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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Alex Kinlaw, Jr., Circuit Court Judge

Case No. 2019-CP-23-06745 and
Case No. 2020-CP-23-00969
Appellate Case No. 2021-000424

The NEXT School, Inc., a Public, Not-for-Profit Corporation Incorporated & Existing under the Laws of the State of South Carolina, Appellant,

v.

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, Respondent,

AND

AT-NET Services-Charlotte, Inc., Respondent,

v.

The NEXT School, Inc., Appellant.

FINAL BRIEF OF RESPONDENT

Adam C. Bach (SC Bar # 74885)
Emily R. Godwin (SC Bar # 103708)
ELLER TONNSEN BACH, LLC
1306 South Church Street
Greenville, SC 29605
Telephone: (864) 236-5013
Facsimile: (864) 312-4191
abach@etblawfirm.com
egodwin@etblawfirm.com
Attorneys for Respondent

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STATEMENT OF THE CASE

On July 2, 2015, AT-NET and Appellant entered into a Master Services Agreement ("Services Agreement") in which Appellant agreed to retain AT-NET to provide certain technological services. (R. pp. 199 – 202). The Services Agreement includes the following provision:

> **Article 13 - Governing Law**
>
> **13.1 North Carolina Law Governs.** The Agreement and subsequent Amendments shall be governed by the laws of the State of North Carolina.

(R. p. 199). The Services Agreement also provides that any disputes regarding the agreement must be resolved in arbitration according to the American Arbitration Association ("AAA"):

> **Article 18 – Arbitration**
>
> **18.1 All Disputes to be Arbitrated.** All disputes related to this Agreement shall be decided by arbitration in accordance with the American Arbitration Association then in effect unless the Parties mutually agree otherwise. This agreement shall be specifically enforceable under the prevailing arbitration law. All awards rendered by the arbitrator(s) shall be final and judgment may be entered upon it in accordance with applicable law in any court having jurisdiction.

(R. p. 200).

Appellant breached the Services Agreement by failing to pay AT-NET for its services. (R. pp. 133 – 40). Accordingly, AT-NET filed suit in North Carolina Superior Court, a court of general jurisdiction, in Mecklenburg County, North Carolina. (R. pp. 203 – 07).

Appellant responded with the first of many evolving jurisdictional/venue arguments. In direct contradiction to its current arguments, Appellant's first tactic was to demand that the suit be dismissed so that it could be resolved in arbitration. On October 2, 2017, Appellant's counsel wrote counsel for AT-NET:

> What is your basis for disregarding the **mandatory arbitration provision** in Article 18.1 of the Master Service[s] Agreement? If we are forced to file a motion to dismiss for lack of personal jurisdiction in NC, or in the alternative **to compel arbitration**, we will likely be seeking attorney's fees for doing so.

(R. p. 205). Counsel for AT-NET responded, "If [Appellant] does not wish to waive the arbitration provision, I'm happy to stay the state court action and proceed to arbitration." (R. p. 205). Appellant's counsel responded: "My client is **not willing** to waive arbitration of 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**." (R. p. 204). In discussing potentially proceeding with arbitration, Appellant's counsel said, "Do you have any thought about where to do the arbitration?" (R. p. 212). To which AT-NET's counsel responded, "If there is no case law or rule governing venue, we can try to work out a mutually agreeable location." (R. p. 211).

On November 14, 2017, Appellant filed a "Motion to Dismiss for Lack of Personal Jurisdiction or, in the Alternative, to Compel Arbitration." (R. pp. 209 – 10). AT-NET subsequently agreed with Appellant to dismiss the suit without prejudice "and [proceed] directly to arbitration." (R. p. 209). As agreed, AT-NET initiated the commercial arbitration with AAA. However, Appellant responded by arguing that the AAA—the same arbitral venue that it just

demanded—could not hear the arbitration because Appellant could only be sued in a South Carolina state court. (R. pp. 159 – 67). Neither an arbitrator nor a location for the arbitration had been chosen; accordingly (at least at this point), it appears that Appellant had no objection to North Carolina as the location for the arbitration and merely objected to arbitration generally. (R. pp. 172 – 74). Indeed, on January 9, 2019, Appellant agreed that, subject to its objections to arbitration, "Charlotte is an acceptable forum." (R. pp. 217 – 18).

On May 2, 2019, the parties participated in the arbitration hearing in Charlotte. (R. pp. 177 – 78). The arbitration was conducted pursuant to the AAA rules "then in effect," the AAA Commercial Arbitration Rules. (R. pp. 133, 137). Notably, Rule R-52(c) of the AAA Commercial Arbitration Rules provides, "Parties to an arbitration under these rules shall be deemed to have consented that judgment upon the arbitration award may be entered in any federal or state court having jurisdiction thereof." AAA Commercial Arbitration Rules, R-52(c) (amended Oct. 1, 2013).

The arbitrator decided in favor of AT-NET and issued a final award denying Appellant's motion to dismiss and awarding $85,884.08 to AT-NET for Appellant's breach of the Services Agreement, with prejudgment interest and attorney's fees. (R. pp. 133, 137 – 38). Appellant submitted a motion to the arbitrator asking her to vacate her decision, which she denied. (R. pp. 133, 137.)

Pursuant to the Federal Arbitration Act, Appellant had three months to file an action with the appropriate court to vacate, modify, or correct the award. 9 U.S.C. § 12 (2018); see also N.C. Gen. Stat. § 1-569.23-.24 (providing that motion to vacate, modify, or correct must be filed "within

90 days after the moving party receives notice of the award").[1] The deadline passed with *no action* by Appellant. (R. pp. 133, 136). On September 30, 2019, AT-NET filed a motion in the North Carolina Superior Court in Mecklenburg County to confirm the award. (R. p. 31). On November 18, 2019, Appellant filed a declaratory judgment action in the South Carolina Court of Common Pleas ("2019 Action"), seeking the court's declaration that claims against Appellant could only be brought through a lawsuit in a South Carolina court and that the arbitration proceeding "and the award that flowed therefrom, are void ab initio." (R. pp. 25 – 32).

On November 21, 2019, the North Carolina Superior Court held a hearing regarding AT-NET's request for confirmation of the arbitration award. (R. p. 31). Appellant had notice of the hearing but refused to attend or file an objection to the award. (R. p. 31; R. p. 84, line 2 – p. 85, line 3). On November 26, 2019, the North Carolina Superior Court entered an order and judgment confirming the award. (R. pp. 133 – 38). In its order, the court noted, "The 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." (R. p. 136). The court held:

> The Court finds that the arbitration was duly conducted pursuant to the Master Services Agreement, that the award was duly rendered by the arbitrator, and that **no grounds exist** to vacate, modify, or correct the Final Arbitration Award. Accordingly, [AT-NET] is entitled to an Order confirming the Final Arbitration Award and to entry of judgment in its favor.

(R. p. 136 (emphasis added)). The court confirmed the full award of $85,884.08. (R. pp. 134 – 38).

On January 17, 2020, AT-NET filed an answer to the 2019 action and, out of an abundance of caution, filed, in the alternative, counterclaims for breach of contract and quantum meruit. (R.

[1] AT-NET believes that the Federal Arbitration Act applies, and Appellant contends that the North Carolina Revised Uniform Arbitration Act applies. Both Acts have substantially identical provisions, and AT-NET complied with the award confirmation provisions of both Acts.

pp. 33 – 41). On February 16, 2020, Appellant filed a motion to dismiss AT-NET's counterclaims and a motion for partial judgment on the pleadings. (R. pp. 126 – 29).

On February 17, 2020, AT-NET filed a notice of filing foreign judgment pursuant to the Uniform Enforcement of Foreign Judgments Act, S.C. Code Ann. § 15-35-900, et seq. ("2020 Action"). (R. pp. 130 – 40). The authenticated judgment from the North Carolina Superior Court was submitted with the notice. (R. pp. 133 – 38). On March 16, 2020, Appellant responded to the notice by filing a "Motion for Relief from Judgment and/or Notice of Defenses," again arguing that the arbitration mandated by the Services Agreement was "void ab initio." (R. pp. 141 – 43).

The Greenville County court held a hearing on May 26, 2020, regarding each of Appellant's three motions: (1) motion for partial judgment on the pleadings in the 2019 Action, (2) motion to dismiss AT-NET's counterclaims in the 2019 Action, and (3) motion for relief from foreign judgment in the 2020 Action. (See R. p. 10.) Appellant and AT-NET each filed a memorandum regarding the motions. (E.g., R. pp. 144 – 223).

During the hearing, Appellant admitted that the Services Agreement "does provide for arbitration." (R. p. 57, lines 24 – 25). Appellant further admitted at the hearing that it agreed to Charlotte, North Carolina, as a venue for the arbitration:

> Well, so the way that the AAA said that they would address my jurisdictional arguments is that they needed to know what the venue would be in order to have an arbitrator assigned. . . . [The jurisdictional issue] needs to be in front of the arbitrator. . . . My hope was that, when [an] arbitrator got assigned, I can reraise my motions to dismiss for lack of jurisdiction. . . ."

(R. p. 63, line 18 – p. 64, line 19.) Moreover, Appellant admitted that it knowingly declined to appear at or object to the hearing in North Carolina Superior Court to confirm the award:

> THE COURT: Let me ask you a question.
>
> MR. BUCKINGHAM: Yes, Your Honor.

THE COURT: Why didn't you object to the order and judgment confirming the arbitration award? Why didn't you object to that?

MR. BUCKINGHAM: In North Carolina?

THE COURT: Yes.

MR. BUCKINGHAM: Well, because our position there was that North Carolina – a North Carolina court has no authority.

THE COURT: Why didn't you appear to say that? Nobody appeared. Did you appear?

MR. BUCKINGHAM: No, no one appeared to say that.

THE COURT: Why not?

MR. BUCKINGHAM: Because, frankly, we considered that to be a legal nullity. In fact, before the confirmation –

THE COURT: Why didn't you just go and tell them that? Why didn't somebody appear to tell them that?

MR. BUCKINGHAM: Frankly, we were afraid of being home cooked in North Carolina. I mean, a North Carolina court is going to look at this and not care anything about –

THE COURT: How do you know that? How do you know that unless you appear?

MR. BUCKINGHAM: We had just assumed that.

THE COURT: Oh. That's a simple question. I'll hear all your argument. I'm just saying, I just wanted to know why you didn't appear.

MR. BUCKINGHAM: Sure.

(R. p. 83, line 25 – p. 85, line 8).

The court denied each of Appellant's three motions. (R. p. 90, lines 18 – 23; R. pp. 1 – 9). On July 7, 2020, the court issued a formal order detailing its reasons for denying the motions. (R. pp. 10 – 18). On July 16, 2020, Appellant filed a motion to alter or amend the court's July 7, 2020 order, and the court issued an order denying the motion on March 25, 2021. (R. pp. 224 – 46; R.

pp. 19 – 24). On April 20, 2021, Appellant filed and served its notices of appeal of the July 7, 2020 order and the March 25, 2021 order. (R. pp. 247 – 84).

STANDARD OF REVIEW

In an action to enforce a foreign judgment, the trial court's findings "must be affirmed if there is any evidence to support them." Minorplanet Syss. USA Ltd. v. Am. Aire, Inc., 368 S.C. 146, 149, 628 S.E.2d 43, 44-45 (2006). "Where a judgment recovered in a court of general jurisdiction in another state is relied on, and the record thereof is duly authenticated or certified, and produced in evidence, it will be presumed that the court had jurisdiction of the subject matter and the parties, in the absence of proof to the contrary or of a showing to the contrary by the record itself." Fin. Fed. Credit Inc. v. Brown, 384 S.C. 555, 563, 683 S.E.2d 486, 490 (2009). The party opposing entry of the foreign judgment bears "the burden of overcoming, by the record or by extrinsic evidence, the constitutionally mandated presumption of the foreign judgment's regularity" and must do so by clear and convincing evidence. Id.; Digital Ally, Inc. v. Light-N-Up, LLC, 408 S.C. 101, 106, 757 S.E.2d 732, 735 (Ct. App. 2014); see also Directory Assistants, Inc. v. Shay, App. Case No. 2014-000459, 2017 WL 5175585 (Ct. App. Nov. 8, 2017) (unpublished) (noting that "the burden of undermining the decree of a sister state 'rests heavily upon the assailant' " in reversing lower court that refused to uphold confirmation of arbitration award in foreign court).

In addition, Appellant's issues on appeal raise questions of law, which are subject to *de novo* review. Town of Summerville v. City of N. Charleston, 378 S.C. 107, 110, 662 S.E.2d 40, 41 (2008) (questions of law are reviewed *de novo*); S.C. Wildlife Fed'n v. Limehouse, 549 F.3d 324, 332 (4th Cir. 2008) (existence of sovereign immunity is a question of law reviewed *de novo*);

Town of Arcadia Lakes v. S.C. Dep't of Health & Envtl. Servs., 433 S.C. 47, 52, 855 S.E.2d 325, 328 (Ct. App. 2021) (statutory interpretation is a question of law reviewed *de novo*).

ARGUMENT

I. THE TRIAL COURT PROPERLY HELD THAT APPELLANT WAIVED SOVEREIGN IMMUNITY BECAUSE SOUTH CAROLINA HAS CONSENTED TO CLAIMS FOR CONTRACTUAL LIABILITY AND APPELLANT CONSENTED TO THE ARBITRATION

Appellant's ever-evolving jurisdictional arguments have settled on contesting both the jurisdiction of the arbitrator and the fact that arbitration took place in North Carolina, but not that arbitration took place at all, which is a change from its original position. (See contra, e.g., R. pp. 32, 145 – 46, 148 – 49, 227). Appellant's primary argument is that the North Carolina court that confirmed the award lacked jurisdiction over it because it is a public body and, therefore, may only be sued in South Carolina unless it has consented to jurisdiction elsewhere. First, whether a state has consented to suit in a sister state is determined by its consent to the type of suit, not the forum. Second, *even if* consent were based on forum, the record is abundantly clear that Appellant consented—even demanded—that the claim be submitted to arbitration and agreed that the arbitration take place in North Carolina.

A. South Carolina Has Consented to Claims for Contractual Liability

The lower court properly held that South Carolina is a "consenting state" regarding suits based upon contractual liability. Appellant's cases confirm this fact. In Franchise Tax Board of California v. Hyatt, 587 U.S. —, 139 S. Ct. 1485 (2019), Gilbert Hyatt sued the Franchise Tax Board of California in Nevada state court, arguing that the Board committed torts against him during its tax audits. Id. at 1490 – 91. The Board, a California state agency, was immune from suit in California and argued that it should likewise be immune from suit in Nevada's courts. Id. at 1491. In contrast, the Nevada courts reasoned that principles of comity required the application

of Nevada law rather than California law, allowing Hyatt to proceed in his suit against the Board. Id. at 1491. The United States Supreme Court disagreed, holding that the Constitution does not "permit[] a State to be sued by a private party *without its consent* in the courts of a different State." Id. at 1490 (emphasis added) (overruling Nevada v. Hall, 440 U.S. 410 (1979), which held that states could be sued in the courts of another state). "Consent," as used by the Supreme Court, concerned whether the Franchise Tax Board was immune from suits in California's own courts.

As one court described Hyatt, "[T]he U.S. Supreme Court held that state courts are required to provide sister states the same immunity the sister states would receive in their own state courts." Hill v. Freedman, 608 S.W.3d 650 (W.D. Mo. 2020) (citations omitted). South Carolina has long recognized this doctrine. In Newberry v. Georgia Department of Industrial Trade, 286 S.C. 574, 336 S.E.2d 464 (1985), the South Carolina Supreme Court held that a *non-consenting* state could not be sued in tort in South Carolina. Id. at 576, 336 S.E.2d at 465. Importantly, the court defined a "non-consenting state" as one that is "protected by sovereign immunity." Id. at 576 n.2, 336 S.E.2d at 465 n.2. The court held that the plaintiff could not file her case against the Georgia agency in South Carolina because Georgia would not allow the plaintiff's case against the agency to "be brought in Georgia"—rendering Georgia a "non-consenting state." Id. at 575. Accordingly, the court held that "consent" refers to whether a state has waived its immunity over a particular type of claim in its own courts.

The South Carolina Supreme Court reaffirmed this interpretation of "consent" in Melton v. Crowder, 317 S.C. 253, 452 S.E.2d 834 (1995). In that case, the plaintiff alleged that her injuries were sustained when a North Carolina Highway Patrolman pursued a suspect in a high-speed chase across the North Carolina state line into South Carolina. Id. at 254, 452 S.E.2d at 834 – 35. The plaintiff filed a negligence suit in South Carolina state court against the North Carolina Highway

Patrol, which argued that, as an agency of North Carolina, it was protected from suit by sovereign immunity. Id.

The South Carolina Supreme Court disagreed. Again, the court framed the issue as "whether North Carolina is a *consenting state* subject to suit in tort in South Carolina" and noted the well-settled rule that a state waives its sovereign immunity when it "expressly consents to be sued." Id. at 254 – 55, 452 S.E.2d at 835 (emphasis added). Importantly, in determining whether North Carolina consented to suit, it considered whether North Carolina allowed such negligence actions against its agencies *in North Carolina courts*. Id. at 255, 452 S.E.2d at 835. The court noted that the North Carolina Tort Claims Act allowed negligence actions to be brought against North Carolina agencies before the state's Industrial Commission. Id. The court further found that the North Carolina appellate courts allowed suit against state agencies in North Carolina state court in certain circumstances, thus holding that sovereign immunity does not completely bar negligence suits against North Carolina agencies in North Carolina's state courts. Id. The South Carolina Supreme Court referred to its holding in Newberry: "Since the plaintiff in Newberry could not maintain a suit in Georgia, we held she could not bring an action in South Carolina. Unlike the facts in Newberry, [the plaintiff here] could maintain a suit *in North Carolina*." Id. at 255 – 56, 452 S.E.2d at 835 – 36 (emphasis added). Accordingly, the court held that "North Carolina is a consenting state" and that the suit could proceed in South Carolina. Id. at 256, 452 S.E.2d at 836.

South Carolina has unquestionably consented to claims for breach of contract in its own courts, and therefore, it is a "consenting" state. In black-letter law, South Carolina declared: "Nothing in [the South Carolina Tort Claims Act] affects liability based on contract nor does it affect the power of the State or its political subdivisions to contract." S.C. Code Ann. § 15-78-20(d) (2005). The South Carolina Supreme Court interpreted this statute as providing that

"[c]ontractual liability is *expressly excluded from immunity*." Wright v. Smallwood, 308 S.C. 471, 473, 419 S.E.2d 219, 220 (1992) (citing S.C. Code Ann. § 15-78-20(d)). Moreover, our courts have long held that South Carolina has consented to claims for breach of contract. Sloan Constr. Co., Inc. v. Southco Grassing, Inc., 377 S.C. 108, 118, 659 S.E.2d 158, 164 (2008) ("A sovereign is not immune from a suit based on its breach of a contractual obligation.") (citations omitted); Hodges v. Rainey, 341 S.C. 79, 92, 533 S.E.2d 578, 585 (2000) ("We eliminated the State's immunity from suit based upon its contractual obligation in 1978 . . . .") (citations omitted). Plainly, South Carolina has waived its immunity for contractual claims, and therefore, AT-NET's breach-of-contract claim was properly submitted to arbitration in North Carolina.

Moreover, in Hyatt and Melton, the defending states have statutes providing venue for suits against the state entities—yet neither court found such venue provisions dispositive as to jurisdiction because the appropriate question was consent to the *type* of claim, not the forum for the dispute.[2] See Hyatt, 587 U.S. —, 139 S. Ct. 1485 (considering California's consent to suit without reference to venue statute, Cal. Gov't Code § 955.2); Melton, 317 S.C. at 254, 452 S.E.2d at 835 (noting that N.C. Gen. Stat. § 143-291 provided North Carolina Industrial Commission as venue for suit against North Carolina defendant while holding that North Carolina consented to suit); see also, e.g., Kent Cty. Md. v. Shepherd, 713 A.2d 290 (Del. 1998) (holding Maryland state entities were not entitled to sovereign immunity in Delaware court, without regard to any venue statute); Trident Tech. Coll. v. Lucas & Stubbs, LTD., 286 S.C. 98, 333 S.E.2d 781 (1985) (confirming arbitration award involving South Carolina state entity without reference to venue statute). It is no stretch to say that every state has a venue provision concerning the appropriate

[2] When Newberry was decided in 1985, Georgia had no comparable venue statute. See Ga. Code Ann. § 50-21-28 (1992).

forum to sue a state entity. The numerous cases concerning "consent," including Hyatt, would be irrelevant if the foreign court merely looked to another state's venue statute to determine consent.

B. Appellant Consented to the Arbitration

Even if the consent referenced in Hyatt refers to a state's consent to suit in a particular forum rather than consent to a type of claim, Appellant's arguments fail because Appellant plainly consented to the arbitration by entering into the Services Agreement. First, South Carolina has already held that a state entity may be compelled to arbitrate—and to arbitrate in North Carolina. In Trident Technical College v. Lucas & Stubbs, LTD., 286 S.C. 98, 333 S.E.2d 781 (1985), Trident Technical College ("TTC"), a South Carolina state entity, and Lucas & Stubbs, LTD ("L&S") entered into a standard form AIA contract with a construction contractor for the construction of the college's campus. Id. at 102, 33 S.E2d at 784; see S.C. Code Ann. § 59-53-410 through – 500. In the factual background of the case, the South Carolina Supreme Court related that "TTC refused to arbitrate and on April 30, 1980, [the contractor] petitioned this Court to compel TTC to arbitrate under the Federal Arbitration Act." Trident Technical College, 286 S.C. at 102, 333 S.E.2d at 784. The court compelled TTC to arbitrate. Id. Notably, the AAA selected three arbitrators, "all residing in the State of North Carolina." Id. at 103, 333 S.E.2d at 784. Although Appellant here would no doubt argue that such arbitration was "void ab initio" for lack of subject matter, the South Carolina Supreme Court did not seem to notice. Rather, it upheld the lower court's decision to both confirm the award and deny the motion to vacate—all without a second glance to any potential jurisdictional issues. Id. at 101, 104 – 11, 333 S.E.2d at 784, 785 – 89.

The North Carolina Court of Appeals has come to a similar conclusion. In State v. Philip Morris USA, Inc., 193 N.C. App. 1, 666 S.E.2d 783 (N.C. Ct. App. 2008), the state of North

Carolina had, with other states, entered into a settlement agreement with various tobacco manufacturers. Id. at 3, 666 S.E.2d at 785. The settlement agreement provided for national arbitration of disputes regarding the agreement. Id. at 6, 9, 666 S.E.2d at 786 – 87, 788. When a dispute arose and North Carolina refused to arbitrate, certain manufacturers filed a motion to compel arbitration, and the lower court granted the motion. Id. at 5 – 6, 666 S.E.2d at 787 – 88. On appeal, the North Carolina Court of Appeals reasoned that North Carolina could not logically argue that it had "no authority to enter into the [settlement agreement]" and noted, "[n]or can the State be asserting that it can never be bound to arbitrate. Courts, including our Supreme Court, have enforced arbitration agreements against sovereigns." Id. at 7, 666 S.E.2d at 787 (citing Johnston Cty. v. R.N. Rouse & Co., 331 N.C. 88, 97, 414 S.E.2d 30, 35 (N.C. 1992) (holding that county should be compelled to arbitrate because it agreed to arbitration clause in contract) (additional citations omitted)). Among other things, North Carolina argued that its state sovereign immunity barred "the forum (national arbitration)." Id. at 9, 666 S.E.2d at 788. The court rejected the argument, quoting another court approvingly: "There is no reason why the [state], as opposed to any other party to a contract, cannot be subject to an analysis of its having met (or not) contractual conditions within the terms established by the contract [i.e., arbitration]." Id. at 9, 666 S.E.2d at 789. Accordingly, the North Carolina Court of Appeals upheld the lower court's order compelling arbitration. Id. at 19, 666 S.E.2d 795; see also In re Haw. State Teachers Ass'n, 140 Hawai'i 381, 397-400, 400 P.3d 582, 598-601 (Haw. 2017) (holding that Hawaii waived state sovereign immunity regarding prejudgment interest when it "explicitly availed itself of arbitration" by agreeing to arbitration provision) (internal marks and citations omitted).

Moreover, although there is little case law discussing waiver of *state* sovereign immunity by contract, courts discussing waiver of other types of sovereign immunity consistently hold that

a sovereign can waive its immunity by contract. For example, in Board of Trustees SABIS International School of Cincinnati v. Montgomery, 205 F. Supp. 2d 835 (S.D. Ohio 2002), the court considered whether a state had waived its Eleventh Amendment sovereign immunity in a contract between the Ohio State Board of Education and a school's board of trustees. Id. at 839. The contract provided that any dispute regarding the contract would be resolved by arbitration. Id. When state officials refused to arbitrate a dispute, the board filed suit in federal court. Id. at 840 – 42. The court held that Ohio had made a "clear declaration" and "unequivocally expressed" its consent to suit in federal court when it agreed to the arbitration provision in the contract (which was governed by the Federal Arbitration Act). Id. at 845 – 46; see also Baum Research & Dev. Co., Inc. v. Univ. of Mass. at Lowell, No. 1:02-CV-674, 2006 WL 461224, at *4 (W.D. Mich. Feb. 24, 2006). The court reasoned that agreeing to the arbitration provision was "pre-litigation conduct, or action undertaken in anticipation of future disputes that might result in litigation" and that allowing the state to agree to arbitration and later claim sovereign immunity from the arbitration "encourages forum shopping by the State, and fails to produce consistent and fair results." Bd. of Trustees, 205 F. Supp. 2d at 846.

Likewise, in Baum Research & Development Co., Inc. v. University of Massachusetts at Lowell, No. 1:02-CV-674, 2006 WL 461224 (W.D. Mich. Feb. 24, 2006), the University of Massachusetts at Lowell argued that its Eleventh Amendment immunity barred Baum Research and Development Co., Inc.'s suit against it in federal district court in Michigan. Id. at *1. In response, Baum pointed to the contract between it and the University, which included a provision that the contract would be "construed, interpreted and applied according to" Michigan law and that "all parties agree to proper venue and hereby submit to jurisdiction in the appropriate State or Federal Courts of Record sitting in the State of Michigan." Id. at *2, *5. The court found that

agreeing to this provision constituted a "clear declaration" of the University's intent to submit to the court's jurisdiction. Id. (internal marks omitted). "By agreeing to this provision, [the University] affirmatively agreed to resolve in federal court any disputes that may arise. Permitting [the University] to now invoke sovereign immunity would permit it to 'selectively . . . hide behind the cloak of sovereign immunity when doing so would serve its litigation objects. . . ." Id. at *5.

Again, in Pettigrew v. Oklahoma ex rel. Oklahoma Department of Public Safety, 722 F.3d 1209 (10th Cir. 2013), the United States Court of Appeals for the Tenth Circuit considered whether the Oklahoma Highway Patrol was entitled to Eleventh Amendment immunity in claims for breach of contract and declaratory judgment when it had entered into a settlement agreement with its employee and the employee subsequently sued. Id. at 1211 – 12. The settlement agreement included a venue provision stating that the laws of Oklahoma would govern any interpretation of the agreement and that if litigation is commenced to enforce the agreement, "the litigation will be brought in the appropriate Oklahoma court having jurisdiction, either state or federal." Id. at 1211. Not surprisingly, the Oklahoma Highway Patrol argued that this language was not "express" enough to waive immunity and that the phrase "appropriate Oklahoma court having jurisdiction" automatically excluded the federal court. Id. at 1214 – 15. The court disagreed. The court held that while the contract language could have been clearer, it satisfied the stringent test for waiver of sovereign immunity because the language allowed for "no other reasonable construction" than waiver. Id. Accordingly, the court affirmed the lower court's denial of Oklahoma's motion to dismiss. Id. at 1216; see also Allen v. Cooper, 895 F.3d 337, 347 (4th Cir. 2018) (recognizing that North Carolina could waive its Eleventh Amendment immunity by contract but holding that vague language providing that parties "may avail themselves of all remedies provided by law or equity" fell short of the "clear statement" needed to constitute waiver).

Courts considering waiver of the United States's or a foreign state's sovereign immunity hold the same: a sovereign may waive its sovereign immunity by contract. Hardie v. United States, 367 F.3d 1288 (Fed. Cir. 2004) (holding that when United States "elected to step into the shoes" of party to contract, it was "subject to the arbitration clause . . . just as any private party would be"); Eckert Int'l, Inc. v. Gov't of Sovereign Democratic Republic of Fiji, 32 F.3d 77, 81 n.2 (4th Cir. 1994) (holding that choice-of-law provision providing that agreement would be construed and interpreted according to the laws of "Virginia in the United States" was enough under Foreign Sovereign Immunities Act to show that Fiji impliedly waived its sovereign immunity and noting that a "rational argument can be made that the phrase of the choice of law provision 'in the United States' is an explicit waiver of sovereign immunity").

A United States Supreme Court case, C & L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Okla., 532 U.S. 411 (2001), is particularly instructive in its discussion of waiver of an Indian tribe's sovereign immunity. As the court previously held, tribes, unlike states, did not concede any sovereign immunity in ratifying the Constitution; thus, tribal immunity "is not subject to diminution by the States" and will prevent suit against the tribe absent a "clear" waiver by the tribe. Kiowa Tribe of Okla. v. Mfg. Techs., Inc., 523 U.S. 751 (1998); C & L Enters., Inc., 532 U.S. at 419. In C & L Enterprises, an Indian tribe and a contractor entered into a standard form construction contract copyrighted by the American Institute of Architects ("AIA"). C & L Enters., Inc., 532 U.S. at 414-15. The AIA contract included an arbitration clause remarkably similar to the one in the Services Agreement:

> All claims or disputes between the Contractor and the Owner arising out of or relating to the Contract, or the breach thereof, shall be decided by arbitration in accordance with the Construction [I]ndustry Arbitration Rules of the American Arbitration Association currently in effect unless the parties mutually agree otherwise . . . . The award rendered by the arbitrator or arbitrators shall be final,

> and judgment maybe entered upon it in accordance with applicable law in any court having jurisdiction thereof.

Id. at 415 (internal marks omitted). Also like here, the applicable AAA Rules provided that "[p]arties to these rules shall be deemed to have consented that judgment upon the arbitration award may be entered in any federal or state court having jurisdiction thereof." Id. at 415.

Further, the AIA contract included a choice-of-law clause: "The contract shall be governed by the law of the place where the Project is located." Id. (internal marks omitted). The Project was located in Oklahoma, which (like North Carolina) adopted a Uniform Arbitration Act providing that "[t]he making of an agreement . . . providing for arbitration in this state confers jurisdiction on the court to enforce the agreement under this act and to enter judgment on an award thereunder." Id. (internal marks omitted). The act defined "court" as "any court of competent jurisdiction in this state." Id. at 416 (internal marks omitted).

After a dispute, the contractor submitted an arbitration demand, which the tribe objected to on the basis of sovereign immunity. Id. The arbitrator rendered an award in favor of the contractor, and the contractor filed suit to enforce the award in Oklahoma state court. Id. The tribe appeared solely to move for dismissal on the basis of sovereign immunity. Id. The Oklahoma court denied the motion and entered judgment confirming the award. Id. The Oklahoma Court of Civil Appeals disagreed with the lower court, holding that the AIA contract provisions fell short of the "unequivocal expression" required for the tribe to waive sovereign immunity. Id. at 417.

The United States Supreme Court granted certiorari and reversed. In its unanimous opinion, the court held that the contract provision constituted a "clear" statement of waiver for several reasons:

1. The arbitration clause required dispute resolution by binding arbitration, and the award would "be reduced to judgment 'in accordance with applicable law in any court having jurisdiction thereof.' ";
2. Pursuant to the AAA rules, the arbitration award would be "entered in any federal or state court having jurisdiction thereof"; and
3. Importantly, the court held that the contract's provision that Oklahoma law would govern the contract "makes it plain enough that a 'court having jurisdiction' to enforce the award in question *is the Oklahoma state court* in which [the contractor] filed suit." As the court held:

> *By selecting Oklahoma law* ("the law of the place where the Project is located") to govern the contract, . . . the parties have effectively consented to confirmation of the award "in accordance with" the Oklahoma Uniform Arbitration Act.

Id. at 418 – 19.

In addition, the court noted that Oklahoma's Uniform Act allowed its courts to have jurisdiction "when 'an agreement . . . provides for arbitration in this state.' " Id. at 419 – 20. Importantly, the court held that although the contract did not explicitly say that the arbitration would take place in Oklahoma, "[o]n any sensible reading of the Act, the [Oklahoma court] fits that statutory description." Id. at 420.

Notably, the tribe argued that it never expressly waived its sovereign immunity in any *judicial forum* because it merely agreed to *arbitration*. Id. at 421 – 22. The court rejected this argument, stating that the arbitration provision "has a real world objective" and that "to the real world, the contract specifically authorizes judicial enforcement of the resolution arrived at through arbitration." Id. at 422. Accordingly, the court held that the tribe waived its sovereign immunity.

C & L Enterprises is exactly on point here:

1. Like the tribe, Appellant agreed to resolve disputes by binding arbitration that would result in a "final" award and that "judgment may be entered upon it in accordance with applicable law in any court having jurisdiction." (R. pp. 194, 200).
2. Like the tribe's contract, the Services Agreement provided for arbitration before AAA with its applicable rules providing that the arbitration award would be "entered in any federal or state court having jurisdiction thereof." (R. pp. 133, 137).
3. As the tribe agreed that another sovereign's laws would govern its contract, Appellant likewise agreed that North Carolina's laws would govern the Services Agreement. (R. pp. 194, 199.) According to the United States Supreme Court, such agreement "makes it plain enough" *that a North Carolina court* has jurisdiction to enforce the award. C & L Enters., Inc., 532 U.S. at 419.

Finally, as the tribe's agreement to governance by Oklahoma law meant that the contract sufficiently "provid[ed] for arbitration in [Oklahoma courts]" to satisfy Oklahoma's Uniform Arbitration Act, so Appellant's agreement to governance by North Carolina law means that the Services Agreement sufficiently "provid[es] for arbitration in [North Carolina]" pursuant to North Carolina's Revised Uniform Arbitration Act. Id.; N.C. Gen. Stat. § 1-569.26 (2015).

Here, Appellant (1) demanded arbitration, (2) referred AT-NET to the "mandatory arbitration provision in [the Services Agreement]," (3) repeated that it was "not willing to waive arbitration in this matter," and (4) even filed a motion to compel arbitration. (R. pp. 203 – 16). In addition, Appellant agreed to the governance of North Carolina law and agreed to conduct the arbitration in Charlotte, North Carolina. (R. pp. 208 – 18).

In sum, the United States Supreme Court's reasoning holds here. By the express terms of the Services Agreement, Appellant plainly consented to the arbitration, its binding award, and the

North Carolina Superior Court's jurisdiction in confirming that award. And Appellant's consent did not end with the Services Agreement—when Appellant further agreed to hold the arbitration in Charlotte, North Carolina, it necessarily agreed that the award would be confirmed by a North Carolina court. Appellant cannot now disclaim jurisdiction of that same court.

II. THE TRIAL COURT PROPERLY HELD THAT THE NORTH CAROLINA SUPERIOR COURT HAD JURISDICTION TO CONFIRM THE ARBITRAL AWARD

By the plain terms of the Services Agreement, Appellant expressly consented to jurisdiction of the North Carolina Superior Court to confirm the arbitration award. Specifically, Appellant agreed to be governed by North Carolina's Revised Uniform Arbitration Act, which includes the following jurisdictional provision: "An agreement to arbitrate providing for arbitration in this State confers *exclusive jurisdiction* on the court to enter judgment on an award under this Article." N.C. Gen. Stat. § 1-569.26 (2015) (emphasis added). The North Carolina Superior Court plainly possessed subject matter jurisdiction to confirm the arbitral award.

Appellant's arguments to the contrary misunderstand the distinction between subject matter jurisdiction and personal jurisdiction: the former considers the class of claims, and the latter considers the identity of the party. Lightfoot v. Cendant Mortg. Corp., — U.S. —, 137 S. Ct. 553, 562 (2017) ("A court must have the power to decide the claim before it (subject-matter jurisdiction) and power over the parties before it (personal jurisdiction) before it can resolve a case."). State sovereign immunity concerns personal jurisdiction because it depends on the party's identity as a sovereign. Mowrer v. U.S. Dep't of Transp., 14 F.4th 723, 741 (D.C. Cir. 2021) (Katsas, J., concurring) ("From the beginning, sovereign immunity thus concerned the power to hale a particular party into court, or what we now call personal jurisdiction."); Hyatt, 587 U.S. —, 139 S. Ct. at 1493 – 94 (discussing sovereign immunity as sounding in personal jurisdiction); see also

PennEast Pipeline Co., LLC v. New Jersey, — U.S. —, 141 S. Ct. 2244, 2264 (2021) (Gorsuch, J., dissenting) ("Structural [sovereign] immunity sounds in personal jurisdiction . . . .").

"Subject-matter jurisdiction, because it involves a court's power to hear a case, can never be forfeited or waived." Arbaugh v. Y&H Corp., 546 U.S. 500, 514 (2006). As recognized by our Supreme Court, "[o]bviously, if the matter may be waived, it cannot involve subject matter jurisdiction." Bardoon Props., NV v. Eidolon Corp., 326 S.C. 166, 170, 485 S.E.2d 371, 373 (1997). Appellant concedes that it is possible for a sovereign to consent to a foreign jurisdiction, and South Carolina and the United States Supreme Court have recognized this explicitly. Because sovereign immunity can be waived, as both parties agree, it must sound in personal, rather than subject matter, jurisdiction. Ins. Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702 (1982) ("[N]o action of the parties can confer subject-matter jurisdiction upon a federal court. Thus, the consent of the parties is irrelevant, principles of estoppel do not apply, and a party does not waive the requirement by failing to challenge jurisdiction early in the proceedings." (internal citations omitted)); State v. Grim, 341 S.C. 63, 66, 533 S.E.2d 329, 330 (2000) ("Furthermore, parties cannot confer subject matter jurisdiction by consent." (citation omitted)).

Here, the North Carolina Superior Court had subject matter jurisdiction because it was empowered to hear the class of claims before it, namely confirmation of arbitration awards issued in Mecklenburg County, North Carolina. It had personal jurisdiction because Appellant consented in the Services Agreement and in selecting Charlotte as the forum for the arbitration hearing. See White v. Preferred Research, Inc., 315 S.C. 209, 432 S.E.2d 506 (Ct. App. 1993) (upholding lower court's confirmation of arbitral award and holding that because parties submitted matter to binding arbitration, "they waived the defense of lack of personal jurisdiction"); see also St. Paul Fire &

Marine Ins. Co. v. Courtney Enters., Inc., 270 F.3d 621, 624 (8th Cir. 2001) (reasoning that "if the court in the selected forum did not have personal jurisdiction to compel arbitration, the agreement to arbitrate would be effectively unenforceable."); Doctor's Assocs., Inc. v. Stuart, 85 F.3d 975, 979, 983 (2d Cir. 1996) (holding that party's agreement to arbitrate in forum showed consent to personal jurisdiction as to matters relating to that arbitration). Further, even if Appellant did not consent, Appellant waived its personal jurisdiction arguments by failing to appear in North Carolina Superior Court and object to confirmation. Pharmavite LLC v. Netbus Inc., Civil Action No. 0:21-cv-00361, 2021 WL 4198506, at *5 (D.S.C. Sept. 15, 2021) ("Because Defendants failed to raise the defense of personal jurisdiction in a timely manner, they have waived their objection to personal jurisdiction in this Court." (citations and internal marks omitted)); S.C. Nat. Bank v. Westpac Banking Corp., 578 F. Supp. 596, 598-99 (D.S.C. 1987) ("Acts inconsistent with the continued assertion of a right, such as the failure to insist upon the right, may constitute waiver. . . . Thus, a party who objects to a court's jurisdiction, but takes action inconsistent with that objection, waives the objection and becomes subject to the court's jurisdiction." (citations omitted)).

Further, if Appellant's argument is correct, then neither the Nevada Supreme Court nor the South Carolina Supreme Court had subject matter jurisdiction to hear Hyatt, Melton, or Newberry. Conspicuously, in each case, the defending governmental entity appeared in the foreign court to assert the defense of sovereign immunity—and no court declined to hear arguments regarding sovereign immunity because it allegedly "had no authority" to do so. (R. p. 84, line 9); see Waterfront Comm'n of N.Y. Harbor v. Governor of N.J., 961 F.3d 234 (3d Cir. 2020) (holding that New Jersey's sovereign immunity deprived New York federal district court of jurisdiction to hear case); All Olympia Gymnastic Ctr. Inc. v. Nassar, Case No. 2:18-cv-10540-JLS-KES, 2020

WL 1955307 (C.D. Cal. Mar. 9, 2020) (holding that court had power to determine whether Michigan consented to suit in federal court in California); Kenneth H. Hughes, Inc. v. Aloha Tower Dev., Corp., 654 F. Supp. 2d 1142 (D. Haw. 2009) (holding state waived Eleventh Amendment sovereign immunity by contract); Ruisi v. O'Sullivan, 132 Conn. App. 1, 30 A.3d 14 (Conn. App. Ct. 2011) (remanding for lower court to determine whether sovereign immunity existed for New York official in Connecticut court). It seems incredible that the United States Supreme Court in Hyatt, the Nevada Supreme Court in Hyatt, and the South Carolina Supreme Court and Court of Appeals in Melton and Newberry all failed to notice that the courts where these actions were litigated lacked subject matter jurisdiction to hear and determine the case at all.

In fact, the only issue as to subject matter jurisdiction in this case is South Carolina's lack of subject matter jurisdiction over the arbitration award. As this Court held in Ashley River Props. I, LLC v. Ashley River Props. II, LLC, 374 S.C. 271, 281, 648 S.E.2d 295, 300 (Ct. App. 2007), "South Carolina courts do not have subject matter jurisdiction to consider a motion to review an arbitration award issued in a proceeding conducted in [another state] pursuant to the parties' written agreement." Here, Appellant expressly agreed in email correspondence that "Charlotte is an acceptable forum" for the arbitration hearing. (R. pp. 217 – 18). Further, Appellant agreed to the AAA Commercial Arbitration Rules, providing that Appellant has "consented that judgment upon the arbitration award may be entered in any federal or state court having jurisdiction thereof." AAA Commercial Arbitration Rules, R-52(c) (amended Oct. 1, 2013). By agreeing to conduct the arbitration hearing in North Carolina, Appellant necessarily agreed that an arbitral award could be reviewed by a North Carolina court. Accordingly, South Carolina courts lack subject matter jurisdiction to review the arbitral award.

Moreover, the North Carolina court plainly had jurisdiction to determine *whether* Appellant had consented to suit. Implicit in each of the above cases is that a court has power to determine *whether* it has jurisdiction in a matter. The United States District Court for the District of California considered this exact issue in All Olympia Gymnastic Center Inc. v. Nassar, Case No. 2:18-cv-10540-JLS-KES, 2020 WL 1955307 (C.D. Cal. Mar. 9, 2020). There, the plaintiffs filed suit in federal court in California against Michigan State University ("MSU"). Id. at *1. MSU argued that under Hyatt, when determining subject-matter jurisdiction, "all the Court needs to know is that MSU is an arm of the State of Michigan" and that it therefore automatically "lacks subject-matter jurisdiction over MSU—no questions asked." Id. at *3. "In other words, MSU construes Hyatt to mean that, in a case like this one, state courts may not exercise jurisdiction over other States or state entities even to determine whether those States or state entities *consented* to jurisdiction." Id. (emphasis in original). The court was incredulous. It reasoned that in Hyatt, the Supreme Court was clear that courts have jurisdiction over a consenting state; therefore, the court *must* have jurisdiction to determine whether the state consented. Id. Such logic—and binding case law from the Supreme Courts of the United States and South Carolina—apply here. The North Carolina Superior Court had jurisdiction to determine whether Appellant had consented.

Appellant knowingly and voluntarily waived its right to contest confirmation and argue it did not consent when it chose not to file any motion to vacate, modify, or correct the arbitral award in North Carolina. When AT-NET filed a motion to confirm the award (and did so without opposition), the court followed its statutory duty in issuing the confirming order. N.C. Gen. Stat. § 1-569.22 (2017) ("Upon motion of a party for an order confirming the award, the court *shall* issue a confirming order . . . ."); Canadian Am. Ass'n of Prof. Baseball, Ltd. v. Ottawa Rapidz, 213 N.C. App. 15, 24, 711 S.E.2d 834, 841 (N.C. Ct. App. 2011) (holding that "Appellants were

required to file a motion to vacate the award or a motion to modify or correct the award under both the [North Carolina Revised Uniform Arbitration Act] and the [Federal Arbitration Act] if it sought to challenge any of the disputable aspects thereof. . . . Otherwise, the court properly authorized to confirm the arbitration decision must enter an order confirming the award upon a motion for confirmation by any party to the arbitration."). The court had jurisdiction to confirm the award; Appellant voluntarily waived its right to challenge that confirmation; the judgment stands.

III. THE TRIAL COURT PROPERLY HELD THAT APPELLANT IS A POLITICAL SUBDIVISION NOT ENTITLED TO SOVEREIGN IMMUNITY

The above discussions assume *arguendo* that Appellant has any sovereign immunity to waive; however, Appellant has failed to show that it is entitled to share in South Carolina's sovereign immunity. Indeed, Appellant has failed to present a single South Carolina appellate case showing that a charter school is protected by South Carolina's state sovereign immunity from suit in a foreign jurisdiction. Nevertheless, such a showing would be immaterial because Appellant is a *political subdivision* of South Carolina and, as such, is not entitled to sovereign immunity.

If a state entity is not an "*alter ego* of the state" and, thus the "state is [not] the real party in interest," the entity is classified as a "political subdivision" of the state, no matter how it may be classified within the state. Ram Ditta v. Md. Nat'l Capital Park & Planning Comm'n, 822 F.2d 456, 457 (4th Cir. 1987) (holding that state entity was "political subdivision" of Maryland, despite Maryland courts' holding that entity was "state agency, and therefore immune from torts"). As a "political subdivision," an entity is not entitled to the state's sovereign immunity recognized by the Eleventh Amendment. Id. As noted in Hyatt, the Eleventh Amendment merely recognized the states' inherent sovereign immunity: it was enacted to "*preserve* the States' traditional immunity from suits" and "*restore* the original constitutional design" of state sovereign immunity. Hyatt, 139 S. Ct. at 1496 (emphases added). Importantly, the Eleventh Amendment provides that states

retain their sovereign immunity from suit in *federal courts*; accordingly, Hyatt's holding that states likewise retain their sovereign immunity from suit in *sister states' courts* necessarily renders analysis of Eleventh Amendment immunity directly applicable to analysis of state sovereign immunity. Id.; see also Galindo v. City of Flagstaff, 452 P.3d 1185, 1187 n.2 (Sup. Ct. Utah 2019) (recognizing relevance of Eleventh Amendment immunity and "political subdivision" doctrine in relation to post-Hyatt analysis of state sovereign immunity: "Hyatt—which addressed constitutionally protected sovereign immunity—does not apply to political subdivisions.")

In determining whether a state entity is a "political subdivision" that is not entitled to immunity, the United States Court of Appeals for the Fourth Circuit provided several factors to consider, the most important being "whether the state treasury will be responsible for paying any judgment that might be awarded." Ram Ditta, 822 F.2d at 457. If the state treasury will not be responsible, "sovereign immunity applies only where the governmental entity is so connected to the State that the legal action against the entity would, despite the fact that the judgment will not be paid from the State treasury, amount to the indignity of subjecting the State to the coercive process of judicial tribunals at the instance of private parties." Hutto v. S.C. Retirement Sys., 773 F.3d 536, 543 (4th Cir. 2014) (quoting Cash v. Granville Cty. Bd. of Educ., 242 F.3d 219, 222 (4th Cir. 2001)) (internal marks omitted). Other important factors include the entity's autonomy from the state, whether its concerns are local or statewide, and its treatment by the laws of its home state. Ram Ditta, 822 F.2d at 457 – 58.

Here, the factors establish that Appellant is a political subdivision, not an *alter ego* of South Carolina. First, and most important, judgment would not be paid from the state treasury. In addition, according to the purpose for their formation, charter schools enjoy a higher degree of autonomy from state regulations and requirements than experienced by regular public schools; and

finally, Appellant is plainly involved in *local* interests rather than statewide interests because it educates local students and has no statewide presence or impact. The only factor that Appellant could argue as favorable is its treatment in state law—but this single factor fails to tip the scales from the other three factors, especially the payment factor. Id. at 459 – 60 (declining to recognize state courts' view of Maryland agency as sufficient to outweigh other three factors); Blake v. Kline, 612 F.2d 718, 722 (3d 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."). Accordingly, Appellant is a political subdivision of South Carolina and, therefore, is not protected by South Carolina's state sovereign immunity.

Finally, Appellant cannot excerpt language from the South Carolina Tort Claims Act in support of its argument that as a "political subdivision," it allegedly cannot be held liable. (App.'s Initial Br. 12 – 13.) The South Carolina Tort Claims Act obviously deals with *torts*—and the plain language of the Act excludes any application to liability in *contract*: "Nothing in this chapter affects liability based on contract . . . ." S.C. Code Ann. § 15-78-20(d) (2005); Wright v. Smallwood, 308 S.C. 471, 473, 419 S.E.2d 219, 220 (1992) (holding that South Carolina Tort Claims Act provides that "[c]ontractual liability is expressly excluded from immunity"); see also Hodges v. Rainey, 341 S.C. 79, 92, 533 S.E.2d 578, 585 (2000) ("We eliminated the State's immunity from suit based upon its contractual obligation in 1978 . . . .") (citations omitted). Contractual liability of the state is not subject to the South Carolina Tort Claims Act, and comparison of language from the Act with Eleventh Amendment immunity analysis is improper. In sum, Appellant is a political subdivision that is not entitled to sovereign immunity for its breach of contract.

CONCLUSION

For the reasons stated above, this Court should affirm the trial judge's rulings denying Appellant's motion for judgment on the pleadings, motion to dismiss, motion for relief from foreign judgment, and motion to alter or amend the judgment.

January 10, 2022

s/Adam C. Bach

Adam C. Bach (SC Bar # 74885)
Emily R. Godwin (SC Bar # 103708)
ELLER TONNSEN BACH, LLC
1306 South Church Street
Greenville, SC 29605
Telephone: (864) 236-5013
Facsimile: (864) 312-4191
abach@etblawfirm.com
egodwin@etblawfirm.com
Attorneys for Respondent