Subject matter jurisdiction is the power to hear and determine cases of the general class to which the proceedings in question belong." Deborah Dereede Living Tr. dated Dec. 18, 2013 v. Karp, 427 S.C. 336, 346, 831 S.E.2d 435, 441 (Ct. App. 2019), cert. denied (Mar. 12, 2020); Johnson v. S.C. Dep't of Prob., Parole, & Pardon Servs., 372 S.C. 279, 284, 641 S.E.2d 895, 897 (2007) ("Subject matter jurisdiction refers to a court's constitutional or statutory power to adjudicate a case.). The North Carolina Superior Court had the power to hear and determine the confirmation of the arbitration award because it was statutorily empowered to do so. See N.C.G.S. § 1-569.22. NEXT directs its fire at the arbitration itself but raises no objection to the power of the Superior Court to entertain the confirmation proceeding. The North Carolina Superior Court possessed subject matter jurisdiction sufficient to confirm the award. Once the award was confirmed, it became a judgment of the North Carolina court. N.C.G.S. § 1-569.25. If NEXT wished to contest the award prior to confirmation, it was obligated to do so in accordance with the procedure set forth by North Carolina law. Having failed to do so, the Superior Court was within its authority to enter the award and enroll the judgment. Requiring NEXT to contest the arbitration award in North Carolina is consistent with South Carolina's well-established law that South Carolina courts do not have subject matter jurisdiction to adjudicate motions related to arbitration proceedings in other states. *See* Ashley River Properties I, LLC v. Ashley River Properties II, LLC, 374 S.C. 271, 280–81, 648 S.E.2d 295, 299–300 (Ct. App. 2007) ("Courts of other states applying the Uniform Arbitration Act to this issue have uniformly held a court's subject

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matter jurisdiction to consider motions related to arbitration is dependent upon, and arises from, the parties' agreement to conduct the arbitration proceedings in that state.") (citing Government e-Mgmt. Solutions, Inc. v. Am. Arbitration Ass' n, Inc., 142 S.W.3d 857, 861 (Mo.App.2004); Artrip v. Samons Constr., Inc., 54 S.W.3d 169, 171 (Ky.App.2001); Chicago Southshore South Bend R.R. v. N. Indiana Commuter Transp. Dist., 184 Ill.2d 151, 234 Ill.Dec. 395, 703 N.E.2d 7, 9 (1998); Tru Green Corp. v. Sampson, 802 S.W.2d 951, 953 (Ky.App.1991)).

Further, this court rejects NEXT's argument that because it is a state actor, it may not be sued in a sister state for breach of contract. In support of its argument, NEXT cites to the South Carolina case Newberry v. Georgia Dep't of Indus. Trade, 286 S.C. 574, 336 S.E.2d 464 (1985) and the United States Supreme Court case Franchise Tax Board of California v. Hyatt, 139 S.Ct. 1485, 1496-1498 (2019). NEXT's citation to these cases is misplaced because both cases deal with non-consenting state actors.

In Hyatt, the United States Supreme Court considered the question of whether the "Constitution permits a state to be sued by a private party **without its consent** in the courts of a different state." 139 S.Ct. at 1490 (emphasis added). In Hyatt, the foreign entity was the Franchise Tax Board of California (the "California Tax Board"), which was being sued in Nevada state court by Hyatt. Id. Under California law, the California Tax Board was immune from suit for all injuries caused by its tax collection. Id. at 1491. "Consent" as discussed in Hyatt refers to a state entity's consent to be sued in general, not to its consent to a particular forum for suit.

This is consistent with South Carolina law and our courts' application of the doctrine of sovereign immunity. In Newberry, South Carolina's Supreme Court considered the question: "Should the courts of this state exercise jurisdiction over a non-consenting sister state?" 336 S.E.2d at 464. The opinion explains that "[a] non-consenting state is one protected by sovereign

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immunity." Id. at 465 fn. 2. The court answered the question as follows: "[W]e hold, as a matter of comity and public policy, a non-consenting sister state may not be sued in tort in South Carolina." Id. at 465. The decision, therefore, prevents suit "against an agency of the State of Georgia in a South Carolina Court in a case that could not be brought in Georgia." Id. at 464. "Consent," therefore, refers to whether a state has waived or reserved sovereign immunity over the particular claim, not whether it has expressly consented to be sued in another forum. Melton v. Crowder, 317 S.C. 253, 254–56, 452 S.E.2d 834, 834–36 (1995).

Thus, the relevant question is whether South Carolina has consented to suit for the breach of contract claims brought by AT-NET. It has. Sloan Const. Co., Inc. v. Southco Grassing, Inc., 377 S.C. 108, 659 S.E.2d 158, 164 at fn. 6 (2008) (citing Hodges v. Rainey, 341 S.C. 79, 533 S.E.2d 578, 585 (2000) ("We eliminated the State's sovereign immunity from suit based upon its contractual obligation in 1978…) (internal citations omitted)). Because South Carolina has waived sovereign immunity for breach of a contractual obligation, it has consented to suit and the judgment is valid.

NEXT argues that "the only venue in which a South Carolina state actor may be sued is in the courts of the State of South Carolina." NEXT fails to discuss, however, whether a state entity may be bound to an agreement to arbitrate. South Carolina courts have previously compelled state entities to arbitrate where it has entered into a valid arbitration agreement. Trident Technical College v. Lucas & Stubbs, LTD., 286 S.C. 98 (1985). It is undisputed that NEXT contractually agreed to arbitrate any dispute with AT-NET and that it agreed to Charlotte as the forum for that arbitration. NEXT cannot first agree to and demand arbitration and then complain that AT-NET complied with the Contract and its demand. The statutes cited by NEXT regarding where to bring a claim against a governmental entity are venue statutes, not jurisdictional. *See* Whetstone, 272

ELECTRONICALLY FILED - 2020 Jul 07 3:38 PM - GREENVILLE - COMMON PLEAS - CASE#2019CP2306745

S.C. at 327. Venue can be waived. Henly v. North Trident Regional Hospital, 275 S.C. 193, 269 S.E.2d 328 (1980). South Carolina has consented to suit for breach of contract claims and NEXT consented to arbitration in North Carolina. Based on this, NEXT can be compelled to arbitrate in North Carolina and the arbitration award and North Carolina judgment are valid.

Finally, political subdivisions of states "do not enjoy a constitutionally protected immunity from suit under the Eleventh Amendment of the United States Constitution." Jinks v. Richland Cty., 538 U.S. 456, 466 (2003). As recently explained by the Utah Supreme Court, "Hyatt—which addressed constitutionally protected sovereign immunity—does not apply to political subdivisions. The principles set forth in Hall continue to govern a state's governmental immunity grant to its political subdivisions and the respect that should be attributed to it by other states." Galindo v. City of Flagstaff, 452 P.3d 1185, 1187 (Sup. Ct. Utah 2019) (citing to Nevada v. Hall, 99 S.Ct. 1182 (1979) (providing that states are free to choose whether or not to accord immunity or respect limits on liability established by sister states when those states were sued in their courts.)).

Whether NEXT should be entitled to sovereign immunity in a foreign court should be analyzed under the same framework as whether it would be entitled to state governmental immunity under the Eleventh Amendment. The Fourth Circuit has provided several factors in determining whether a political subdivision is an *alter ego* of the state, the most important of which being "whether the state treasury will be responsible for paying any judgment that might be awarded." Ram Ditta v. Maryland National Capital Park and Planning Comm'n, 822 F.2d 456, 457 (1987). Other factors include "whether the entity exercises a significant degree of autonomy from the state, whether it is involved with local versus statewide concerns, and how it is treated as a matter of state law." Id. Consideration of these factors weigh against finding that NEXT is an *alter ego* of the state and entitled to state sovereign immunity: The judgment will not be paid from

ELECTRONICALLY FILED - 2020 Jul 07 3:38 PM - GREENVILLE - COMMON PLEAS - CASE#2019CP2306745

the statue treasury, charter schools were established to provide a high degree of autonomy from state regulations and requirements, and NEXT educates local students and has no statewide impact or presence. The only factor in its favor is how it is treated as a matter of state law, but this is only one factor to be considered and is not determinative. Id. citing Blake v. Kline, 612 F.2d 718, 722 (3rd Cir. 1979) ("Local law and decisions defining the status and nature of the agency involved in its relation to the sovereign are factors to be considered, but only one of a number that are of significance.").

Because NEXT is a political subdivision, not a state actor, it is not entitled to the sovereign immunity discussed in Hyatt. Thus, even if NEXT's interpretation of Hyatt were correct, which it is not, this case is properly analyzed under the Hall framework and North Carolina is free to ignore NEXT's claims of immunity within its jurisdiction.

THEREFORE, for the reasons stated above, and based on the arguments of counsel, the memoranda submitted, the record in this case, and the common and statutory law of the State of South Carolina,

IT IS ORDERED,

That NEXT's motions are denied. The clerk is directed docket and index the North Carolina judgment as any other judgment of this state in civil action number 2020-CP-23-00969.

AND IT IS SO ORDERED.

____
Judge, Thirteenth Judicial Circuit

Greenville, SC

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Greenville Common Pleas

Case Caption: Next School Inc vs. AT Net Services Charlotte Inc , defendant, et al

Case Number: 2019CP2306745

Type: Order/Other

So Ordered

s/Alex Kinlaw, Jr., #2763

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