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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

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.

RECORD ON APPEAL

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Next School Inc
PLAINTIFF(S)

AT Net Services Charlotte Inc et al
DEFENDANT(S)

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ACTION DISMISSED (*CHECK REASON*):** Rule 12(b), SCRPC; Rule 41(a), SCRPC (Vol. Nonsuit); Rule 43(k), SCRPC (Settled);
 Other
- ACTION STRICKEN (*CHECK REASON*):** Rule 40(j), SCRPC; Bankruptcy;
 Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
 Other
- STAYED DUE TO BANKRUPTCY**
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (*CHECK APPLICABLE BOX*):**
 Affirmed; Reversed; Remanded;
 Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: See attached order (formal order to follow) Statement of Judgment by the Court:

Plaintiff's Motion for Partial Judgment on the Pleadings Denied. Formal Order from Attorney Adam Bach to follow within 20 days.

ORDER INFORMATION

This order ends does not end the case.

See Page 2 for additional information.

For Clerk of Court Office Use Only

This judgment was electronically entered by the Clerk of Court as reflected on the Electronic Time Stamp, and a copy mailed first class to any party not proceeding in the Electronic Filing System on 05/26/2020 .

American Arbitration Association Inc

NAMES OF TRADITIONAL FILERS SERVED BY MAIL

Court Reporter:

E-Filing Note: The date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgment to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.



Greenville Common Pleas

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

Case Number: 2019CP2306745

Type: Order/Electronic Form 4

So Ordered

s/Alex Kinlaw, Jr., #2763

Electronically signed on 2020-05-26 16:52:44 page 3 of 3

Next School Inc
PLAINTIFF(S)

AT Net Services Charlotte Inc et al
DEFENDANT(S)

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
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 Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
 Other
- STAYED DUE TO BANKRUPTCY**
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (*CHECK APPLICABLE BOX*):**
 Affirmed; Reversed; Remanded;
 Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: See attached order (formal order to follow) Statement of Judgment by the Court:

Plaintiff's Motion to Dismiss Denied. Formal Order from Attorney Adam Bach to follow within 20 days.

ORDER INFORMATION

This order ends does not end the case.

See Page 2 for additional information.

For Clerk of Court Office Use Only

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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/Electronic Form 4

So Ordered

s/Alex Kinlaw, Jr., #2763

Electronically signed on 2020-05-26 16:53:45 page 3 of 3

AT Net Services Charlotte Inc
PLAINTIFF(S)

Next School Inc
DEFENDANT(S)

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ACTION DISMISSED (*CHECK REASON*):** Rule 12(b), SCRPC; Rule 41(a), SCRPC (Vol. Nonsuit); Rule 43(k), SCRPC (Settled);
 Other
- ACTION STRICKEN (*CHECK REASON*):** Rule 40(j), SCRPC; Bankruptcy;
 Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
 Other
- STAYED DUE TO BANKRUPTCY**
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (*CHECK APPLICABLE BOX*):**
 Affirmed; Reversed; Remanded;
 Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: See attached order (formal order to follow) Statement of Judgment by the Court:

Defendant Next School Inc. Motion for Relief is denied. A formal order is to be submitted from Attorney Adam Bach within 20 days.

ORDER INFORMATION

This order ends does not end the case.

See Page 2 for additional information.

For Clerk of Court Office Use Only

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NAMES OF TRADITIONAL FILERS SERVED BY MAIL

Court Reporter:

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Greenville Common Pleas

Case Caption: AT Net Services Charlotte Inc vs. Next School Inc

Case Number: 2020CP2300969

Type: Order/Electronic Form 4

So Ordered

s/Alex Kinlaw, Jr., #2763

Electronically signed on 2020-05-26 16:51:42 page 3 of 3

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.

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

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

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

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

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

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



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

Electronically signed on 2020-07-06 12:59:37 page 9 of 9

STATE OF SOUTH CAROLINA)
)
COUNTY OF GREENVILLE)

IN THE COURT OF COMMON PLEAS
THIRTEENTH JUDICIAL CIRCUIT

C. A. No. 2019-CP-23-06745

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.)

ORDER

AT-NET Services-Charlotte, Inc.,)

C. A. No. 2020-CP-23-00969

Plaintiff,)

vs.)

The NEXT School, Inc.,)

Defendant.)

This matter came before me for a hearing on March 1, 2021 on The NEXT School, Inc.’s (“NEXT”) motion to alter or amend the judgment of this court entered on July 7, 2020. Present at the hearing on behalf of NEXT was Steven Edward Buckingham of the Law Office of Steven Edward Buckingham, LLC. Present at the hearing on behalf of AT-NET Services-Charlotte, Inc.

(“AT-NET”) was Adam C. Bach of the law firm Eller Tonnsen Bach, LLC. For the reasons stated herein, and in its original order, NEXT’s motion to alter or amend the court’s judgment is denied.

NEXT contractually agreed to arbitration in North Carolina, demanded that AT-NET arbitrate its claims against NEXT, and participated in the arbitration proceeding in North Carolina. After an arbitration award was entered against NEXT, AT-NET filed an action to confirm its award as provided for by North Carolina law. NEXT failed to appear or contest confirmation in that proceeding. The North Carolina Superior Court confirmed the award, and it became a judgment of the North Carolina Court (the “North Carolina Judgment”). As a judgment of a sister state, the judgment against NEXT is entitled to the Full Faith and Credit of courts in South Carolina under both the United States Constitution and the Uniform Enforcement of Foreign Judgment Acts (“UEFJA”), S.C. Code § 15-35-900, *et seq.*

The North Carolina Superior Court had subject matter jurisdiction to entertain confirmation of the arbitration award because it was statutorily empowered to do so. 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. This 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 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.”).

In its motion to reconsider, NEXT relies on three cases: 1) Newberry v. Georgia Dep’t of Indus. Trade, 286 S.C. 574, 336 S.E.2d 464 (1985); 2) Melton v. Crowder, 317 S.C. 253, 254–56,

452 S.E.2d 834, 834–36 (1995); and 3) Franchise Tax Board of California v. Hyatt, 139 S.Ct. 1485, 1496-1498 (2019). It is notable to the court that in each of these cases, the objecting state actor presented its jurisdictional arguments to the sister states’ courts and did not, as NEXT has done here, failed to appear. In Melton, the North Carolina Highway Patrol moved to dismiss an action in South Carolina circuit court based on lack of subject matter jurisdiction and lack of personal jurisdiction. *See Melton*, 452 S.E.2d at 835. The North Carolina Highway Patrol argued that under North Carolina law, North Carolina state actors could only be sued in the North Carolina Industrial Commission. In rejecting these arguments, the South Carolina Supreme Court held that “North Carolina’s partial waiver of [sovereign immunity] is sufficient to allow Melton to maintain his suit” in South Carolina.

Similarly, in Newberry, the State of Georgia presented its arguments concerning sovereign immunity to the courts of South Carolina. Newberry, 336 S.E.2d 464. Finally, in Hyatt, 139 S.Ct. at 1490-1491, the State of California spent 21 years in Nevada courts contesting Nevada’s ability to apply its sovereign immunity statute, rather than California’s, to an action against its Franchise Tax Board.

It is difficult for the court to believe that the Supreme Courts of both South Carolina and the United States failed to notice that the relevant state courts lacked subject matter jurisdiction to even hear and consider the matters before them. Instead, it is apparent that these courts possessed subject matter jurisdiction to hear and consider the objecting states’ sovereign immunity claims. Likewise, the North Carolina Superior Court possessed subject matter jurisdiction to hear and determine NEXT’s objections to the arbitration based on sovereign immunity grounds. NEXT failed to appear before the North Carolina Court and the North Carolina Judgment is final and entitled to Full Faith and Credit in South Carolina.

Further, even if NEXT had appeared in North Carolina to contest the award, South Carolina is amenable to suit in North Carolina based on South Carolina law. In its original motion seeking relief from the North Carolina Judgment, NEXT did not specify the basis for which it sought relief from the judgment but argued that sovereign immunity prevented it from being sued in North Carolina, citing to Newberry v. Georgia Dep't of Indus. Trade, 286 S.C. 574 (1985) and Franchise Tax Board of California v. Hyatt, 139 S. Ct. 1485 (2019). The issue in both Newberry and Franchise Tax Board was whether one state may exercise jurisdiction over another state despite that state's objection to the foreign state's proceedings. In both Newberry and Franchise Tax Board, the dispositive consideration was whether the state was a "consenting" state. The answer to this question depends on whether or not the state has waived sovereign immunity for the types of claims brought in the foreign court. *See Hyatt*, 139 S.Ct. at 1496-1497; Newberry, 336 S.E.2d at 464; Melton, 452 S.E.2d at 835-836. If it has, it is a "consenting" state and a foreign state court may choose to exercise jurisdiction over it. South Carolina has unquestionably waived sovereign immunity with regard to breach of contract claims. It is therefore a consenting state as to the claims brought by AT-NET, and the North Carolina judgment based on these claims is valid.

For these reasons, the North Carolina Judgment is valid and enforceable against NEXT. It is noteworthy, however, that NEXT appears to have shifted its position regarding whether a South Carolina state actor may be bound by an arbitration clause. In its original motions, NEXT argued that it could not be forced to arbitrate. Now it argues that it can be forced to arbitrate but only in South Carolina. This is noteworthy because the contract in this case involves interstate parties and the arbitration provision, therefore, is subject to the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1, *et seq.* The Supreme Court of the United States has held that "when parties agree to arbitrate all questions arising under a contract, the FAA supersedes state laws lodging primary

jurisdiction in another forum, whether judicial or administrative.” Preston v. Ferrer, 552 U.S. 346, 359, 128 S. Ct. 978, 987, 169 L. Ed. 2d 917 (2008). Thus, the FAA preempts contrary state law and, therefore, the underlying arbitration itself was proper in North Carolina.

Finally, NEXT argues that the North Carolina state court failed to engage in any analysis regarding NEXT’s amenability to suit in North Carolina. This is unsurprising since NEXT chose not to appear and present any of its arguments to the North Carolina court.

THEREFORE, for the reasons stated above in its original order, 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, NEXT’s motion to alter or amend the judgment of the court is DENIED.

AND IT IS SO ORDERED.

Judge, Thirteenth Judicial Circuit

Greenville, SC



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

Electronically signed on 2021-03-25 13:14:20 page 6 of 6

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF GREENVILLE) THIRTEENTH JUDICIAL CIRCUIT

THE NEXT SCHOOL, INC., *a Public,*) C.A. No. 2019-CP-23-_____
Not-for-Profit Corporation Incorporated)
& *Existing under the Laws of the State of*)
South Carolina,)
)
Plaintiff,)

vs.)

SUMMONS

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.)

TO THE DEFENDANTS ABOVE-NAMED:

You are hereby summoned and required to answer the Complaint in this action, a copy of which is herewith served upon you, and to serve a copy of your Answer to said Complaint to the undersigned counsel at his office, 16 Wellington Avenue, Greenville, SC 29609, within thirty (30) days after service hereof, exclusive of the day of such service. If you fail to answer the Complaint within the time aforesaid, Plaintiff will apply to the Court for the relief demanded therein, and judgment by default may be rendered against you for the relief demanded in the Complaint.

[Signature Block Follows]

Respectfully submitted,

s/ Steven Edward Buckingham

Steven Edward Buckingham, Esq. (S.C. Bar No. 75089)
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Attorney for Plaintiff

Filed this 18th Day of November, 2019.
Greenville, South Carolina

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF GREENVILLE) THIRTEENTH JUDICIAL CIRCUIT

THE NEXT SCHOOL, INC., *a Public,*) C.A. No. 2019-CP-23-_____
Not-for-Profit Corporation Incorporated)
& Existing under the Laws of the State of)
South Carolina,)

Plaintiff,)

vs.)

COMPLAINT

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.)

Trial by Jury Not Demanded

COMES NOW The NEXT School, Inc., Plaintiff, by and through its undersigned counsel, and complaining of the Defendants, would respectfully show unto this Honorable Court as follows:

INTRODUCTION

1. This is an action for declaratory relief, seeking a judicial determination that Plaintiff—as a South Carolina state-actor—is not subject to the jurisdiction of any court or tribunal for which the State of South Carolina has not given its express consent to be sued, and that the decision of any such extra-jurisdictional tribunal adverse to the interests of a South Carolina state-actor is void ab initio.

PARTIES, JURISDICTION & VENUE

2. Plaintiff is The NEXT School, Inc. It is organized as a not-for-profit corporation under the laws of the State of South Carolina, and maintains its principal place of operation in

Greenville County. Plaintiff is also “a public school and part of the South Carolina Public Charter School District,” S.C. Code § 59-40-40(2)(a), which renders Plaintiff a state actor, see McNaughton v. Charleston Charter Sch. for Math & Science, Inc., 411 S.C. 249, 266, 768 S.E.2d 389, 399 (2015).

3. Defendant AT-Net Services—Charlotte, Inc. (“**AT-Net**”) is a corporation incorporated under the laws of the State of North Carolina, and, on information and belief, maintains its principal place of business in Mecklenburg County, North Carolina.

4. AT-Net, on information and belief, engages regularly in business transactions with contacts in South Carolina. Furthermore, the origin of the underlying dispute involves a business transaction that AT-Net engaged in with Plaintiff, involving AT-Net’s delivery of (what turned out to be inferior) technological goods in South Carolina.

5. Defendant American Arbitration Association, Inc. (“**AAA**”) is a not-for-profit corporation incorporated under the laws of the State of New York.

6. Plaintiff is informed and believes that AAA engages in routine and systematic business with contacts in South Carolina.

7. This Court is vested with subject matter jurisdiction with regard to this dispute by virtue of the South Carolina Constitution, Article V, § 11, as enabled through South Carolina Code § 14-5-10 et seq.

8. This Court has personal jurisdiction over each Defendant pursuant to South Carolina Code § 36-2-802 and § 36-2-803.

9. Venue in this Court is proper pursuant to South Carolina Code § 15-7-30.

ALLEGATIONS OF FACT

10. During 2015, AT-Net agreed to provide Plaintiff with certain technological goods which were needed to provide Plaintiff's students with fast, reliable access to the internet, quite obviously to facilitate their education.

11. At the time of Plaintiff's agreement with AT-Net, and continuing for months thereafter, it was Plaintiff's understanding—based on the explicit representations of AT-Net personnel—that AT-Net's compensation for the technology provided to Plaintiff would come through a federal program intended to fund scholastic investments in technology.

12. On several occasions, AT-Net personnel confirmed with Plaintiff that they were both knowledgeable and experienced in perfecting their right to payment through the aforementioned federal program.

13. These representations proved, ultimately, untrue.

14. AT-Net, for reasons of its own doing, failed to apply to the federal government for payment on the technology provided to Plaintiff.

15. AT-Net subsequently took the position that there was never any agreement with Plaintiff for AT-Net to pursue compensation from the aforementioned federal program, and that Plaintiff was primarily and immediately liable to AT-Net for the technology provided.

16. AT-Net thereafter demanded a substantial amount of money from Plaintiff for the technology provided, in derogation of their agreement.

17. When Plaintiff reminded AT-Net that AT-Net needed to pursue payment from the federal government, AT-Net refused, and elected to pursue action against Plaintiff directly.

18. In November 2018, AT-Net commenced arbitration proceedings against Plaintiff with the AAA.

19. From the outset of those proceedings, Plaintiff consistently argued that Plaintiff was not subject to suit in any jurisdiction or proceeding other than the courts of the State of South Carolina. This is because:

- a. Plaintiff, as an operator of charter schools in South Carolina, is indisputably regarded as a “part of the South Carolina Public Charter School District,” S.C. Code § 59-40-40(2)(a);
- b. In that connection, Plaintiff is indisputably regarded under South Carolina law as a “state actor,” McNaughton v. Charleston Charter Sch. for Math & Science, Inc., 411 S.C. 249, 266, 768 S.E.2d 389, 399 (2015);
- c. As a state actor, Plaintiff may only be sued in a court or tribunal for which the State of South Carolina has given its express consent to be sued; and,
- d. The only venue in which a South Carolina state actor may be sued is the courts of the State of South Carolina, S.C. Code § 15-78-10(e) & § 15-77-50.

20. Plaintiff raised this jurisdictional challenge in its answer to AT-Net’s complaint, filed in arbitration, as well as in a contemporaneously submitted motion to dismiss.

21. AAA denied Plaintiff’s motion. The arbitration hearing was scheduled for May 2, 2019.

22. Plaintiff renewed its jurisdictional challenge again on or about April 28, 2019.

23. AAA’s arbitrator did not resolve the motion in advance of the arbitration hearing, which proceeded as scheduled on May 2.

24. Immediately prior to the commencement of the arbitration hearing, Plaintiff delivered a notice to both AAA's arbitrator and AT-Net's counsel that Plaintiff was participating in the arbitration hearing only under protest, subject to and without waiving its jurisdictional defenses.

25. Following the arbitration hearing, AAA's arbitrator decided that AAA had jurisdiction over AT-Net's dispute with Plaintiff, and that Plaintiff was liable to AT-Net for the full amount of liability claimed by AT-Net.

26. On or about May 15, 2019, Plaintiff submitted a motion to vacate the arbitration award on the basis of the same jurisdictional deficiencies.

27. By letter dated May 23, 2019, the AAA's arbitrator denied Plaintiff's motion and issued an award in favor of AT-Net.

28. On or about September 30, 2019, AT-Net filed an action in North Carolina state court to confirm the AAA arbitrator's award. A hearing on that motion is, according to Plaintiff's understanding, set for Thursday, November 21.

29. At no point has any arbitration panel or the court of any other State had any jurisdiction over the dispute between Plaintiff and AT-Net, nor will they ever. Plaintiff is a state actor; it may only be sued in the venues approved by the State of South Carolina; and the time is nigh for a declaration that, when the General Assembly says you may sue a state actor only in the courts of our State, that is simply the law.

FOR A FIRST & ONLY CAUSE OF ACTION
(Declaratory Judgment)

30. Plaintiff incorporates each and every of the foregoing allegations of fact into this cause of action, to the extent such allegations are not inconsistent with those that follow in this cause of action.

31. There is a real, live, substantial, and justiciable controversy among the parties as to whether Plaintiff is a state actor and whether, regardless of such status, it may be subject to the jurisdiction of any court or tribunal other than as permitted by the South Carolina General Assembly.

32. Plaintiff respectfully requests a declaratory judgment that:

- a. Affirms its status as a South Carolina state actor;
- b. Affirms the law of this State, that a South Carolina state actor may be sued only in the venues expressly consented to by the General Assembly; and,
- c. Establishes, once and for all, that the arbitration proceeding initiated by AT-Net and convened by AAA, and the award which flowed therefrom, are void ab initio.

PRAYER FOR RELIEF

WHEREFORE, having fully stated its claim against Defendants, at least as such claim is presently known and understood, Plaintiff respectfully requests a judgment and order which provides for the relief requested, and for such other and further relief as the court deems just and proper.

Respectfully submitted,

s/ Steven Edward Buckingham

Steven Edward Buckingham, Esq. (S.C. Bar No. 75089)
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Attorney for Plaintiff

Filed this 18th Day of November, 2019.
Greenville, South Carolina

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

**DEFENDANT AT-NET SERVICES-
 CHARLOTTE, INC.’S ANSWER AND
 COUNTERCLAIMS**

(Jury Trial Demanded)

The defendant, AT-NET Services-Charlotte, Inc., a Private Corporation Incorporated & Existing under the Laws of the State of North Carolina (hereinafter, “AT-NET”), answering the complaint, would respectfully allege and show unto the Court as follows:

FOR A FIRST DEFENSE

1. The allegations of paragraph 1 are not directed at AT-NET and, therefore, no response is required from AT-NET. To the extent a response is required the allegations are denied.
2. AT-NET admits, upon information and belief, that Plaintiff is a not-for-profit corporation formed under the laws of the State of South Carolina and maintains its principal place of operation in Greenville County. The remaining allegations constitute a legal conclusion to which no response is required from AT-NET. To the extent a response is required the allegations are denied.

3. AT-NET admits the allegations of paragraph 3.

4. In response to the allegations of paragraph 4, AT-NET admits that it has transacted business in the State of South Carolina in the past and that the subject business dispute relates to the delivery of certain goods to a customer located in South Carolina. AT-NET denies the remaining allegations.

5. AT-NET admits, upon information and belief, the allegations of paragraph 5.

6. AT-NET lacks sufficient information to form a belief as to the truth of the allegations of paragraph 6 and, therefore, denies same.

7. AT-NET admits that the Court has subject matter jurisdiction over this action.

8. In response to the allegations of paragraph 8, AT-NET admits that the Court has personal jurisdiction over AT-NET. AT-NET lacks sufficient information to form a belief as to the truth of the remaining allegations and, therefore, denies same.

9. AT-NET admits the allegations of paragraph 9.

10. In response to the allegations of paragraph 10, AT-NET admits that the parties entered into an agreement wherein AT-NET agreed to provide certain technological goods and/or services to Plaintiff in exchange for monetary consideration (the "Agreement"). To the extent that any other allegation may go beyond or contradict this admission it is denied.

11. AT-NET denies the allegations of paragraph 11.

12. AT-NET denies the allegations of paragraph 12.

13. AT-NET denies the allegations of paragraph 13.

14. AT-NET denies the allegations of paragraph 14.

15. In response to the allegations of paragraph 15, AT-NET admits that the parties' Agreement provided that Plaintiff would be responsible for the payment of the goods and services

supplied by AT-NET. AT-NET denies that it was contractually required by the Agreement to seek payment from the federal government before demanding payment from Plaintiff or that it ever agreed otherwise. AT-NET denies the remaining allegations.

16. AT-NET denies the allegations of paragraph 16.

17. In response to the allegations of paragraph 17, AT-NET admits that it demanded payment from Plaintiff for all amounts due and outstanding from Plaintiff under the Agreement and initiated legal proceedings against Plaintiff to enforce the Agreement. AT-NET denies the remaining allegations.

18. AT-NET admits the allegations of paragraph 18.

19. In response to the allegations of paragraph 19, AT-NET admits that Plaintiff did raise jurisdictional arguments in prior proceedings in North Carolina. Further answering, in response to AT-NET's lawsuit filed in Mecklenburg County, North Carolina, the plaintiff demanded that the suit be dismissed and the dispute be arbitrated, to which AT-NET consented. The remaining allegations are denied.

20. AT-NET admits the allegations of paragraph 20.

21. AT-NET admits the allegations of paragraph 21.

22. AT-NET admits the allegations of paragraph 22.

23. AT-NET admits the allegations of paragraph 23.

24. AT-NET admits the allegations of paragraph 24.

25. AT-NET admits the allegations of paragraph 25.

26. In response to the allegations of paragraph 26, AT-NET refers to Plaintiff's motion to vacate and denies any allegations inconsistent therewith.

27. AT-NET admits the allegations of paragraph 27.

28. AT-NET admits the allegations of paragraph 28 and would further show that the award was confirmed.

29. AT-NET denies the allegations of paragraph 29.

30. In response to the allegations of paragraph 30, AT-NET repeats and realleges the defenses stated in the previous paragraphs as if fully restated herein.

31. AT-NET denies the allegations of paragraph 31.

32. The allegations of paragraph 32 constitute a legal conclusion to which no response is required. To the extent a response is required, the allegations are denied.

33. AT-NET denies each and every allegation of the complaint not admitted, explained, or modified hereinabove.

FOR A SECOND DEFENSE

34. AT-NET adopts and realleges the allegations of its previous defenses as if fully repeated herein.

35. Plaintiff has failed to state facts sufficient to constitute a cause of action, and the complaint should be dismissed.

FOR A THIRD DEFENSE

36. AT-NET adopts and realleges the allegations of its previous defenses as if fully repeated herein.

37. Plaintiff's claims for relief are barred, in whole or in part, by the equitable doctrines of unclean hands, estoppel, and laches.

FOR A FOURTH DEFENSE

38. AT-NET adopts and realleges the allegations of its previous defenses as if fully repeated herein.

39. Plaintiff has voluntarily and intentionally waived known rights against AT-NET, and therefore Plaintiff's claims should be dismissed.

FOR A FIFTH DEFENSE

40. AT-NET adopts and realleges the allegations of its previous defenses as if fully repeated herein

41. Plaintiff's claim is barred by the doctrines of res judicata and collateral estoppel.

FOR A SIXTH DEFENSE

42. AT-NET adopts and realleges the allegations of its previous defenses as if fully repeated herein

43. Plaintiff's claim is preempted by the Federal Arbitration Act.

FOR AN SEVENTH DEFENSE

44. AT-NET adopts and realleges the allegations of its previous defenses as if fully repeated herein

45. Plaintiff's claim is time-barred for failure to take action within ninety days of the final award.

**FOR AN EIGHTH DEFENSE AND BY WAY OF COUNTERCLAIMS
(Factual Allegations)**

46. This counterclaim is pled solely and exclusively in the alternative and hypothetical event that the court finds for the plaintiff on its action and no other.

47. AT-NET is a North Carolina corporation with a principal place of business in Mecklenburg County, North Carolina.

48. Upon information and belief, NEXT School is a South Carolina nonprofit organization with a principal place of business in Greenville County, South Carolina.

49. Venue and jurisdiction are proper in the Circuit Court of Greenville County.

50. The claims asserted herein are brought within all applicable statutes of limitation and repose.

51. All conditions precedent to this action have been satisfied.

52. In July 2015 NEXT School hired AT-NET to provide technology (“IT”) goods and services.

53. From July 2015 to the present, AT-NET provided IT goods and services to NEXT School.

54. To date, NEXT School has failed and refused to pay AT-NET for IT goods and services rendered from July 2015 through the present in the principal amount of \$50,434.11, plus interest at the rate of 18% per annum from the dates of breach.

55. As of August 15, 2017, NEXT School owes AT-NET at least \$61,060.80 in principal and interest, with interest continuing to accrue at the contractual rate.

FIRST COUNTERCLAIM

(In the alternative, Breach of Contract)

56. The allegations of paragraphs 1 through 55 are realleged and incorporated herein by reference.

57. As set forth above, AT-NET and NEXT School contracted for AT-NET to provide IT goods and services to NEXT School.

58. AT-NET performed its obligations under the contract.

59. NEXT School breached the contract by failing to make payments to AT-NET for goods and services rendered when the invoices became due and payable.

60. Pursuant to the written agreement between the parties, NEXT School’s outstanding invoices begin accruing interest at 18% per annum if not paid within thirty days of issuance.

61. As a result of NEXT School's failure to timely pay its invoices, AT-NET has been damaged in the principal amount of \$50,434.11, plus interest at the rate of 18% per annum from the various dates of breach.

SECOND COUNTERCLAIM

(In the alternative, Quantum Meruit)

62. The allegations of paragraphs 1 through 61 are realleged and incorporated herein by reference.

63. AT-NET provided IT equipment and services to NEXT School with a reasonable expectation of payment for the equipment and services.

64. NEXT School knowingly and voluntarily accepted the benefit of the equipment and services under circumstances requiring it to compensate AT-NET or otherwise be unjustly enriched.

65. AT-NET is entitled to recover the reasonable value of the equipment and services it provided.

66. The reasonable fair market value of the equipment and services provided by AT-NET is at least \$50,434.11.

67. As a direct result of NEXT School's failure to pay for the fair value of the goods and services provided by AT-NET, NEXT School has been unjustly enriched at AT-NET's expense.

68. In the event that it is determined that there is not a contract between AT-NET and NEXT School, AT-NET is entitled to judgment against NEXT School for unjust enrichment or in quantum meruit for the principal sum of \$50,434.11, plus pre-judgment interest at the highest rate allowable by law.

WHEREFORE, having fully answered the complaint herein, the defendant, AT-NET Services-Charlotte, Inc., prays that the complaint be dismissed with costs and for such other and further relief as the Court deems just and proper.

In the alternative, AT-NET Services-Charlotte, Inc., prays:

1. That AT-NET be awarded judgment against NEXT School in the principal amount of \$50,434.11, plus interest at the rate of 18% per annum from the various dates of breach for NEXT School's failure to pay its obligations for goods and services rendered;

2. That AT-NET be awarded judgment against NEXT School in excess of \$10,000.00 for actual damages sustained as a result of NEXT School's breach of contract or, alternatively, Defendant's unjust enrichment.

3. That the costs of this action be taxed to NEXT School;

4. That AT-NET be awarded attorneys' fees pursuant to the agreement between the parties; and

5. That AT-NET have such other and further relief as the Court may deem just and proper.

Signature page follows

Respectfully submitted,

s/Adam C. Bach

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Attorneys for Defendant AT-NET Services-
Charlotte, Inc., a Private Corporation
Incorporated & Existing under the Laws of
the State of North Carolina

January 17, 2020

Greenville, South Carolina

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF GREENVILLE) THIRTEENTH JUDICIAL CIRCUIT

THE NEXT SCHOOL, INC., *a Public,*) C.A. No. 2019-CP-23-06745
Not-for-Profit Corporation Incorporated)
& Existing under the Laws of the State of)
South Carolina,)
)
Plaintiff,)

vs.)

REPLY TO COUNTERCLAIM

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.) **Trial by Jury Demanded**

The NEXT School, Inc., Counterclaim-Defendant, by and through its undersigned counsel, respectfully submits this Reply to the Counterclaim asserted by Defendant AT-NET Services-Charlotte, Inc.

INTRODUCTION

1. The NEXT School, Inc. (“**the School**”) is submitting this Reply out of an abundance of caution. On November 18, 2019, the School commenced this action by filing a summons and complaint; the only cause of action asserted in the Complaint was for declaratory judgment, seeking a judicial determination that an underlying arbitration proceeding was void. On January 17, 2020, Defendant AT-NET Services-Charlotte, Inc. (“**AT-NET**”) filed an answer to the complaint, and further, as its own protective action, asserted counterclaims for breach of contract and quantum meruit with regard to issues that were ostensibly decided in the arbitration

proceeding at issue; according to AT-NET, these counterclaims were raised “solely and exclusively in the alternative and hypothetical event that the court finds for [the School] on its action” for declaratory relief. On February 16, 2020, the School filed a motion for judgment on the pleadings, as well as a motion to dismiss AT-NET’s counterclaims.

2. AT-NET subsequently commenced a separate civil action against the School, seeking to domesticate a foreign judgment that was entered with respect to the arbitration proceeding. (C.A. No. 2020-CP-23-00969.) That action was commenced on February 17, 2020. The School filed a motion for relief from that judgment on March 16, 2020.

3. The Court set a hearing for all three motions to be heard at the same time on May 26, 2020. Each of the School’s motions was denied, and a consolidated order to that effect was entered on July 7, 2020.

4. The School filed a Rule 59 motion with respect to the Court’s consolidated order on July 16, 2020.

5. A hearing on the School’s Rule 59 motion was held on March 1, 2021. By order entered March 25, 2021, the School’s Rule 59 motion was denied.

6. The practical effect of the Court’s March 25, 2021 order (from which an appeal has now been taken) is that AT-NET’s attempt to enroll the foreign judgment against the School (which is the -00969 action) was permitted; in that connection, the Court’s order should have clarified that, in the context of the -06745 action, the School’s declaratory judgment action was decided on the merits in a way that was adverse to the School, and that AT-NET’s counterclaim was moot. The Court’s order did not make such clarification.

7. Regardless, the School has filed notices of appeal in both the -06745 and -00969 actions, which ought to perfect a stay of proceedings in each case pending appeal.

8. However, as noted above, out of an abundance of caution, the School is filing this Reply to AT-NET's counterclaim, precisely to avoid any adverse procedural consequences that might arise as a result of the Court's March 25 order.

FOR A FIRST DEFENSE TO THE COUNTERCLAIM
(General Denial)

9. Unless expressly admitted, qualified, or otherwise explained, each and every allegation of the counterclaim is denied.

FOR A SECOND DEFENSE TO THE COUNTERCLAIM
(Responses to Specific Allegations)

10. The School incorporates each and every preceding paragraph and defense into this specific defense, to the extent that such preceding paragraphs and defenses are not inconsistent with the defense that follows.

11. Responding to Paragraph 46 of AT-NET's counterclaim, it is admitted that AT-NET's counterclaim is non-justiciable. Subject to the non-justiciability of AT-NET's counterclaim, any assertion of fact set out in Paragraph 46 to which a response is required from the School is denied.

12. Responding to Paragraph 47 of AT-NET's counterclaim, and subject to the School's continuing objection as to non-justiciability, the allegations of fact set out in Paragraph 47 are, to the best of the School's knowledge, information, and belief, admitted.

13. Responding to Paragraph 48 of AT-NET's counterclaim, and subject to the School's continuing objection as to non-justiciability, the allegations of fact set out in Paragraph 48 are, to the best of the School's knowledge, information, and belief, denied. The School is organized as a not-for-profit corporation under the laws of the State of South Carolina, and maintains its principal place of operation in Greenville County. The School is also "a public school

and part of the South Carolina Public Charter School District,” S.C. Code § 59-40-40(2)(a), which renders the School a state actor, see McNaughton v. Charleston Charter Sch. for Math & Science, Inc., 411 S.C. 249, 266, 768 S.E.2d 389, 399 (2015).

14. Responding to Paragraph 49 of AT-NET’s counterclaim, and subject to the School’s continuing objection as to non-justiciability, the allegations set out in Paragraph 49 constitute legal conclusions to which no response is required, and none shall be deemed as having been given. To the extent that the allegations of Paragraph 48 require some other or further response, the School continues to object to the propriety of jurisdiction and venue on the basis of non-justiciability.

15. Responding to Paragraph 50 of AT-NET’s counterclaim, and subject to the School’s continuing objection as to non-justiciability, the allegations of fact set out in Paragraph 50 are denied.

16. Responding to Paragraph 51 of AT-NET’s counterclaim, and subject to the School’s continuing objection as to non-justiciability, the allegations of fact set out in Paragraph 51 are denied.

17. Responding to Paragraph 52 of AT-NET’s counterclaim, and subject to the School’s continuing objection as to non-justiciability, the allegations of fact set out in Paragraph 52 are denied as written.

18. Responding to Paragraph 53 of AT-NET’s counterclaim, and subject to the School’s continuing objection as to non-justiciability, the allegations of fact set out in Paragraph 53 are denied.

19. Responding to Paragraph 54 of AT-NET's counterclaim, and subject to the School's continuing objection as to non-justiciability, the allegations of fact set out in Paragraph 54 are denied.

20. Responding to Paragraph 55 of AT-NET's counterclaim, and subject to the School's continuing objection as to non-justiciability, the allegations of fact set out in Paragraph 55 are denied.

FOR A THIRD DEFENSE TO THE COUNTERCLAIM AND AS TO THE FIRST CAUSE OF ACTION
(Breach of Contract)

21. The School incorporates each and every preceding paragraph and defense into this specific defense, to the extent that such preceding paragraphs and defenses are not inconsistent with the defense that follows.

22. Responding to Paragraph 57 of AT-NET's counterclaim, and subject to the School's continuing objection as to non-justiciability, the allegations of fact set out in Paragraph 57 are admitted.

23. Responding to Paragraph 58 of AT-NET's counterclaim, and subject to the School's continuing objection as to non-justiciability, the allegations of fact set out in Paragraph 58 are denied.

24. Responding to Paragraph 59 of AT-NET's counterclaim, and subject to the School's continuing objection as to non-justiciability, the allegations of fact set out in Paragraph 59 are denied.

25. Responding to Paragraph 60 of AT-NET's counterclaim, and subject to the School's continuing objection as to non-justiciability, the allegations of fact set out in Paragraph 60 are denied.

26. Responding to Paragraph 61 of AT-NET's counterclaim, and subject to the School's continuing objection as to non-justiciability, the allegations of fact set out in Paragraph 61 are denied.

FOR A FOURTH DEFENSE TO THE COUNTERCLAIM AND AS TO THE SECOND CAUSE OF ACTION
(Quantum Meruit)

27. The School incorporates each and every preceding paragraph and defense into this specific defense, to the extent that such preceding paragraphs and defenses are not inconsistent with the defense that follows.

28. Responding to Paragraph 63 of AT-NET's counterclaim, and subject to the School's continuing objection as to non-justiciability, the School is without knowledge or information sufficient to form a belief as to the truth of such allegations, since they deal with the expectations of AT-NET, and so denies the same.

29. Responding to Paragraph 64 of AT-NET's counterclaim, and subject to the School's continuing objection as to non-justiciability, the allegations of fact set out in Paragraph 64 are denied.

30. Responding to Paragraph 65 of AT-NET's counterclaim, and subject to the School's continuing objection as to non-justiciability, the allegations of fact set out in Paragraph 65 are denied.

31. Responding to Paragraph 66 of AT-NET's counterclaim, and subject to the School's continuing objection as to non-justiciability, the School is without knowledge or information sufficient to form a belief as to the truth of such allegations, and so denies the same.

32. Responding to Paragraph 67 of AT-NET's counterclaim, and subject to the School's continuing objection as to non-justiciability, the allegations of fact set out in Paragraph 67 are denied.

33. Responding to Paragraph 68 of AT-NET's counterclaim, and subject to the School's continuing objection as to non-justiciability, the allegations of fact set out in Paragraph 68 are denied.

FOR A FIFTH DEFENSE TO THE COUNTERCLAIM AND AS TO THE PRAYER FOR RELIEF

34. The School incorporates each and every preceding paragraph and defense into this specific defense, to the extent that such preceding paragraphs and defenses are not inconsistent with the defense that follows.

35. Responding to the prayer for relief of AT-NET's counterclaim, and subject to the School's continuing objection as to non-justiciability, the requests for relief set out in such paragraph are denied.

FOR A SIXTH DEFENSE TO THE COUNTERCLAIM
(Re-Assertion of General Denial)

36. The School incorporates each and every preceding paragraph and defense into this specific defense, to the extent that such preceding paragraphs and defenses are not inconsistent with the defense that follows.

37. As previously asserted, unless otherwise expressly admitted, qualified, or otherwise explained, each and every allegation of the counterclaim is denied.

FOR A SEVENTH DEFENSE TO THE COUNTERCLAIM
(Lack of Justiciability)

38. The School incorporates each and every preceding paragraph and defense into this specific defense, to the extent that such preceding paragraphs and defenses are not inconsistent with the defense that follows.

39. As previously described in the "Introduction" section to this Reply, there is presently no justiciable controversy before the Court, regardless of whether that circumstance is

described as a mootness, ripeness, claim or issue preclusion, and/or res judicata basis, or on any other basis affecting justiciability.

FOR AN EIGHTH DEFENSE TO THE COUNTERCLAIM
(Appellate Stay)

40. The School incorporates each and every preceding paragraph and defense into this specific defense, to the extent that such preceding paragraphs and defenses are not inconsistent with the defense that follows.

41. As previously described in the “Introduction” section to this Reply, and as reflected in the records of the Clerk of Court, this matter is presently on appeal, and is therefore subject to the stay imposed on cases proceeding before the appellate courts.

FOR A NINTH DEFENSE TO THE COUNTERCLAIM
(Reservation of Rights)

42. The School incorporates each and every preceding paragraph and defense into this specific defense, to the extent that such preceding paragraphs and defenses are not inconsistent with the defense that follows.

43. In the event this matter is no longer subject to a stay or otherwise becomes justiciable, the School hereby reserves the right to file an amended Reply to assert additional defenses that may be available.

WHEREFORE, the School respectfully requests the entry of a judgment and order that provides such relief as the Court deems just and proper.

Respectfully submitted,

s/ Steven Edward Buckingham

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Attorney for The NEXT School, Inc.

Filed this 24th Day of April, 2021
Greenville, South Carolina

DEMAND FOR TRIAL BY JURY

I, the undersigned counsel for The NEXT School, Inc., hereby request a trial by jury as to each and every cause of action to which the right of trial by jury is available, should this case at some point become justiciable.

s/ Steven Edward Buckingham

Steven Edward Buckingham, Esq.

1 STATE OF SOUTH CAROLINA
2 IN THE COURT OF COMMON PLEAS
3 COUNTY OF GREENVILLE

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

8 Plaintiff,

9 vs. Transcript of Record
10 2019-CP-23-06745

11 AT-NET Services-Charlotte, Inc., a
12 Private Corporation Incorporated &
13 Existing under the Laws of the State
14 of North Carolina, and
15 American Arbitration Association, Inc.,
16 a Not-for-Profit Corporation Incorporated &
17 Existing under the Laws of the State of
18 New York,

19 Defendants.

20
21
22

23 May 26, 2020
24 Greenville, South Carolina

25 B E F O R E:

The HONORABLE ALEX KINLAW, JR.

A P P E A R A N C E S:

Steven E. Buckingham, Representing the plaintiff
Adam Bach, Representing the defendant

23
24
25

SHARON G. HARDOON, CSR
Official Circuit Court Reporter, III

1 THE COURT: Let's go on the record. The
2 next matter before the Court is captioned NEXT
3 School, Incorporated vs. AT-NET Services,
4 Charlotte Incorporated, defendant, et. al. This
5 is case number 2019-CP-23-6745 and
6 2020-CP-23-0960. I have three motions before the
7 Court; plaintiff's motion to dismiss, plaintiff's
8 motion for partial summary -- partial judgment on
9 the pleadings, and defendant NEXT School's motion
10 for relief.

11 I've got Mr. Steve Buckingham. Where is he?

12 MR. BUCKINGHAM: Standing, sir.

13 THE COURT: Mr. Buckingham is standing.

14 And then on the other side, I've got Mr. Bach. Is
15 that right?

16 MR. BACH: Yes, sir, Your Honor.

17 THE COURT: Adam Bach.

18 Which way do you want to proceed in,
19 Counsel?

20 MR. BUCKINGHAM: Well, since I'm
21 standing, let me, kind of, give you the color
22 commentary on what is going on with this case.

23 THE COURT: Yes, go ahead and do that.

24 MR. BUCKINGHAM: First of all, may it
25 please the Court, this is my first hearing after

1 the crisis so I'll be kicking the rust off the
2 tires as I work my way back into the swing of
3 things.

4 This case as a contract dispute with a
5 somewhat unusual spin. The unusual spin is that
6 my client, the NEXT School, which is a free public
7 charter school here in Greenville entered into a
8 contract with Mr. Bach's client, AT-NET Services.
9 The contract, generally, was for the installation
10 of cabling and other technology infrastructure
11 devices for this school as it was setting up its
12 scholastic operations here in Greenville in the --
13 as I recall, it was in the 2015 time frame.

14 So, AT-NET provided this technology
15 infrastructure to the school. It was installed.
16 There was a dispute about whether and to what
17 extent it was functional. The real crux of this
18 comes up underneath how this contract was going to
19 be paid.

20 I didn't know anything about the program
21 and what I tell you about before this case, but
22 the Federal Communications Commission has a
23 program they make it available to schools and
24 libraries across the country every year to help
25 these institutions improve their technology

1 infrastructure. So they've got a pool of money
2 that you can draw from. And the way it generally
3 works is if, say, I'm the school and I recognize
4 technology needs that I have, I can get
5 prequalified with the FCC's program. It's called
6 E-rate in order get a commitment that, when the
7 technology is provided, the funds will be
8 available from this federal pot of money.

9 So the school went through this process,
10 got prequalified to participate from the FCC, and
11 the service provider was going to be AT-NET
12 Services. And, of course, AT-NET provided this
13 technology, and then the wheels came off the bus.

14 There are two ways that you can get
15 funding through E-rate and there was an ambiguity
16 about who was going to do what. One way is that
17 the school, the applicant institution, can pay the
18 service provider and then seek reimbursement from
19 the federal government. The other way is that the
20 service provider provides the technology, the
21 school certifies that it's received the
22 technology, and then the service provider makes
23 application to E-rate and the federal government
24 pays them directly. Both ways are perfectly
25 acceptable, but there was apparently confusion

1 about which way would be pursued in this
2 circumstance.

3 It was the school's understanding, since
4 they were in start-up mode, that it was going to
5 be AT-NET that submitted the payment request to
6 the federal government to be reimbursed. AT-NET
7 thought it was the school that was going to pay
8 them and then get reimbursed from the federal
9 government. For whatever reason, they couldn't
10 work out that difference.

11 And then, despite what I perceive to be
12 honest, good faith efforts, in order to facilitate
13 AT-NET to petition the federal government to get
14 paid directly, the window closed. There's an
15 annual time frame on that window every year.

16 So, AT-NET, of course, comes looking to
17 the school to pay them when that was not quite our
18 understanding of how this transaction was going to
19 occur, and that's when they commenced proceedings
20 against the school.

21 Now, it is absolutely critical to
22 understand what the school's position is in our
23 governmental constellation. It is a charter
24 school. That does not mean it is a private
25 school. It is a charter school. And under

1 South Carolina law, which is kind of unusual in
2 how charter schools are done around the country,
3 the way that the South Carolina government
4 requires charter schools to be created is that
5 they are -- they incorporate as a not-for-profit
6 corporation just like any other private entity,
7 and then they apply to the State, to the
8 South Carolina Public Charter School District to
9 get their charter. And if approved, then that
10 corporation that's formed can conduct its
11 educational mission through the auspicious of the
12 South Carolina Public Charter School System.

13 For that reason, and you'll see this in
14 the documents that I filed with the Court, it is
15 the bedrock of the motions that are before you
16 today to understand and appreciate that the
17 school, NEXT School, Inc., despite the fact that
18 it has "Inc." on it, is a state actor. And that's
19 not just Steve Buckingham on the wall, that is
20 direct from the South Carolina code, the citations
21 I provided to you in my memorandum, and it is also
22 from the opinion of the South Carolina Supreme
23 Court saying, in no uncertain terms, that public
24 charter schools, like the school in this case, are
25 state actors.

1 Now, why does that matter? It matters
2 because if the school is a state actor, then that
3 restricts the opportunities that another truly
4 private party, like AT-NET Services, has for
5 pursuing legal relief from the school.

6 And here's what I mean by that, it is
7 axiomatic that you can only sue the State of South
8 Carolina and its public bodies, its political
9 organizations, underneath any state actor, in only
10 the places where the state of South Carolina says
11 you can sue us.

12 And, in this case -- in every case, it's
13 the law that the State of South Carolina says you
14 can only sue the state and state actors in
15 South Carolina state courts, period. No other
16 forum, no other venue, no other jurisdiction, only
17 the courts of the state of South Carolina.

18 Now, despite that, AT-NET began its legal
19 journey with the school by suing us in
20 North Carolina state court. We raised objections
21 to that. They dismissed it and commenced
22 arbitration proceedings because, as Mr. Bach has
23 provided the Court in a recently filed memorandum,
24 at least an attachment thereto, the contract does
25 provide for arbitration.

1 From the outset of those arbitration
2 proceedings, which I directly participated in -- I
3 didn't participate in the North Carolina action
4 because I'm not licensed up there -- but in the
5 arbitration proceedings consistently, on no fewer
6 than six separate occasions, I said to AT-NET,
7 their counsel, and the arbitrator, guys, you can't
8 compel arbitration against us. We're a state
9 actor under South Carolina state law, the
10 proceedings have to happen in South Carolina state
11 court. Everyone disregarded me.

12 So, ultimately the arbitrator issued an
13 award in favor of AT-NET Services and against the
14 school to the tune of about \$80,000.

15 The next step, and even after that award
16 was issued, I filed a post-hearing, post-award
17 motion to vacate raising all the jurisdictional
18 arguments again. They were, again, disregarded.

19 The next step beyond that is that AT-NET
20 went back to North Carolina state court to confirm
21 the arbitration award. And, frankly, the school
22 did not appear. It can't appear as a matter of
23 law in a foreign jurisdiction under South Carolina
24 law.

25 So North Carolina state court confirms

1 the arbitration award, and that brings us to
2 today, which is, AT-NET, through Mr. Bach, seeking
3 to enroll that foreign judgment here in South
4 Carolina against the school.

5 And I'm, again, in front of you -- well,
6 in front of you for the first time, but, again, in
7 front of a legal proceeding saying, all those
8 prior proceedings, the arbitration, the
9 confirmation of the award in North Carolina, all
10 of that is impermissible under state law. It is
11 jurisdictionally improper. It should not have
12 happened. It's void ab initio.

13 So there is no foreign judgment to
14 enroll, and that's the basis of my request for
15 relief from judgment that I filed in the context
16 of one of the actions in front of you. And,
17 separately, with the motion for judgment on the
18 pleadings, the only cause of action that I've
19 asserted in the complaint is for declaratory
20 judgment that all those proceedings are void.

21 And so that's why I've moved for judgment
22 on the pleadings with regard to.

23 THE COURT: Okay.

24 MR. BUCKINGHAM: You may have questions
25 for me and I'm glad to field those.

1 THE COURT: No, I don't. As a matter of
2 fact, I read your memorandum and I think it -- I
3 don't really have any questions.

4 Let me hear from you, counselor.

5 MR. BACH: Thank you, Your Honor. I
6 wanted to make sure the Court received a copy of
7 the brief I filed this morning. I brought an
8 extra copy. Mr. Buckingham has one. If I could
9 hand it up, if that's okay. This is in response
10 to the brief.

11 THE COURT: Give me 30 seconds to
12 sanitize it. Thirty-second sanitizer.

13 MR. BACH: I'm still getting used to it.

14 THE COURT: I got it right here.

15 MR. BACH: That's a fresh copy. The only
16 pages I touched were the ones I handed to you. Better
17 safe than sorry.

18 THE COURT: Better safe than sorry.

19 MR. BACH: I'd have a hard time appearing
20 in front of you if you think I gave you COVID.

21 THE COURT: That wouldn't be nice.

22 Okay, we're good. Yes, sir.

23 MR. BACH: Thank you, Your Honor. On
24 behalf of AT-NET, just by way of background, some
25 issues that were not addressed in Mr. Buckingham's

1 recitation of the facts, I don't know that there's
2 a lot of disagreement, but just to provide some
3 additional color: AT-NET and NEXT entered into a
4 contract that provided for arbitration and that
5 it's governed by North Carolina law. The
6 arbitration provision was enforceable under
7 North Carolina law. AT-NET is a North Carolina
8 company. NEXT is a South Carolina charter school;
9 therefore, the services that were provided are
10 interstate commerce and the Federal Arbitration
11 Act applies. So to the extent that any rules or
12 statutes that would disfavor arbitration, they
13 have to stand up to scrutiny of the Federal
14 Arbitration Act and are preempted by them.

15 The contract, since it had the
16 arbitration provision in North Carolina, it's true
17 my client initially filed suit in
18 Mecklenburg County, North Carolina.

19 NEXT's attorney at the time was
20 David Rothstein. And David Rothstein sent an
21 email to my client on October 4th that's attached
22 to the motion that I filed on October 4th -- I
23 mean the memo I filed on October 4th. And this
24 David Rothstein on behalf of the NEXT School.
25 This is Exhibit B. "My client is not willing to

1 waive arbitration in this matter. I would request
2 that you voluntarily dismiss the complaint in
3 Mecklenburg County without prejudice and submit
4 the matter to arbitration as required by the
5 contract. Please let me know your client's
6 decision by next Wednesday, October 11th so I'll
7 have sufficient time to prepare and file a motion
8 to dismiss."

9 Mr. Rothstein, actually Exhibit C, some
10 additional emails, he actually followed through.
11 He filed a motion to dismiss in North Carolina for
12 lack of personal jurisdiction or to compel
13 arbitration. And at NEXT School's request, we
14 agreed to dismiss the case in Mecklenburg and
15 proceed with arbitration. In the contract, there
16 is not a provision as to the jurisdiction for
17 arbitration but the parties agreed via an email
18 from Mr. Buckingham to the case coordinator for
19 the American Arbitration Association. This is
20 Exhibit D. Mr. Buckingham sent an email to
21 Mr. Germanji on January 9, 2019 saying that they
22 agreed to Charlotte as the location for the
23 arbitration.

24 THE COURT: Who is Mr. Germanji?

25 MR. BACH: Germanji was the manager of

1 ADR Services for the American Arbitration
2 Association.

3 THE COURT: That's Exhibit D?

4 MR. BACH: Yes, sir.

5 THE COURT: Let me get there. Hold on.
6 And this agreement was between who?

7 MR. BACH: So it wasn't this agreement.
8 What I read from this, maybe Mr. Buckingham can
9 fill you in, was that after the demand for
10 arbitration was filed with AAA, there was a
11 question as to where the proceeding would be held.

12 THE COURT: Right.

13 MR. BACH: It looks like the parties all
14 agreed on Charlotte. According to this,
15 Mr. Buckingham said that, you know, without
16 waiving his objections to jurisdiction and venue,
17 Charlotte is an acceptable forum.

18 So the parties proceeded to arbitration
19 in Charlotte as provided by the contract. And
20 that arbitration proceeding resulted in a final
21 arbitration award in favor of AT-NET on
22 May 23, 2019 on their breach of contract claims.

23 THE COURT: Let me ask you -- I didn't
24 mean to cut you off, counselor -- why did you
25 agree to that?

1 MR. BUCKINGHAM: Well, so the way that
2 the AAA said that they would address my
3 jurisdictional arguments is that they needed to
4 know what the venue would be in order to have an
5 arbitrator assigned. The AAA, the coordinator
6 that Mr. Bach referenced, Mr. Germanji, I made my
7 first jurisdictional objection to him and he said,
8 I'm not taking it up. It needs to be in front of
9 the arbitrator. They can't assign an arbitrator
10 until you have a location for arbitration, and so
11 that's how that developed.

12 So that's why I say in the email that
13 Mr. Bach references, subject to and without
14 waiving any objections to jurisdiction or venue,
15 you know, we are fine with this proceeding in
16 Charlotte.

17 My hope was that, when in arbitrator got
18 assigned, I can reraise my motions to dismiss for
19 lack of jurisdiction, which I did, and they would
20 be ruled upon. In fact, they weren't ruled upon
21 until after the arbitration hearing.

22 THE COURT: Go ahead.

23 MR. BACH: Thank you, Your Honor. So on
24 May 23rd, the arbitrator found in favor of AT-NET
25 on its breach of contract claims.

1 Then, again, this contract governed by
2 North Carolina law under the North Carolina
3 general statutes an arbitration award can be
4 confirmed in the Superior court for the county in
5 which the arbitration was held.

6 So on October 7, 2019, AT-NET moved to
7 confirm the arbitration award with the
8 Mecklenburg County Superior Court, and a hearing
9 was held on November 21, 2019. There is no
10 indication at all that NEXT didn't have notice of
11 that hearing. They did not file any objection to
12 the confirmation within the 90 days as required by
13 North Carolina law and required by the
14 Federal Arbitration Act. They did not appear at
15 the hearing and contest confirmation of the award
16 on any grounds or basis whatsoever as required
17 both under North Carolina general statutes and the
18 Federal Arbitration Act.

19 The Superior Court, which is their court of
20 general jurisdiction, a sister court to this court,
21 the Circuit Court here, noted that no application to
22 modify, vacate, or correct a final arbitration award
23 was filed -- had been filled and the time to file such
24 an application had passed.

25 The order and judgment of the

1 Superior Court of North Carolina is attached as
2 Exhibit E, and as an exhibit to that order is the
3 arbitration award which is confirmed.

4 Under North Carolina law, which is the
5 same as the Federal Arbitration Act and under the
6 South Carolina Arbitration Act, once the
7 arbitration award is confirmed, it becomes a
8 judgment of the North Carolina courts that is
9 subject to respect just like any other judgment of
10 the state.

11 Two days prior to the hearing, NEXT filed
12 is a declaratory judgment action in
13 South Carolina. Following confirmation, we moved
14 under the Uniform Enforcement of Foreign Judgments
15 Act to have that judgment enrolled here as a
16 judgment of the State of South Carolina.

17 And, at that point in time, NEXT filed
18 its motion for relief from judgment.

19 Your Honor, we have several reasons why
20 all the motions should be denied beginning with,
21 our court has been clear that it does not have
22 subject matter jurisdiction to review a form
23 arbitration award, and I'm talking specifically
24 about Ashley River Properties I vs. Ashley River
25 Properties II, 374 S.C. 271. In that case, our

1 Supreme Court said, applying both the plain
2 language of the Act, and it's talking about the
3 South Carolina Uniform Arbitration Act, in the
4 cases of other states interpreting similar
5 provisions, South Carolina courts do not have
6 subject matter jurisdiction to consider a motion
7 to review an arbitration award issued in a
8 proceeding conducted, in that case it was
9 New York, but in a foreign jurisdiction pursuant
10 to the parties' written agreement.

11 In that case it was New York, but that
12 case used jurisdictions -- other cases from other
13 jurisdictions saying, look, if the arbitration
14 occurs in New York, or in North Carolina, or some
15 other state, your forum for challenging that award
16 on any deficient basis is in that jurisdiction.
17 We don't review other states. And the reason for
18 that is clear: This court should not sit as an
19 appellate court on the Superior Court in
20 North Carolina, and that's essentially what
21 Mr. Buckingham is asking the Court to do.

22 There is no reason why NEXT could not
23 have filed an objection to confirmation within the
24 time period allotted under either -- under both
25 the NCGS or the Federal Arbitration Act, have all

1 of its arguments reviewed and considered by the
2 North Carolina Superior Court. It did file a
3 motion to dismiss in the Mecklenburg County
4 Superior Court, so its concerns about am I
5 subjecting myself to jurisdiction are not valid,
6 and would not be in any regard. An entity that
7 arbitrates in a foreign jurisdiction has every
8 right under those statutes of that state to appear
9 and contest confirmation as provided for by their
10 statutes. They have a duty and a responsibility
11 to do so, and, if they don't, their arguments are
12 waived. But this Court does not subject matter
13 jurisdiction to review the decisions of the
14 confirmation of a foreign jurisdiction.

15 THE COURT: If the there was a contested
16 confirmation, they could have raised the issue of
17 jurisdiction at that time.

18 MR. BACH: Right. Any objection that
19 they are currently raising in this court, they
20 could have raised in the Mecklenburg County court.

21 And I would just point out, they never
22 raised that objection in Mecklenburg County court,
23 other than initially with the motion to dismiss,
24 which agreed to, and then based on their demands
25 that we go to arbitration, and then their consent

1 that we appear in Charlotte. So the time to raise
2 the issues that are being raised now was prior to
3 confirmation of the award.

4 And I'll skip ahead in my brief a little
5 bit. The NEXT School uses the term
6 "subject matter" imprecisely in its brief. Okay?

7 So the judgement that we are here about
8 today is the confirmed arbitration award for the
9 North Carolina court, which is a judgment of the
10 State of North Carolina, and we're seeking to have
11 it enrolled here.

12 The plaintiff is saying -- or NEXT School
13 is saying, well, the arbitration panel did not
14 have jurisdiction over the charter school. That's
15 their argument. They didn't have subject matter
16 jurisdiction over the charter school.

17 As I pointed out in my a brief, subject
18 matter jurisdiction in South Carolina just means
19 the power to hear the class of cases that is
20 before the Court. It is not personal
21 jurisdiction. It is not saying, you have no basis
22 to hail me in to court. It is saying that you do
23 not have the power to consider the type of case
24 before you. This is very important.

25 The North Carolina Superior Court

1 unquestionably had subject matter jurisdiction to
2 consider confirmation of the award. That is the
3 law in North Carolina. The statute in
4 North Carolina and the Federal Arbitration Act
5 specifically authorized the North Carolina
6 Superior Court to review and confirm arbitration
7 awards. So there is no dispute that it had
8 subject matter jurisdiction over confirmation of
9 the award.

10 They're challenging the subject matter of
11 the jurisdiction for award itself, but they're not
12 challenging, and cannot challenge, the fact that
13 the Superior Court had the jurisdiction to
14 consider and confirm the award.

15 And that's important because, if it had
16 subject matter jurisdiction to consider and
17 confirm the award, it was incumbent upon NEXT to
18 appear in that court and contest the basis of the
19 arbitration award on any basis it chose. So we
20 have to be very precise.

21 When we talk about, did the
22 North Carolina court lack subject matter
23 jurisdiction, no one can make the argument that it
24 lacked subject matter jurisdiction to consider and
25 confirm arbitration award because it explicitly

1 did so under the North Carolina general statutes.

2 You may argue, as Mr. Buckingham does,
3 and I think he's incorrect and I'll get to that in
4 a second, that NEXT wasn't subject to arbitration
5 in North Carolina and then the arbitrator didn't
6 have subject matter jurisdiction of that, but it
7 was incumbent upon them, because the
8 Superior Court was a court of competent
9 jurisdiction over confirmation of the award, to
10 appear in the court and contest the confirmation.

11 So, Your Honor, I don't believe this
12 court has the jurisdiction to consider the motions
13 that the NEXT School has brought, or its motion
14 for declaratory judgment. I don't believe this
15 Court can sit in as an appellate court over the
16 North Carolina court on confirmation of this
17 arbitration award, especially where the
18 NEXT School demanded arbitration, consented to
19 arbitration in North Carolina, and then failed to
20 appear and contest confirmation after an adverse
21 award was entered.

22 Getting to the underlying argument that
23 NEXT School makes about subject matter
24 jurisdiction, the underlying argument is that the
25 arbitrator, the AAA, lacked jurisdiction to hail

1 the NEXT School into court, because, according to
2 Mr. Buckingham and the NEXT School, South Carolina
3 has not consented to arbitration in foreign
4 states, or to be sued in a foreign state.

5 In support of that proposition, NEXT
6 cites to the South Carolina case of
7 Newberry vs. Georgia Department of Industrial
8 Trade and the recently decided Supreme Court case
9 of Franchise Tax Board of California vs. Hyatt.
10 I'm going to start with Hyatt.

11 Hyatt was decided last year and overruled
12 Nevada vs. Hall in a progeny of cases. And what
13 Hyatt -- the question before the Court -- and I
14 can't say it any better than Justice Thomas did --
15 the question before the Court as stated by the
16 majority is whether the constitution of the
17 United States permits a state to be sued by a
18 private party without its consent in the courts of
19 a different state.

20 The question for Hyatt was, the
21 Franchise Tax Board of California, which
22 essentially is California's tax collecting arm,
23 had collected taxes -- collected taxes from an
24 individual named Hyatt who was a resident in
25 Nevada. He didn't think that their tax collection

1 efforts were correct. He thought that they
2 damaged them, and, in fact, a Nevada jury agreed.
3 He sued the California tax collecting agency in
4 Nevada and got a judgment against the California
5 tax collecting agency.

6 The problem was, is that under North --
7 I'm sorry -- under California law, the tax
8 collecting agency was immunized under California
9 law. There was a California statute that
10 immunized it from lawsuits that caused damage --
11 or brought damage from its tax collecting
12 activities.

13 Nevada didn't have a law like that. In
14 Nevada, you could sue a tax collecting agency if
15 their actions were in gross negligence. The
16 Nevada court, the problem with the case as decided
17 by Hyatt, or the reason why the Supreme Court
18 intervened and said you can't do this was not that
19 California had to answer a lawsuit in Nevada.
20 That had nothing to do with the basis of the
21 decision in Hyatt.

22 The problem was, the Nevada court refused
23 to apply California law and give the California
24 state entity the same immunities in Nevada as it
25 would have had in California.

1 So Hyatt could not have sued in
2 California. He could have sued in Nevada under
3 Nevada law. The question was, does Nevada have to
4 apply to California law and immunize the tax
5 collecting agency of California, or can it apply
6 Nevada law and allow the suit to proceed.

7 The Supreme Court answered that you have
8 to apply the State immunities if there is --
9 Nevada has to apply California law if immunities
10 exist there.

11 That is exactly the same result that
12 South Carolina reached in the Newberry case. And
13 in the Newberry case, South Carolina -- very
14 simple factual pattern. A South Carolina resident
15 tried to sue the Georgia Department of Industry &
16 Trade. The question in that case was: Can a
17 South Carolina resident hail a Georgia state
18 entity into South Carolina court for a lawsuit
19 that occurred or arose in South Carolina? Should
20 the Court of this state exercise jurisdiction over
21 a non-consenting be sister state?

22 Here's how the Supreme Court of
23 South Carolina defined consent. A non-consenting
24 is one protected by sovereign immunity. It's not
25 a state that says, you know, we don't scour

1 Georgia statutes to see if they consented to sue
2 in some other state court or some other courts
3 besides its industrial commission. No. The
4 question isn't, where would it be sued in Georgia.
5 The question is, can it be sued in Georgia at all
6 for the same thing that you are trying to sue it
7 for South Carolina? And in Newberry, the
8 South Carolina Supreme Court answered that
9 question no. If you can't sue them in Georgia for
10 what you're trying to bring a suit for in
11 South Carolina, then you can't sue them here.

12 It's not that Georgia has to consent or
13 give written permission, or you got to go to the
14 legislature or governor for a permission slip to
15 sue them here. The question is, on consent,
16 did -- has Georgia abrogated sovereign immunity so
17 that you could sue them for the same thing in
18 Georgia as you are attempting to sue them for
19 here. That is exactly what the Supreme Court said
20 when it distinguished Newberry vs. Georgia Partner
21 of Industry & Trade and Melton vs. Crowder,
22 another Supreme Court case from 1995,
23 317 S.C. 253.

24 It states the State is immune unless it
25 expressly consents to be sued. And in that case,

1 it was a North Carolina highway patrolman who
2 chased a suspect into South Carolina and then
3 caused damaged due to his negligence here in
4 South Carolina and the South Carolina resident
5 tried to sue the North Carolina highway patrolman
6 in South Carolina and the trial court dismissed
7 and said, you can't do this. Take a look at
8 Newberry.

9 In reversing the trial court, the
10 Supreme Court said, no, you absolutely can sue the
11 North Carolina Highway Patrol in South Carolina,
12 if North Carolina has abrogated sovereign immunity
13 and you could sue them in North Carolina. So as
14 long as you could file the suit in North Carolina,
15 you can file the suit in South Carolina.

16 So really the question about consent here
17 is not whether or not South Carolina expressly
18 stated that you could go to North Carolina or some
19 other state. The question is: Has South Carolina
20 abrogated sovereign immunity for the types of
21 claims that AT-NET brought in this case? And the
22 answer to that question is an unquestionably yes.
23 South Carolina abrogated sovereign immunity for
24 suits based on a contractual obligation in 1978.
25 It has repeatedly reaffirmed that there is no

1 sovereign immunity for a breach of a contract
2 obligation. I've cited some cases in there,
3 Sloan Construction, Hodges vs. Raney. Tinsley was
4 the original case. But there is no sovereign in
5 South Carolina for breach of contract.

6 So because you can sue South Carolina in
7 South Carolina, you can also sue -- it is a
8 consenting state, you can sue South Carolina in
9 North Carolina.

10 And let me just say, the factual pattern
11 in Melton is absolutely square to rejecting what
12 NEXT is arguing here. Because in North
13 Carolina -- and I'm also licensed in
14 North Carolina -- in North Carolina the statutes
15 in North Carolina only allow suit against a state
16 governmental entity in the industrial commission
17 of North Carolina. That is what the statutes say.
18 If you want to bring a case in North Carolina
19 against a North Carolina state entity, it has to
20 be in the industrial commission, just as
21 Mr. Buckingham argues here that there are venue
22 statutes saying that you have to sue a State
23 entity in Circuit Court here.

24 The Supreme Court didn't find that
25 relevant at all. What the Supreme Court said was,

1 that's not the relevant factor. The relevant
2 factor was, has sovereign immunity for this class
3 of cases been abrogated. So now you can sue them
4 in Circuit Court here provided they've waived
5 sovereign immunity there.

6 I'll also say that they found exceptions to
7 that in North Carolina and that it wasn't always in
8 the industrial commission. There were some types of
9 cases in which a North Carolina entity could be sued
10 outside the industrial commission.

11 NEXT fails to address whether or not a
12 state entity could be hailed into arbitration, but
13 that question was considered in Trident Technical
14 College vs. Lucas & Stubbs, 286 98, 1985. I admit
15 that this is part of the factual recitation from
16 the Supreme Court. But according to that case,
17 Trident Technical College, which is unquestionably
18 a State entity, is created by our State statutes,
19 and I've cited the statute.

20 In Trident Technical College,
21 Trident Technical College refused to arbitrate and
22 petitioned this court, the Supreme of South
23 Carolina -- I'm sorry. Trident Technical refused
24 to arbitrate, and the plaintiff in that case
25 petitioned this court, the Supreme Court of

1 South Carolina to compel Trident Technical's
2 arbitrator under the Federal Arbitration Act. On
3 May 20th, the hearing was held before the
4 honorable Walter J. Bristow ordering that the
5 federal act was applicable and requiring
6 Trident Technical College to operate.

7 So that is a State entity subject to the
8 same laws that NEXT is, subject to the same venue
9 statutes that are cited by NEXT being compelled
10 into the arbitration under the Federal Arbitration
11 Act, and I've cited over cases giving examples of
12 public entities being compelled to arbitrate.

13 And, as the Supreme Court recognized in
14 that case and I note in my brief, failure to --
15 especially when the arbitration clause concerns
16 interstate commerce, failure to enforce that
17 provision to arbitrate is based on any
18 South Carolina statute is preempted by the Federal
19 Arbitration Act. We cannot have a state law that
20 would arbitration where the Federal Arbitration
21 Act demands it, which is the case here.

22 Your Honor, I would also argue, as I note
23 in my brief, that NEXT is not entitled to
24 sovereign immunity in a foreign court because it
25 is a political subdivision of the State. It is

1 not the State itself. I set forth the reasons why
2 I believe that NEXT ought to be -- its immunity
3 ought to be analyzed by the same standard that is
4 applied under 11th amendment, immunity. And if
5 you apply those factors, NEXT is not entitled to
6 sovereign immunity in a foreign court, even under
7 the Hyatt standard. The Hall standard would apply
8 in North Carolina, is free to disregard sovereign
9 immunity for a political subdivision.

10 And then finally, Your Honor, I would
11 just note, we filed a counterclaim in the
12 alternative. I don't have much of a basis other
13 than just the citation to the rules for the motion
14 for dismissal of our counterclaim. Our
15 counterclaim is standard in the alternative. The
16 statute of limitations had not expired. At the
17 time we filed, all these filings were current in
18 South Carolina.

19 So in response to the NEXT School's
20 declaratory judgment action, we restated our
21 breach of contract claim here in South Carolina.
22 Your Honor, there's nothing impermissible about us
23 doing so. We have the right to state a
24 counterclaim in the alternative. If this court
25 were to find in favor of the NEXT School in its

1 declaratory judgment action and its motion for
2 relief and, you know, that process were to play
3 out in that way, then we still have a right to
4 bring our breach of contract action here and have
5 stated it within the applicable statute of
6 limitations. There's no reason why we would not
7 be able to do so. I don't know of any law that
8 says that if a judgment is voided, it's voided for
9 eternity. You can't bring a new suit on its own.

10 Your Honor, I'm sorry, that was lengthy,
11 but I'm happy to answer any questions.

12 THE COURT: Yes, sir.

13 Go ahead.

14 MR. BUCKINGHAM: With regard to the
15 proposition that the Federal Arbitration Act can
16 compel a state actor to engage in arbitration, I
17 don't know what the law -- the status of the law
18 is. I'll be candid with you. I did not have a
19 chance to vet Mr. Bach's citations before coming
20 in here since the brief was filed about an hour
21 ago.

22 What I would expect is that the
23 Trident Tech case that Mr. Bach mentioned probably
24 did not address the sovereign immunities of state
25 actors in analyzing the arbitration, the

1 compulsion of arbitration issue. But I don't know
2 that, and I've not researched that issue. And so
3 I can't make any representations one way or the
4 other, but I suspect it's not as clean cut as
5 Mr. Bach suggests, particularly when it comes to a
6 federal law compelling a state actor to engage in
7 a particular form of remedy.

8 I suspect what the law is, is that there
9 is federal deference to states engaging in and be
10 amenable to claims only on the ways that they have
11 said that they would be amenable to such claims,
12 and according to such forms of relief and
13 processes of relief as they would make them
14 amenable.

15 Now, that's an important thing. There
16 was some discussion here about is the school a
17 political subdivision or a state actor or
18 whatever. That is totally irrelevant. We know
19 that's irrelevant because the Supreme Court has
20 told us -- the South Carolina Supreme Court has
21 told us that's irrelevant.

22 In looking at the McNaughten case I cited
23 the Supreme Court holds, in no uncertain terms,
24 that the school is a state actor. It doesn't make
25 any distinction with a political subdivision or

1 what that mean for immunity, because, as the
2 Supreme's note, it's irrelevant. What's relevant
3 is that NEXT is a state actor. And, as a state
4 actor, it is subject to the same immunities as
5 other state actors, and one of those is not being
6 held into -- to stand or account for a suit in any
7 other place other than what the State has said.

8 And the general assembly acting through
9 both houses and with legislation passing the law
10 by the signature of the governor has said, you
11 can't sue state actors anywhere other than in the
12 state of South Carolina. You can't sue them in
13 North Carolina. And there is no statute that
14 Mr. Bach can point to by which the general
15 assembly, again with the signature of the governor
16 has said, yes, state actors can be compelled to
17 participate in arbitration. That is does not
18 exist anywhere in the South Carolina code. The
19 only thing that exists in the South Carolina code
20 is a short brief, plain statement that says state
21 actors are subject to suit only in South Carolina,
22 period.

23 Now, Mr. Bach has also characterized what
24 I'm asking this court to do as --

25 THE COURT: Let me ask you a question.

1 MR. BUCKINGHAM: Yes, Your Honor.

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

5 MR. BUCKINGHAM: In North Carolina?

6 THE COURT: Yes.

7 MR. BUCKINGHAM: Well, because our
8 position there was that North Carolina -- a
9 North Carolina court has no authority.

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

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

14 THE COURT: Why not?

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

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

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

25 THE COURT: How do you know that? How do

1 you know that unless you appear?

2 MR. BUCKINGHAM: We had just assumed
3 that.

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

8 MR. BUCKINGHAM: Sure.

9 Well, to the point about you sitting as
10 an appellate judge, that's exactly not what we're
11 doing. What we're doing -- well, what Mr. Bach
12 has asked you to do is to find that the decision
13 of the North Carolina state court is entitled to
14 full faith and credit. And the obligation of the
15 court, again, the South Carolina code and the
16 Uniform Enforcement Foreign Judgment Act requires
17 you to examine the existence of full faith and
18 credit. Are there enough circumstances by which
19 this court should enroll a judgment and full faith
20 and credit to the North Carolina decision?

21 Now, on that point, because I anticipated
22 this argument from Mr. Bach, the South Carolina
23 Court of Appeals has said a judgment of a court
24 without jurisdiction of the person or the subject
25 matter is not entitled to recognition or

1 enforcement in another state or to the full faith
2 and credit provided for in the federal
3 constitution. Otherwise, before a court is bound
4 by the judgment rendered in another state, it may
5 inquire into the jurisdictional basis of the
6 foreign court's decree. And that case is
7 Digital Ally, Inc. vs. Light-N-Up, LLC, 757 S.E.2d
8 732, and it looks like the pen cite is at 734,
9 735.

10 Now, when it comes to jurisdiction, this
11 absolutely is a question of subject matter
12 jurisdiction. It's about the competence of a
13 court to hear and decide a case. And if
14 South Carolina has said that our state actors
15 aren't amenable to sue anywhere else in any other
16 forum, then necessarily no other forum has subject
17 matter jurisdiction to render a judgment, adverse
18 or otherwise, regarding South Carolina state
19 actors.

20 We see exactly what the problem is by
21 doing that. You go outside of that. Apparently
22 North Carolina says, oh, it's fine. We can
23 entertain suits against other state's actors here
24 in these courts regardless of what the home state
25 for that state actor says. That provides an

1 inherent ground of conflict for the comity that
2 should exist among the states, to accord state's
3 respect for the sovereignty that each continues to
4 possess.

5 And here there is no indication
6 whatsoever that the North Carolina Circuit Court
7 engaged in any analysis, any discussion at all
8 about whether or not NEXT was a South Carolina
9 state actor. None. There is none that's
10 portrayed in the order confirming the judgment.
11 There's nothing.

12 THE COURT: Well, it would have been nice
13 if somebody was there asking that question. It
14 would have been nice if you had a warm body
15 sitting in the courtroom to pose that question,
16 counsel.

17 MR. BUCKINGHAM: Your Honor, that may, in
18 fact, certainly be the case. But the fact of the
19 matter is, the South Carolina general assembly
20 says we didn't have to be there. We didn't have
21 to be there. You're not amenable to suit. State
22 actors aren't amenable to suit, and can't -- and
23 have no obligation show up in another court and
24 said, oh, you can't be here. You don't remember
25 jurisdiction over us.

1 THE COURT: Okay. Anything else?

2 MR. BUCKINGHAM: No, Your Honor.

3 THE COURT: Anything else from either
4 side?

5 MR. BACH: Your Honor, just briefly.
6 What we're asking NEXT to do, come to
7 North Carolina and raise its arguments in that
8 court, is exactly what the California Franchise
9 Board did in Hyatt. That case takes place in
10 Nevada. They spent 30 years -- the state entity
11 for California spent 30 years in Nevada raising
12 the arguments it had as to jurisdiction, as to
13 comity, as to sovereign immunity, as to all these
14 things in Nevada. The idea that, you know, you
15 don't have to appear in a foreign court because
16 you're going to get home cooked, talk about a blow
17 against comity and against cooperation among
18 states.

19 I'd also say that Mr. Buckingham's
20 argument completely -- would completely abrogate
21 Melton vs. Crowder, because North Carolina has
22 only consented to suit in the Industrial
23 Commission of North Carolina. That's what the
24 statute says. Yet, a South Carolina court -- a
25 South Carolina Supreme Court decision says, no,

1 you can sue the North Carolina Highway Patrol in a
2 South Carolina Circuit Court provided it has
3 waived sovereign immunity as to the class of cases
4 for which you are attempting sue in
5 South Carolina. It was all squares with what
6 they're arguing here.

7 And really the question, Your Honor, that
8 hasn't been brought up, although the answer is
9 affirmative is, does North Carolina recognize the
10 same doctrine as South Carolina. And if you
11 answer that question yes, which it is, I believe,
12 then that really takes care of the question. That
13 is -- we apply the same doctrine in North Carolina
14 to bring a South Carolina entity to North Carolina
15 that South Carolina applies to bring a
16 North Carolina entity into South Carolina.

17 Thank you.

18 MR. BUCKINGHAM: One final point.

19 THE COURT: One final point.

20 MR. BUCKINGHAM: What Mr. Bach said, as
21 far the reason why you wouldn't want to appear in
22 North Carolina to contest this very action is
23 shown by what happened in the Hyatt case. As
24 Mr. Bach just said, the State of California was in
25 Nevada for 30 years litigating the fact that they

1 didn't have to be in Nevada litigating any issues
2 against them, and Nevada consistently ruled
3 against them. And it took the United States
4 Supreme Court saying, no, California is entitled
5 to immunity. None of this -- none of this had any
6 jurisdictional basis.

7 MR. BACH: Your Honor, I apologize.
8 Hyatt is important here. I just want make sure
9 it's clear. California never challenged its
10 ability to be sued in Nevada. What California
11 challenged was, does Nevada have to apply
12 California law and give us immunity as we would
13 have in California, and that's what the Court
14 decided. The Court said, Nevada you have apply
15 the same immunity that California would have in
16 California, not that you can't sue us here at
17 all.

18 THE COURT: All right. I'll tell you
19 what I'm going to do: I'm going to deny
20 plaintiff's motion to dismiss, deny the
21 plaintiff's motion for partial judgments on the
22 pleadings, and deny defendant, NEXT School's
23 motion for relief.

24 I'm going to adopt the rationale as set
25 forth by you, Mr. Bach, and ask you to prepare an

1 order incorporating the rationale and send it to
2 me by way e-filing within 10 days -- or 20 days.
3 Send a copy to opposing counsel before you send it
4 to me.

5 MR. BACH: Yes, sir. You said 20 days?

6 THE COURT: 20 days. Does that give you
7 enough time?

8 MR. BACH: Yes, sir.

9 THE COURT: All right. Thank you all.
10 Have a good one.

11 (The hearing was concluded.)

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CERTIFICATE OF REPORTER

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I, SHARON G. HARDOON, Official Circuit Court Reporter, III for the State of South Carolina at Large, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and evidence introduced in the hearing of the captioned case, relative to appeal, in the Court of Common Pleas for Greenville County, Greenville, South Carolina.

I do further certify that I am neither kin, counsel, nor interest to any party hereto.

June 7, 2021



Sharon G. Hardoon, CSR
Official Circuit Court Reporter, III

B E F O R E:

THE HONORABLE ALEX KINLAW, JR. JUDGE.

A P P E A R A N C E S:

STEVEN E. BUCKINGHAM, ESQ.
Attorney for The NEXT School, Inc.

ADAM C. BACH, ESQ.
Attorney for AT-NET Services Charlotte, Inc.

HOLLIE M. JENKINS
Circuit Court Reporter

I N D E X

(There were no witnesses called.)

E X H I B I T S

(There were no exhibits introduced.)

P R O C E E D I N G S

1
2 COURT REPORTER'S NOTE: Due to remote platform
3 interruption and video-audio interference throughout the
4 hearing, those instances are denoted with "[audio
5 distortion]" in the transcript.

6 THE COURT: This is a motion to -- motion to
7 reconsider in the interest of the NEXT School, vs. AT-NET
8 Services Charlotte, et al. This is case number
9 2019-CP-23-06745.

10 And I think this is --

11 Mr. Bach, you represent the -- let me make sure I've
12 got it here.

13 Mr. Buckingham, you represent the -- you represent
14 the Defendant -- I mean, the Plaintiff.

15 And, Mr. Bach, you represent the Defendant; is that
16 right?

17 MR. BACH: Yes, sir, Your Honor. There -- there are
18 two cases here, companion cases. And Mr. Buckingham
19 represents the Plaintiff in the declaratory judgment
20 action to avoid the judgment. And I represent the
21 Plaintiff in the motion to [audio distortion] the foreign
22 judgment.

23 I -- I -- you know, I don't know that --

24 THE COURT: I saw it.

25 MR. BACH: -- for purposes of our hearing today --

1 but just -- just for the record -- and I think in the
2 2019 -- so 2019-CP-23-6745, I represent AT-NET -- I
3 represent AT-NET Services in both, but the Defendants in
4 that one. And then in 2020-CP-23-969, I represent the
5 Plaintiff.

6 THE COURT: Got you. Okay. We're ready to get
7 started.

8 I'll be glad to hear from you.

9 MR. BUCKINGHAM: Very good.

10 Well, and, again, for purposes of a clean record,
11 this is Steve Buckingham. And I do represent the NEXT
12 School in the 6745 and the 969 actions.

13 We are here this morning for a -- a motion for
14 reconsideration. I don't know about y'all, but I can't
15 think of a better way to spend a rainy Monday morning than
16 talking about jurisdiction. What an exciting way to spend
17 a Monday morning.

18 So I -- I don't know if you've had a chance to review
19 the motion for reconsideration I'd filed. Judge, [audio
20 distortion] the underlying --

21 THE COURT: Yeah. I -- I've got it in front of me,
22 yes.

23 MR. BUCKINGHAM: Okay. Very good.

24 And so just by way of [audio distortion], we have a
25 master of services agreement between my client, the

1 school, and Mr. Bach's client, AT-NET, with regard to some
2 school equipment that was provided back in 2015, 2016.
3 The equipment never worked right. That's neither here nor
4 there. There was an issue about whether and to what
5 extent the federal government was going to pay for the
6 equipment. And -- and there was confusion about how that
7 process was to be accomplished. In any event, that
8 confusion resulted in this immediate confusion that we're
9 in.

10 So the -- the parties dispute went to arbitration
11 against the school's protest. An arbitration award was
12 entered in 2019 that was adverse against the school. And
13 then the -- AT-NET filed a motion to enroll the
14 arbitration in North Carolina and is presently seeking to
15 enforce that foreign judgment in South Carolina. We, of
16 course, have filed an action in South Carolina to stop
17 that.

18 So by order dated July 7th, 2020, Your Honor decided
19 that with regard to the 2019-6745 action, which is the one
20 that my client brought as Plaintiff for declaratory
21 judgment, that we are not entitled to judgment on the
22 pleadings. That the arbitration was not void, as we
23 contend, and that the foreign judgment could be enrolled.
24 And by association in connection with the 2020-969 action
25 in which AT-NET Services is the Plaintiff that the foreign

1 judgment was capable of enrollment.

2 So from that point is how we got to this motion for
3 reconsideration. There's just a few brief matters from
4 your July 7th order that I wanted to address.

5 The first one is it is my understanding from the
6 language that is towards the end of your order that there
7 is a conclusion that the school is not a state actor. And
8 we contend that that is incorrect.

9 Our -- our basis for this is laid out in our initial
10 briefing that we submitted, as well as in the motion for
11 reconsideration. And -- and the -- the basis for that, I
12 mean, there -- it's pretty brief. So I can -- I can
13 address it very quickly.

14 The basis for that is found in the South Carolina
15 Code itself, that's section 59-40-42(a), in which the
16 South Carolina legislature explained that public charter
17 schools like this NEXT School here in Greenville are state
18 actors. That was confirmed by a decision of the South
19 Carolina Supreme Court in 2015, which is the McNaughton
20 case, in which the South Carolina Supreme Court held
21 directly that -- that free public charter schools like
22 NEXT are state actors.

23 Now, I think it's particularly important to point out
24 that the -- the South Carolina Supreme Court explicitly
25 used the phrase state actor in connection with its

1 description of what public charter schools are.

2 And then the third thing I would point to is the
3 related decision from Judge McIntosh from 2019 that I
4 attached to my initial briefing in which the Oconee County
5 Circuit Court explicitly recognized that NEXT School is a
6 state actor.

7 Now, this is not just an academic point. This has
8 real impact for the disposition of this case. And this
9 leads into the other matters that we are -- are seeking
10 reconsideration of.

11 It is our position that the state actor can only be
12 sued where the State says it can be sued. And the
13 legislature has told us where that is, particularly in --
14 at South Carolina Code Section 15-77-50, which I've cited
15 in my initial briefing in this case.

16 The legislature says that the circuit courts of this
17 state -- and I'm quoting from the statute directly -- are
18 hereby invested with jurisdiction to hear and determine
19 questions, actions, and controversies affecting boards,
20 commissions, and agencies of this state.

21 And so it is our position that consistent with this
22 statutory section that it is the courts of the State of
23 South Carolina and only the courts of the State of South
24 Carolina that have authority per the expressed will of the
25 legislature in order to hear and decide actions involving

1 South Carolina state actors.

2 We further think that is confirmed by a decision of
3 the United States Supreme Court. This is the Franchise
4 Tax Board vs. Hyatt case that was referenced in my initial
5 briefing. And the citation for that case is 139 S.Ct.
6 1485.

7 So for those reasons, it is the school's position
8 that we can only be sued where the state says we can be
9 sued. And when it comes to arbitration proceedings, we
10 are not aware of any authority as established from the
11 South Carolina legislature that says that -- that state
12 actors are subject to compulsory arbitration.

13 Now, I understand that there's an agreement in this
14 case. The -- the underlying contract is this master
15 services agreement. And the master services agreement has
16 an arbitration clause in it. I -- I completely concede
17 that.

18 But it is our position that regardless of that
19 contractual provision because we are dealing with a South
20 Carolina state actor, the enforceability of those
21 provisions is necessarily limited by what the legislature
22 says a state actor can do. There is no authority that
23 says that a state actor independently of what the
24 legislature has said can submit to a dispute resolution in
25 any form, other than what the legislature has said.

1 And in this case and in all cases, the legislature
2 has said only South Carolina courts have authority for
3 dispute resolution. In that same connection, we are not
4 aware of any South Carolina appellate decisions that
5 suggest otherwise.

6 I know that Mr. Bach in his initial briefing had
7 suggested that there's this Trident Technical College case
8 that says -- I believe that case is from the 70s in which
9 it was -- I suppose the -- the -- the dispute resolution
10 mechanism there was arbitration. And I -- I assume,
11 although it doesn't say in the opinion, that Trident
12 Technical College is some form of -- some form of state
13 actor in South Carolina.

14 As I said, the opinion doesn't say that. And, in
15 fact, the opinion, if you review that case, does not
16 address the question of jurisdiction at all. No party
17 ever raised that. Well, at least, if it did, the
18 appellate courts, which at that time was the Supreme
19 Court, did not address it.

20 So it would seem that on the issue of whether or not
21 a South Carolina state actor is subject to compulsory
22 arbitration as part of a contract, it would seem that it
23 is a -- a case of first impression in South Carolina. I
24 wish that weren't the case, but that's where we are.
25 That's the first piece of it. We -- we contend that that

1 arbitration proceeding was void because the legislature
2 says it's void.

3 But then the second piece of this is that after
4 Mr. Bach's client got its arbitration award, it went to
5 the courts of the State of North Carolina in order to
6 enforce that judgment, which they're now trying to enroll
7 here in South Carolina.

8 It is our position that that act, also, is a
9 violation of the South Carolina legislature's limitations
10 on how you enforce judgments against a South Carolina
11 state actor. I mean, explicitly, by trying to enroll that
12 judgment in North Carolina, Mr. Bach's client went to a
13 North Carolina court, commenced a proceeding against my
14 client, the South Carolina state actor, and received
15 authorization from that court to enroll the judgment.
16 That was the commencement of the lawsuit.

17 And consistent with Section 15-75-7750 that I just
18 referenced, that is, again, in derogation of the
19 limitations that the legislature has put on South Carolina
20 state actors to be subjected to suit in the court of
21 jurisdiction.

22 So for those reasons, we contend that the arbitration
23 award is void, which if we're correct about that, then it
24 should void the North Carolina proceedings. But related
25 to that, even if the arbitration award were valid, the

1 act -- the fact that it was attempted to be commenced and
2 enrolled in North Carolina is, also, invalid.

3 And so those are the matters that we perceive ought
4 to be corrected within your decision. Ultimately, we
5 would ask in the context of the 6745 declaratory judgment
6 action that you reconsider your prior determination and
7 find that the arbitration proceeding was void.

8 And in the context of the 2020-969 case, which was
9 about relief from foreign judgment, that you would,
10 likewise, determine that the -- the -- the foreign
11 judgment that was enrolled in a North Carolina court
12 against a South Carolina state actor is void, also, for
13 lack of jurisdiction.

14 THE COURT: I'm going to -- I'm going to hear from
15 Mr. Bach in a minute.

16 But I want you to -- to comment briefly. I remember
17 this case. And one of -- one of the concerns I had was
18 that the arbitration that occurred in North Carolina, this
19 was done by the urgency [sic] of former counsel for NEXT,
20 from what I understand. And then once the lawsuit was
21 filed in North Carolina, then Counsel -- former Counsel
22 for NEXT demanded that the arbitration in North Carolina
23 go forward.

24 As a matter of fact, I'm reading, specifically, he
25 says that my client NEXT is -- is not willing to waive

1 arbitration. I would request that you voluntarily dismiss
2 the complaint in Mecklenburg County without prejudice and
3 submit the matter to arbitration.

4 And then I think one of the questions that I asked at
5 the last hearing was, did the school have representation
6 at the arbitration? And my notes tell me that there was
7 no representation. But I don't know about at the
8 arbitration -- the actual arbitration. I don't -- at
9 least, my notes reflect that. And maybe Mr. Bach could --
10 could comment on that as well.

11 And then I'll let you come back, Mr. Buckingham.

12 But those are some of the things I -- notes I wrote
13 down from last time that I had some concerns about.

14 MR. BUCKINGHAM: Yes, Your Honor.

15 THE COURT: Okay. Go ahead, Mr. Bach.

16 MR. BACH: Thank you, Your Honor.

17 The Court's decision in July of this year [sic]
18 was -- was correct both as a matter of fact and as a
19 matter of law. I would just note, initially, that the
20 purpose of a motion to reconsider is not to reargue
21 matters that have been determined. And there are no --
22 there's no instance here in this -- this motion to
23 reconsider that the Court -- you know, he hasn't pointed
24 to some fact that was stated incorrectly in the Court's
25 order or some mischaracterization or misstatement of the

1 law. And so, Your Honor, we think that the order is
2 correct.

3 But let me just -- I think it's important to -- to
4 recount as you've already begun to the factual history at
5 issue here. There was a contract that provided for
6 arbitration in North Carolina. There was a lawsuit that
7 was filed by AT-NET against NEXT in Mecklenburg County,
8 North Carolina.

9 As you just correctly stated, on September 19th,
10 2017, Mr. Rothstein, who was NEXT's former attorney,
11 specifically, communicated to the attorney at that time
12 for AT-NET that -- that NEXT wanted its arbitration as
13 contractually agreed upon. He would -- they would not
14 waive that arbitration.

15 So AT-NET did what NEXT axed -- NEXT asked and
16 dismissed the case in North Carolina. And I believe based
17 on -- the facts in this case are that NEXT did participate
18 in the arbitration. They participated subject to their
19 jurisdiction on -- their objections on jurisdiction. But
20 they did not fail to appear at the arbitration.

21 Now, what Your Honor may be talking about -- and --
22 and, again, I think it's critical in this case. On
23 October 7, 2019, AT-NET moved to affirm the award in the
24 North Carolina Superior Court pursuant to the North
25 Carolina Arbitration Act. The North Carolina Arbitration

1 Act provides that a party that wishes to challenge an
2 award -- an arbitration award has 90 days to do so after
3 they receive the award.

4 THE COURT: Yeah.

5 MR. BACH: There was a hearing held on November 21,
6 2019, on AT-NET's motion to confirm the award. And NEXT
7 did not appear at that hearing or -- at the confirmation
8 of award. Instead, they filed the declaratory judgment
9 action in this case. And then we filed a motion to enroll
10 the foreign judgment.

11 As we work our way through the order, the first and
12 most important finding that this Court made, which is
13 correct, is that North Carolina's Superior Court
14 unquestionably had subject matter jurisdiction to consider
15 and confirm the arbitration award. The fact that they
16 failed to [audio distortion] and contest it does not
17 somehow deprive North Carolina Superior Court's of the
18 ability to consider and confirm an arbitration award. And
19 if NEXT had an issue with the arbitration award itself,
20 its -- it had a duty to object in North Carolina.

21 In Ashley River Properties, a Court of Appeals case
22 from 2007 which Your Honor cited in its -- in its order
23 correctly so, our courts have been incredibly clear that
24 this Court does not have jurisdiction -- subject matter
25 jurisdiction to consider and overrule another -- a sister

1 state's court's determination about arbitration
2 proceedings that took place in that state.

3 So when the arbitration proceedings proceeded in
4 North Carolina, jurisdiction was vested in the North
5 Carolina courts to consider objections as to the -- the
6 arbitration proceeding there. And this Court does not
7 have the ability to, essentially, now come in and overrule
8 the North Carolina court.

9 As to this -- the question about the underlying
10 proceedings and subject matter jurisdiction, the -- NEXT
11 cites to three cases in support of its -- I think,
12 actually, only two. But there's a third that we cited
13 that, also, addresses this issue. It cites to the Hyatt
14 case, which is a Supreme Court case -- United States
15 Supreme Court case, the Newberry vs. Georgia Indus --
16 Indus. Trade case, which is -- was a South Carolina case.
17 And then we cited and -- and Your Honor cited in his order
18 to Melton vs. Crowder.

19 This is critical. In all three of these cases, the
20 state entity that wished to object to jurisdiction in
21 another state went to the state where the proceedings were
22 [audio distortion] and the franchise tax board went to
23 Nevada. It was sued in Nevada. California contested
24 jurisdiction in Nevada. They didn't allow a judgment to
25 be taken against them there and then appeal it.

1 In Melton vs. Crowder, the North Carolina state
2 patrol -- a North Carolina state patrolman chased a --
3 chased a suspect into South Carolina where there was a
4 crash. North Carolina came to South Carolina in order to
5 contest jurisdiction. It did not wait for a judgment to
6 be entered in South Carolina and then seek to contest it
7 in North Carolina.

8 And in Newberry, same thing. The Georgia Department
9 of Industrial Trade contested jurisdiction in South
10 Carolina. The reason why that's important, Your Honor, is
11 because there's two issues of jurisdiction here, personal
12 jurisdiction and subject matter jurisdiction.

13 In each of these -- if -- if the Court were to rule
14 that Mr. Buckingham is correct and that a state can't be
15 sued in another state, in -- in each of those cases the
16 state contested jurisdiction in the form -- jurisdiction.
17 If subject matter jurisdiction were an issue, then Melton
18 and Newberry both have to be vacated because a South
19 Carolina court considered a foreign state's objections to
20 jurisdiction in South Carolina.

21 The reason why that was not improper, Your Honor, is
22 because whether or not a state has consented to
23 jurisdiction in a foreign state is a matter of personal
24 jurisdiction, which can be waived. That's Ex Parte Cannon
25 and a host of other cases, Eaddy vs. Eaddy. Ex Parte

1 Cannon, specifically, states that. It states that
2 "personal jurisdiction may be waived. Ex Parte Cannon 685
3 S.E.2d 814."

4 Each of these -- the -- the question was has each of
5 these out of state entities waived jurisdiction through
6 their statutes to -- or consented to be [audio distortion]
7 in another state. That is a matter of personal, not
8 subject.

9 So as the Court correctly stated in its order,
10 Subject matter jurisdiction is the power to hear and
11 determine cases of the general class to which the
12 proceedings in question belong.

13 The North Carolina Arbitration Act, specifically,
14 authorizes the North Carolina Superior Court to consider
15 questions as to the enforceability of an arbitration award
16 issued in North Carolina. It is, specifically, and
17 statutorily empowered to do so. It has subject matter
18 jurisdiction over consideration of an arbitration award in
19 North Carolina.

20 NEXT is, essentially, objecting to personal
21 jurisdiction, which it waived by failing to appear and
22 contest at the North Carolina arbitration -- at the North
23 Carolina Superior Court.

24 And, again, Your Honor, this Court would have to
25 overrule Ashley River Properties, Government E-Management

1 Solutions, Airtrip, Southshore South Bend, Tru Green, all
2 cases correctly cited in your order that stand for the
3 proposition that we don't overrule foreign courts
4 decisions about arbitrations that happen within their
5 jurisdiction.

6 Your Honor, I believe that that is, essentially, what
7 would dispose of this. But, Your Honor, even if it was
8 stated that they did not waive their objection by failing
9 to appear in -- in superior court in North Carolina, their
10 statement of the law is incorrect.

11 In both Newberry and Melton, what our Supreme Court
12 said was whether or not a sister state is a consenting
13 state, the question is whether or not they have agreed to
14 be sued for the types of claims that are brought, not
15 whether or not they have, specifically, consented to
16 jurisdiction in another state.

17 So, for example, in Melton vs. Crowder, the question
18 was, can a -- can an individual bring a suit against the
19 North Carolina patrol for negligence in North Carolina?
20 If the answer to that question is, yes, then it is a
21 consenting sister state. If the answer to that question
22 is, no, it is not.

23 And that's exactly what happened in Newberry vs.
24 Georgia Industrial Commission. In that case, the Supreme
25 Court asked the same question, could -- could this same

1 case be brought in Georgia under its laws? And the answer
2 there was, no. Because Georgia had not waived its
3 immunity to tort liability in -- at that point in time in
4 1985.

5 And so because Georgia -- you couldn't sue them in
6 Georgia, you couldn't sue them in South Carolina. It
7 wasn't whether or not Georgia, or South Carolina, or North
8 Carolina had said it's okay for someone to be sued in --
9 in a sister state.

10 The question -- consent means -- in fact, the Court
11 in -- in Newberry, specifically, stated that consent means
12 whether or not a nonconsenting state is one protected by
13 sovereign immunity. That's from Newberry vs. Georgia
14 Department of Industrial Trade.

15 So the question here, Your Honor, is, has South
16 Carolina waived sovereign immunity for contract claims?
17 And the answer to that question is, unquestionably, yes.
18 In Hodges vs. Rainey, which this correctly cited in its
19 order, 341 S.C. 79, we eliminated the state's sovereign
20 immunity from suit based on contractual obligations of
21 1978.

22 So it has consented to sue on contractual
23 obligations. This is a contractual case. South Carolina
24 is a consenting state. And a -- and NEXT consented to be
25 sued in North Carolina. South Carolina has waived

1 sovereign immunity for these types of claims, which makes
2 South Carolina a consenting state under both Newberry and
3 Melton vs. Crowder.

4 Nobody has addressed the arbitration arguments here
5 and whether or not a state entity can agree to
6 arbitration. I agree with Mr. Buckingham that there has
7 never been a case that directly addressed this.

8 In Trident College vs. Lucas & Stubbs, our Supreme
9 Court found Trident Technical College -- and we cite to
10 the actual statute -- is a creature of South Carolina
11 statute. It is created by South Carolina Code 59-53-410.
12 That is the statute that creates Trident Technical
13 College.

14 Trident Technical College refused to arbitrate, even
15 though they had signed an arbitration agreement. A
16 hearing was held in front of a Supreme Court Justice,
17 Walter J. Bristow, who issued an order finding that the
18 arbitration -- Federal Arbitration Act was applicable
19 and required Trident Technical College to arbitrate.

20 Now, we don't even have that situation here. Because
21 NEXT demanded arbitration. But even if they had not,
22 state entities have been compelled to arbitrate.

23 The Federal Arbitration Act, also, applies here
24 because AT-NET is a North Carolina entity providing
25 services in South Carolina. Interstate Commerce is

1 invoked. And so the Federal Arbitration Act would
2 pre-empt any attempt for a state entity to run from its
3 obligations to arbitrate, which is, essentially, what the
4 Supreme Court found in the Trident Technical College case.

5 Finally, Your Honor, the Court correctly determined
6 that with regard to the -- to the NEXT School's citations
7 to the Hyatt case, the Supreme Court case, our Supreme
8 Court -- the Supreme Court of the United States has been
9 very clear that that was a question of Eleventh Amendment
10 sovereign immunity. And Eleventh Amendment sovereign
11 immunity does not automatically apply to all state
12 entities.

13 The Fourth Circuit in [audio distortion] provided for
14 consideration that have to be considered as to whether or
15 not sovereign immunity applies to a state -- a subdivision
16 of a state. Those -- those four factors are -- that the
17 most important one, it said, is whether or not a judgment
18 will be paid from the state treasury.

19 The second is autonomy from the state. The third one
20 was whether or not the entity is involved with state --
21 with local or statewide concerns. And the final one was
22 how -- how it is treated as a matter of state law.

23 So only the last factor would be applicable here.
24 NEXT School is claiming, well, as a matter of state law,
25 we're treated as a state actor and then doesn't even

1 address the other four factors. NEXT -- a judgment
2 against NEXT will not be paid out of the state treasury.

3 Charter schools are formed in order to provide a high
4 degree of autonomy from the state. A charter school is
5 necessarily -- NEXT School is necessarily concerned with
6 local concerns, not statewide concerns.

7 And, Your Honor, the -- the -- NEXT School submitted
8 its charter school contract as one of its exhibits. And I
9 would just point out that in that exhibit, it, actually,
10 states that the school is incorporated as a South Carolina
11 non-profit corporation. It is just a part of the charter
12 school district. But it is -- actually, it's a non-profit
13 corporation.

14 So a high degree of autonomy from the state. It's
15 not going to be paying this out of the state treasury.
16 And it is involved with local versus statewide concerns.

17 Your Honor's decision on the Eleventh Amendment was,
18 also, correct. And if that is correct, then Hyatt does
19 not even apply. The former framework Supreme Court
20 decision Hall applies. And a state can be sued in a -- in
21 a sister state under that framework.

22 So, Your Honor, for all those reasons, your -- your
23 decision was correct. And there is no reason to
24 reconsider.

25 THE COURT: Mr. Buckingham, anything else?

1 MR. BUCKINGHAM: Yes, Your Honor. I -- I just wanted
2 to touch on your questions and then -- and just briefly
3 touch on three other points that Mr. Bach raised -- maybe
4 four other points, based on --

5 THE COURT: Well, before you do that, Mr. Bach was
6 correct when I referenced the fact that NEXT did not
7 attend the arbitration. What I meant was they did not
8 attend the hearing to contest the confirmed confirmation.

9 So I wanted to be clear with that's what I meant.
10 And, of course, Mr. Bach was correct.

11 But I'm a little concerned. And I guess you'll
12 address this. But why didn't NEXT respond within the
13 90 days?

14 MR. BUCKINGHAM: Well, to that point -- you know, we
15 know how this goes, Your Honor. If we show -- if we had
16 shown up in a North Carolina court, that is going to be
17 used as evidence that we consented to jurisdiction in
18 North Carolina.

19 Certainly, we would have raised our arguments about
20 jurisdiction there. But the fact that we would have shown
21 up to make an appearance in order to contest jurisdiction,
22 which -- never have existed seemed kind of superfluous.
23 And -- and we knew it was going to be used as a weapon
24 against us.

25 Now, the reality is, it gets used as a weapon against

1 us no matter what we do. So --

2 THE COURT: Wait a minute. I'm a little confused on
3 what you -- that statement. You're telling me that if --
4 if you show -- if you made a -- if you responded within
5 90 days and showed up to contest jurisdiction that that
6 would automatically be viewed that you were subject to
7 jurisdiction.

8 Is that what I'm hearing you say?

9 MR. BUCKINGHAM: I am -- I am certain that the
10 argument would have been made. That because we appeared
11 in court to contest jurisdiction would have been used as
12 evidence that we could have been -- that -- that we did
13 submit to jurisdiction in a foreign court.

14 THE COURT: All right.

15 MR. BUCKINGHAM: I'm confident that argument would
16 have been made.

17 THE COURT: Go ahead.

18 MR. BUCKINGHAM: And so on that point before I leave
19 it, the -- Mr. Bach has characterized our objections to
20 jurisdiction as personal jurisdiction. And that is not
21 correct.

22 I, certainly, think there is a personal jurisdiction
23 component to the argument since personal jurisdiction
24 necessarily implicates the -- the limits of the Fourteenth
25 Amendment. But this is, also, very much a subject matter

1 jurisdiction question. And it's axiomatic that subject
2 matter jurisdiction either exists or it doesn't.

3 A party cannot engage in conduct in order to consent
4 to -- to the subject matter jurisdiction. And when it
5 comes to a state actor, the -- the starting point for the
6 analysis is that the state will only allow itself to be
7 sued how it says it can be sued. It is the one that
8 creates subject matter jurisdiction for a state actor.

9 And in this case, the State of South Carolina has
10 said as part of our jurisdictional analysis, a -- a cause
11 of action against a state actor does not exist, unless it
12 is brought in a South Carolina court. That is subject
13 matter jurisdiction.

14 And to the extent that it is brought outside the
15 territory of the State of South Carolina, like I said, it
16 could, also, be a personal jurisdiction issue. But this
17 is not -- this is not solely a personal jurisdiction
18 issue. It is not solely a venue issue, as Mr. Bach has
19 previously articulated. This goes to the core of how the
20 legislature says this state may be sued and under what
21 circumstances.

22 To -- let's see. To your -- to your other questions.
23 I do want to call attention just very briefly to the
24 language that Mr. Rothstein used. He said that the school
25 did not waive its right to arbitration. He didn't

1 necessarily [audio distortion]. He suggested, you know,
2 you dismiss the North Carolina action.

3 Again, this is -- this is murky water. And because
4 there is no case on point, it's hard to say what anyone
5 should have done in this circumstance.

6 I think having the benefit of hindsight, the --
7 probably the proper procedure would have been for the case
8 to have been initiated in circuit court and then for
9 the -- the circuit in South Carolina and for the circuit
10 court to entertain a motion to compel arbitration so that
11 we can address these jurisdictional issues if they exist
12 and do that up-front, rather than on the back end. But I
13 don't know. It may -- it may very well just take an
14 appellate decision to tell us what do we do here.

15 With -- with regard to the appellate courts views of
16 the law of entertaining suits regarding foreign state
17 actors, I think Mr. Bach is conflating two issues. The
18 cases that he cited were cases from -- involving state
19 actors outside of South Carolina who are participating in
20 South Carolina state courts.

21 And the analysis that South Carolina courts were
22 engaging it is under what circumstances have those sibling
23 states consented to their amenability to sue outside of
24 their own jurisdictions. That is not the circumstance
25 here. The question that we are faced with here that we

1 have no real guidance on in terms of case law from the
2 South Carolina courts is when will South Carolina allow
3 its own political subdivisions, its own state actors to be
4 sued in a form other than what the legislature has
5 established.

6 And on that point, as I said, I -- I'm not aware of
7 any case law. The closest that I've seen is the Trident
8 Technical College case that Mr. Bach referenced. And,
9 again, the question of jurisdiction was never raised in
10 that. I -- I don't think that if you were to rule with us
11 that you have to overturn or that appellate courts have to
12 overturn [audio distortion]. I think this is just [audio
13 distortion], to be candid with you.

14 The -- the final argument -- the -- the two final
15 points I want to raise are while Mr. Bach has referenced
16 the Federal Arbitration Act, that has injected an entirely
17 new level of complication into this case. Because now,
18 we're talking about the federal government's statutes
19 pre-empting or -- or potentially pre-empting state law
20 sovereign immunity in a way that is other than is allowed
21 under the Fourteenth Amendment.

22 Again, that's a can of worms we may have to address.
23 I -- I'm not really aware of any South Carolina law on
24 that question. But, certainly, if the basis under which
25 arbitration was compelled and it's your determination that

1 arbitration was valid, then I think that we probably
2 necessarily have to explore whether and to what extent the
3 Federal Arbitration Act pre-empts state sovereign
4 immunity.

5 And, finally, Mr. Bach had referenced the fact that
6 the school is organized as a South Carolina not-for-profit
7 corporation. That's exactly right. I've said all the way
8 through that these -- these entities -- these public
9 charter school entities are an unusual situation in South
10 Carolina law. The law -- you know, the section of the
11 South Carolina code that establishes public charter
12 schools requires that they be set up as not-for-profit
13 entities in order to submit their applications to exist as
14 a charter school in order to receive their charter.

15 So that's on the one hand. But on the other hand, we
16 have the South Carolina Supreme Court saying for all
17 intents and purposes, these entities are South Carolina
18 state actors. That is the explicit holding of the
19 McNaughton case. We are in a wild west frontier with this
20 stuff. I -- I'm not going to suggest that any of this is
21 easy. It's not. But these are the issues that I see laid
22 out ahead.

23 MR. BACH: Your Honor --

24 THE COURT: I was -- go ahead. Go ahead, Mr. Bach.

25 MR. BACH: If I may, just briefly, in Melton vs.

1 Crowder, I'm reading directly from the case, The North
2 Carolina Highway Patrol moved for dismissal pursuant to
3 Rule 12(b)(1) (2) and (6) based on lack of subject matter
4 and personal jurisdiction.

5 So the North Carolina Highway Patrol moved for
6 lack -- to dismiss based on lack of subject matter
7 jurisdiction in a South Carolina court. The trial court,
8 actually, agreed with -- and the reason why was because
9 under North Carolina law, similar to South Carolina law,
10 you may only sue a North Carolina entity in the North
11 Carolina industrial commission.

12 So just like Mr. Buckingham is arguing South Carolina
13 under the tort claims act is only considered a suit in
14 South Carolina, North Carolina argued in Melton vs.
15 Crowder that you don't have subject matter jurisdiction
16 over us. Because under our law, you may only sue our
17 state patrolmen in the North Carolina industrial
18 commission.

19 The trial court, actually, granted the motion to
20 dismiss. The plaintiff appealed. And the Supreme Court
21 reversed the trial court because it said the analysis
22 about whether or not it was consenting or not was not
23 whether or not North Carolina had stated you can sue us in
24 the industrial commission or in another state. The
25 question was, had North Carolina abrogated sovereign

1 immunity for these types of claims, i.e. had North
2 Carolina abrogated sovereign immunity for negligence
3 claims? The answer to that question was, yes. Because
4 the answer to that question was, yes, North Carolina was a
5 consenting state. And the South Carolina Supreme Court
6 said North Carolina can be sued in South Carolina.

7 So this case is on all fours just in a reverse
8 situation. And the Supreme Court of South Carolina
9 determined that subject matter was not an issue -- was
10 not -- there was subject matter jurisdiction because --
11 because North Carolina had abrogated sovereign immunity
12 for tort claims.

13 Here, South Carolina has abrogated sovereign immunity
14 for contract claims. South Carolina is, therefore, under
15 Melton and Newberry a consenting state and is subject to
16 jurisdiction in North Carolina.

17 THE COURT: All right. Anything else, Mr. Buckingham?

18 MR. BUCKINGHAM: No. I -- I disagree with the
19 analysis. I mean, he may be right. But I -- I do think
20 it's conflating to things aren't necessarily the same.
21 But I've made that argument.

22 THE COURT: All right. I -- I'll tell you what I
23 want you to do, I want both sides to just send me a
24 proposed order.

25 Can you do that within 20 days?

1 MR. BACH: Yes, sir, Your Honor.

2 MR. BUCKINGHAM: Yes, sir.

3 THE COURT: Within 20 days. And I'll take a look at
4 it.

5 I appreciate it.

6 Thanks.

7 *****END OF TRANSCRIPT OF RECORD*****
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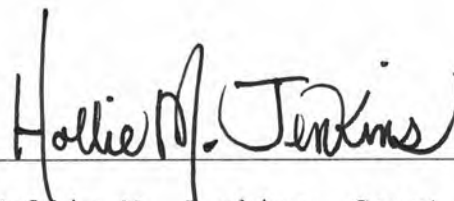
CERTIFICATE OF REPORTER

STATE OF SOUTH CAROLINA)
COUNTY OF GREENVILLE)

I, HOLLIE JENKINS, Official Court Reporter for the Thirteenth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete Transcript of Record of the proceedings had and the evidence introduced in the trial of the captioned case, relative to appeal, in the Court of Common Pleas for Greenville County, South Carolina, on the 1st day of March, 2021.

I do further certify that I am neither of kin, counsel, nor interest to any party hereto.

June 9, 2021

A handwritten signature in cursive script that reads "Hollie M. Jenkins". The signature is written in black ink and is positioned above a horizontal line.

Hollie M. Jenkins, Court Reporter

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF GREENVILLE) THIRTEENTH JUDICIAL CIRCUIT

THE NEXT SCHOOL, INC., *a Public,*) C.A. No. 2019-CP-23-06745
Not-for-Profit Corporation Incorporated)
& Existing under the Laws of the State of)
South Carolina,)
)
Plaintiff,)

vs.)

MOTION FOR PARTIAL JUDGMENT ON THE PLEADINGS

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.)

COMES NOW The NEXT School, Inc., Plaintiff, by and through its undersigned counsel, and pursuant to Rule 12(c), SCRPC, respectfully requests an Order from the Court which grants a judgment in Plaintiff’s favor as to the single cause of action for declaratory judgment set out in the Complaint.

Plaintiff intends to support this Motion with a memorandum to be submitted to the Court in advance of a hearing on this matter.

WHEREFORE, Plaintiff respectfully requests an award of the relief herein requested, and for such other and further relief as the Court deems just and proper.

Respectfully submitted,

s/ Steven Edward Buckingham

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Attorney for Plaintiff

Filed this 16th Day of February, 2020.
Greenville, South Carolina

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF GREENVILLE) THIRTEENTH JUDICIAL CIRCUIT

THE NEXT SCHOOL, INC., *a Public,*) C.A. No. 2019-CP-23-06745
Not-for-Profit Corporation Incorporated)
& Existing under the Laws of the State of)
South Carolina,)
)
Plaintiff,)

vs.)

MOTION TO DISMISS

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.)

COMES NOW The NEXT School, Inc., Plaintiff, by and through its undersigned counsel, and pursuant to Rule 12(b)(1) & (6), SCRCP, respectfully requests an Order from the Court which dismisses both causes of action of Defendant AT-NET Services—Charlotte, Inc. asserted against Plaintiff.

Plaintiff intends to support this Motion with a memorandum to be submitted to the Court in advance of a hearing on this matter.

WHEREFORE, Plaintiff respectfully requests an award of the relief herein requested, and for such other and further relief as the Court deems just and proper.

Respectfully submitted,

s/ Steven Edward Buckingham

Steven Edward Buckingham, Esq. (S.C. Bar No. 75089)
The Law Office of Steven Edward Buckingham, LLC
16 Wellington Avenue
Greenville, SC 29609
(o) 864.735.0832
(e) seb@buckingham.legal

Attorney for Plaintiff

Filed this 16th Day of February, 2020.
Greenville, South Carolina

STATE OF SOUTH CAROLINA)
)
COUNTY OF GREENVILLE)
)
AT-NET Services – Charlotte, Inc.,)
)
Plaintiff,)
)
vs.)
)
The NEXT School, Inc.,)
)
Defendant.)
)
_____)

IN THE COURT OF COMMON PLEAS
THIRTEENTH JUDICIAL CIRCUIT

**NOTICE OF FILING OF FOREIGN
JUDGMENT**

TO: DEFENDANT THE NEXT SCHOOL, INC.

1. Please be advised that I represent AT-NET Services – Charlotte, Inc. in the above-referenced action.
2. AT-NET Services – Charlotte, Inc. is a North Carolina corporation with a registered agent located at 3401 St. Vardell Lane, Suite D, Charlotte, NC 29217.
3. AT-NET Services – Charlotte, Inc.’s principal office is located at 3401 St. Vardell Lane, Suite D, Charlotte, NC 29217.
4. My law firm, Eller Tonnsen Bach LLC, is located at 1306 South Church Street, Greenville, SC 29605.
5. On November 27, 2019, the North Carolina Superior Court for Mecklenburg County entered judgment against the Defendant, The NEXT School, Inc., for damages in the amount of Forty-five Thousand Eight Hundred Fifty Two and 00/100 Dollars (\$45,852.00), pre-petition interest in the amount of Twenty-four Thousand Nine Hundred Eighty and 77/100 Dollars (\$24,980.77), Fifteen Thousand Fifty One and 00/100 Dollars in attorneys’ fees, Two Thousand Seven Hundred Seventy Five and 00/100 Dollars in arbitration costs, and Two Hundred and

00/100 Dollars in court costs. An authenticated copy of the foreign judgement is attached hereto as **Exhibit A**.

6. The order granting judgment was a final judgment.

7. The judgment remains unsatisfied in full for damages in the amount of Forty-five Thousand Eight Hundred Fifty Two and 00/100 Dollars (\$45,852.00), pre-petition interest in the amount of Twenty-four Thousand Nine Hundred Eighty and 77/100 Dollars (\$24,980.77), Fifteen Thousand Fifty One and 00/100 Dollars in attorneys' fees, Two Thousand Seven Hundred Seventy Five and 00/100 Dollars in arbitration costs, and Two Hundred and 00/100 Dollars in court costs.

8. An authenticated copy of the judgment was filed with the Clerk of Court for the Superior Court Division for Mecklenburg County in the State of North Carolina.

9. I have attached a file-stamped copy of the foreign judgment and affidavit.

10. Pursuant to the Uniform Enforcement of Foreign Judgments Act, § 15-35-900 et seq., please be advised that you have 30 days from receipt of this notice to seek relief from the enforcement of the judgment.

11. If the judgment is not satisfied and no relief is sought within 30 days of receipt of this notice, the judgment will be enforced in the same manner as any judgment in this state.

[Signature on following page.]

Respectfully Submitted,

s/Adam C. Bach

Adam C. Bach (S.C. Bar #74885)
Brendan J. Kelley (S.C. Bar # 102972)
Eller Tonnsen Bach, LLC
1306 S. Church Street
Greenville, SC 29605
Phone: 864-236-5013
abach@etblawfirm.com
bkelly@etblawfirm.com

Attorney for AT-NET Services – Charlotte, Inc.

February 17, 2020

Greenville, SC

Exhibit A

| | |
|--|---|
| STATE OF NORTH CAROLINA In The General Court Of Justice <u>Mecklenburg</u> County | EXEMPLIFICATION U.S. Code Title 28-1738 |
|--|---|

As Clerk of the Superior Court of this County, State of North Carolina, I certify that the attached copies of the documents described below are true and accurate copies of the originals now on file in this office.

| | |
|--|--|
| <i>Number And Description Of Attached Documents</i> AT-NET SERVICES-CHARLOTTE, INC., VS. THE NEXT SCHOOL, | ORDER AND JUDGMENT CONFIRMING ARBITRATION AWARD 19 CVS 18853 |
|--|--|



| | |
|--|---|
| Date | 01-28-2020 |
| Signature | <i>Nathaniel Pratt</i> |
| Name (Type Or Print) | NATHANIEL PRATT |
| <input checked="" type="checkbox"/> Deputy CSC | <input type="checkbox"/> Assistant CSC <input type="checkbox"/> Clerk Of Superior Court |

As a Judge of the General Court of Justice, State of North Carolina, I certify that the signature appearing above is that of the Clerk, Assistant Clerk, or Deputy Clerk of Superior Court for this County, who is duly sworn. I further certify that the seal affixed to the certificate appearing above is the seal of this Court and that it has been used here in good form by the proper officer.

| | |
|-------------------------------|-----------------------|
| Date | 01-28-2020 |
| Signature Of Judge | <i>W. Robert Bell</i> |
| Name Of Judge (Type Or Print) | W.ROBERT BELL |

As Clerk of the Superior Court of this County, State of North Carolina, I certify that the signature appearing above is that of a duly sworn Judge of the General Court of Justice, State of North Carolina.



| | |
|---|--|
| Date | 01-28-2020 |
| Signature | <i>Jeffrey A. White</i> |
| Name Of Clerk (Type Or Print) | JEFFREY A. WHITE |
| <input checked="" type="checkbox"/> Assistant CSC | <input type="checkbox"/> Clerk Of Superior Court |

STATE OF NORTH CAROLINA
COUNTY OF MECKLENBURG

FILED IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
19-CVS-18853

2019 NOV 27 12 12:05

AT-NET SERVICES-CHARLOTTE, INC.,

MECKLENBURG CO., C.S.C.

DEC 13 2019

Plaintiff / Claimant,

v.

THE NEXT SCHOOL,

Defendant / Respondent.

ORDER AND JUDGMENT
CONFIRMING ARBITRATION AWARD

This matter came before the Court pursuant to N.C.G.S. § 1-569.22, on Plaintiff AT-Net Services-Charlotte, Inc.'s ("At-Net") Motion to Confirm Arbitration Award and Enter Judgment Based on Award (the "Motion") entered on May 23, 2019 by Carolyn Hopkins Carlburg. For the reasons stated below, the Court concludes that At-Net's Motion should be granted and that judgment should be entered in favor of At-Net:

1. At-Net and The Next School ("Next") entered into a written contract on July 2, 2015 entitled the Master Services Agreement. The Master Services Agreement provides for arbitration in the event of a dispute between the parties.

2. At-Net commenced arbitration proceedings against Defendant The Next School ("Next") with the American Arbitration Association in November 2018.

3. Carolyn Hopkins Carlburg conducted the arbitration hearing in Mecklenburg County on May 2, 2019, and entered an Interim Award on May 12, 2019.

4. The Final Arbitration Award was issued on May 23, 2019, a true and accurate copy of which was attached to the Motion and the Affidavit of Matthew M. Holtgrewe.

5. 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.

6. 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.

NOW, THEREFORE, it is hereby ordered that:

1. The Final Arbitration Award entered on May 23, 2019 by Carolyn Hopkins Carlburg, attached hereto, is confirmed; and

2. In accordance with the Final Arbitration Award, Defendant Next is liable to Plaintiff At-Net:

- a. In the principal amount of \$45,852.00, plus interest at the legal rate of 8% per annum from May 24, 2019 until paid, with costs taxed to Defendant Next;
- b. \$24,980.77 in interest through May 23, 2019;
- c. \$15,051.00 for attorney's fees;
- d. \$2,775.00 in arbitration costs; and,
- e. \$200.00 in court costs.

Ordered this 26th day of November, 2019.



Superior Court Judge Presiding

AMERICAN ARBITRATION ASSOCIATION
Commercial Arbitration

In the Matter of the Arbitration between:

At-Net Services - Charlotte, Claimant
Represented by Matthew Michael Holtgrewe
Erwin, Bishop, Capitano & Moss, P.A.

-v-

The Next School, Respondent
Represented by Steven E. Buckingham
Buckingham Law
CASE NUMBER: 01-18-0004-2576

FINAL AWARD OF THE ARBITRATOR

I, THE UNDERSIGNED ARBITRATOR, having been designated in accordance with Article 18 of the parties' Master Services Agreement, effective July 2, 2015, having been duly sworn, and the evidentiary hearing conducted in accordance with the Commercial Rules of the American Arbitration Association, and having fully reviewed and considered the written documents submitted to me by the parties, and the oral testimony of the parties' witnesses during the evidentiary hearing and having previously rendered an Interim Award, I hereby make my FINAL AWARD as follows:

1. Respondent's Motion to Dismiss [and Notice of Protest] is denied.
2. Respondent is liable to Claimant for total damages in the amount of \$85,884.08 as follows:
 - A. Breach of the parties' Master Services Agreement [MSA], Articles 1.3, 2.1, 2.2, 2.5, 7.1, 9.1, 10.1, 13 and 18, in the amount of \$45,852.00;
 - B. Interest thereon [late payment fees] in accordance with the parties' MSA [Article 2.1] in the amount of \$24,980.77;
 - C. Claimant's attorney's fees in accordance with the parties' MSA [Article 9.1 in the amount of \$15,051.00;

The administrative filing fees of the American Arbitration Association, in the amount of

\$1,725.00, and the fee of the Arbitrator in the amount of \$2,100, shall be borne by Respondent. Therefore, Respondent shall reimburse Claimant the sum of \$2,775.00 for said fees previously incurred by Claimant, upon demonstration by Claimant that said fees have been paid in full.

All of the above referenced damages and fees shall be paid by Respondent to Claimant within thirty (30) days from the date of this Final Award.

This Final Award shall be made in full settlement of all claims made in this Arbitration. All claims not expressly granted herein are hereby denied.

I, Carolyn Hopkins Carlburg, do hereby affirm upon my oath as Arbitrator that I am the individual described hereinabove, who executed this instrument, which is my Final Award.

/ss/ Carolyn Hopkins Carlburg

May 23, 2019

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

AT-NET Services – Charlotte, Inc.,

Plaintiff,

vs.

The NEXT School, Inc.,

Defendant.

IN THE COURT OF COMMON PLEAS
THIRTEENTH JUDICIAL CIRCUIT

**AFFIDAVIT IN SUPPORT OF FILING OF
FOREIGN JUDGMENT**

Personally appeared before me, Adam C. Bach, who, on behalf of the firm Eller Tonnsen Bach, LLC (the “Firm”) being duly sworn, states as follows:

1. The Firm is retained to represent the plaintiff in the above-referenced action.
2. On November 26, 2019, the North Carolina Superior Court for Mecklenburg County confirmed the arbitration award and entered judgment against the Defendant, The NEXT School, for damages in the amount of Forty-five Thousand Eight Hundred Fifty Two and 00/100 Dollars (\$45,852.00), pre-petition interest in the amount of Twenty-four Thousand Nine Hundred Eighty and 77/100 Dollars (\$24,980.77), Fifteen Thousand Fifty One and 00/100 Dollars in attorneys’ fees, Two Thousand Seven Hundred Seventy Five and 00/100 Dollars in arbitration costs, and Two Hundred and 00/100 Dollars in court costs. An authenticated copy of the foreign judgement is filed contemporaneously as Exhibit A to the notice of filing of foreign judgment.
3. The order and judgment confirming arbitration award was a final judgment.
4. The judgment remains unsatisfied in full for damages in the amount of Forty-five Thousand Eight Hundred Fifty Two and 00/100 Dollars (\$45,852.00), pre-petition interest in the amount of Twenty-four Thousand Nine Hundred Eighty and 77/100 Dollars (\$24,980.77), Fifteen Thousand Fifty One and 00/100 Dollars in attorneys’ fees, Two Thousand Seven Hundred

Seventy Five and 00/100 Dollars in arbitration costs, and Two Hundred and 00/100 Dollars in court costs.

5. The NEXT School, Inc. contests the judgment.

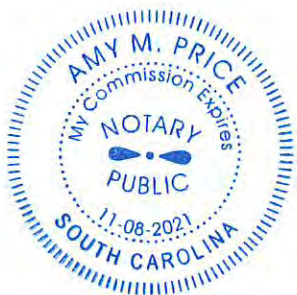
Adam C. Bach
Attorney for AT-NET Services – Charlotte, Inc.

SUBSCRIBED AND SWORN TO ME BEFORE
on this the 17th day of February, 2020

Amy M. Price

Notary Public in and for
the State of South Carolina

My Commission Expires: 11-8-2021



| | | |
|---|---|---|
| STATE OF SOUTH CAROLINA |) | |
| |) | IN THE COURT OF COMMON PLEAS |
| COUNTY OF GREENVILLE |) | THIRTEENTH JUDICIAL CIRCUIT |
| AT-NET Services—Charlotte, Inc., |) | C.A. No.: 2020-CP-23-00969 |
| |) | |
| Plaintiff, |) | |
| |) | |
| vs. |) | <u>MOTION FOR RELIEF FROM JUDGMENT</u> |
| |) | <u>AND/OR NOTICE OF DEFENSES</u> |
| The NEXT School, Inc., |) | |
| |) | |
| Defendant. |) | |

COMES NOW The NEXT School, Inc., Defendant, by and through its undersigned counsel, and pursuant to South Carolina Code § 15-35-940, respectfully submits this Motion for Relief from Judgment and/or Notice of Defenses.

In support of this Motion, Defendant would respectfully show unto this Honorable Court as follows:

1. Defendant is “a public school and part of the South Carolina Public Charter School District,” S.C. Code § 59-40-40(2)(a), which renders Defendant a state actor for all purposes under the laws and Constitution of the State of South Carolina, see *McNaughton v. Charleston Charter Sch. for Math & Science, Inc.*, 411 S.C. 249, 266, 768 S.E.2d 389, 399 (2015).

2. In November 2018, Plaintiff commenced arbitration proceedings against Defendant before the American Arbitration Association.

3. From the outset of those proceedings, and as a consequence of its state-actor status, Defendant consistently argued that Defendant was not subject to suit in any jurisdiction or proceeding other than the courts of the State of South Carolina.

4. Defendant has detailed the relevant timeline of events, and in particular, the fact of it having raised jurisdictional objections at every pertinent procedural stage of the arbitration

proceeding, in a separate pleading that is on file with the Court of Common Pleas for the Thirteenth Judicial Circuit, C.A. No. 2019-CP-23-06745 (Greenville County). That suit seeks a judicial declaration that the arbitration proceeding at issue in this case is void ab initio. Defendant hereby incorporates the allegations of such pleading, as well as the relief demanded therein, into this Motion.

5. Despite Defendant's constant jurisdictional objections, the matter proceeded to arbitration on May 2, 2019. The arbitrator subsequently issued an award in favor of Plaintiff, which Plaintiff presently seeks to enforce.

6. The fact is, Defendant—as a South Carolina state actor—is not now, nor has it ever been, subject to suit in any forum other than the courts of the State of South Carolina. This is the law as established by the South Carolina Constitution and the statutes promulgated thereunder by the General Assembly. In derogation of these principles, Plaintiff is now seeking to enforce a judgment against Defendant that was awarded by the American Arbitration Association, and confirmed by the courts of a foreign jurisdiction. None of this is permissible under South Carolina Code § 15-78-10(e) and § 15-77-50, which establish that South Carolina state actors may only be sued in a court or tribunal for which the State of South Carolina has given its express consent to be sued; that is to say, more precisely, only the courts of the State of South Carolina.

WHEREFORE, Defendant respectfully requests a Judgment and Order from the Court which denies Plaintiff's effort to enroll the foreign judgment at issue against a South Carolina state actor, and provides such other and further relief as the Court deems just and proper.

Respectfully submitted,

s/ Steven Edward Buckingham

Steven Edward Buckingham, Esq. (S.C. Bar No. 75089)
The Law Office of Steven Edward Buckingham, LLC
16 Wellington Avenue
Greenville, SC 29609
(o) 864.735.0832
(e) seb@buckingham.legal

Attorney for Defendant The NEXT School, Inc.

Filed this 16th Day of February, 2020.
Greenville, South Carolina

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF GREENVILLE) THIRTEENTH JUDICIAL CIRCUIT

THE NEXT SCHOOL, INC., a Public,) C.A. No. 2019-CP-23-06745
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.)

**MEMORANDUM OF THE NEXT SCHOOL, INC.
IN SUPPORT OF ITS MOTION FOR JUDGMENT
ON THE PLEADINGS, MOTION TO DISMISS &
MOTION FOR RELIEF FROM JUDGMENT**

AT-NET SERVICES—CHARLOTTE,) C.A. No.: 2020-CP-23-00969
INC.,)
)
Plaintiff,)

vs.)

THE NEXT SCHOOL, INC.,)
)
Defendant.)

COMES NOW The NEXT School, Inc.—Plaintiff in one civil action, Defendant in another—
and pursuant to the applicable Rules of Civil Procedure, respectfully submits this Memorandum
in Support of the relief requested in three separate motions: (1) a Motion for Judgment on the
Pleadings; (2) a Motion to Dismiss the counterclaim of AT-Net Services—Charlotte, Inc.; and (3)
a Motion for Relief from a foreign judgment in favor of AT-Net Services—Charlotte, Inc.

ORGANIZATION OF ARGUMENT

At first blush, this case would appear to be a procedural quagmire. But it's actually not that complicated. AT-Net Services—Charlotte, Inc. (“ATNSC”) is a North Carolina company. The NEXT School (“**the School**”) is a free public charter school here in Greenville. ATNSC believes it has a contractual dispute with the School, and now, has sued the School three times on the same claim. The first time was in North Carolina state court, and ATNSC voluntarily dismissed that action; the second time was in an arbitration proceeding; and the third time is presently before this Court.

With regard to the arbitration proceeding, the School consistently objected to the validity of the proceeding on the basis of jurisdiction. It is black-letter law that state actors—like the School—cannot be subject to suit in any venue other than the courts of the State of South Carolina. The arbitrator disregarded the School's jurisdictional objections, and ultimately, issued an award in favor of ATNSC against the School. Then, ATNSC went back to the courts of the State of North Carolina to confirm the arbitration award. Now, ATNSC is attempting to enroll the foreign judgment against the School. None of this is jurisdictionally permissible.

Before ATNSC's award was confirmed, the School filed the underlying declaratory judgment action in this—a South Carolina—court, to declare that the arbitration proceedings were invalid.

Consequently, two of the motions presently before the Court are inextricably intertwined: (1) the School's Motion for Judgment on the Pleadings, which seeks only a declaration that, as a matter of law, the arbitration proceedings were invalid on the basis of lack of jurisdiction; and (2) the School's Motion for Relief from the foreign judgment, which is also invalid on the basis of lack of jurisdiction.

The third motion is the School's Motion to Dismiss ATNSC's counterclaim. ATNSC is very well aware that the arbitration award—and its subsequent confirmation in North Carolina—are void. Accordingly, in ATNSC's answer to the School's complaint for declaratory judgment, ATNSC has re-asserted—for a third time—its claim against the School. This, too, as explained below, is subject to dismissal.

Accordingly, this Memorandum is structured in three parts. Part I establishes the School's identity as a South Carolina state actor. Part II addresses the jurisdictional weakness of ATNSC's arbitration award and confirmation efforts. And Part III discusses the Motion to Dismiss.

PART I: THE SCHOOL IS A SOUTH CAROLINA STATE ACTOR.

First, the South Carolina Code states, in no uncertain terms, that public charter schools are, “for purposes of state law and the state constitution, considered a public school and part of the South Carolina Public Charter School District.” S.C. Code § 59-40-40(2)(a).

Second, the South Carolina Supreme Court has held, again in no uncertain terms, that public charter schools are “state actors.” They are considered state actors “because [they are] classified as a public school; [are] funded by state money; and created by virtue of state law in furtherance of the state's duty to provide public education pursuant to Article XI, section 3 of the South Carolina Constitution.” McNaughton v. Charleston Charter Sch. for Math & Science, Inc., 411 S.C. 249, 266, 768 S.E.2d 389, 399 (2015).

Third, and specifically, the School has already been recognized by the courts of this State as a state actor. See Or. Granting in Part the School's Mot. Dismiss, Alexander v. The NEXT School, Inc. et al., 2019-CP-37-00716 (Oconee County, S.C. Mar 2, 2020) (McIntosh, J.) (attached hereto as **Attachment A**).

**PART II: SOUTH CAROLINA STATE ACTORS ARE NOT SUBJECT TO SUIT IN ANY FORUM
OTHER THAN IN THE COURTS OF THE STATE OF SOUTH CAROLINA.**

As a South Carolina state actor, the School can only be sued in the forums in which the State of South Carolina—through the General Assembly—has consented state actors to be sued. And on that point, the General Assembly has been very clear: the only venue in which a South Carolina state actor may be sued is the courts of the State of South Carolina. S.C. Code § 15-78-20(e) (“Nothing in this chapter is construed as a waiver of the state’s or political subdivision’s . . . consent to be sued in any state court beyond the boundaries of the State of South Carolina.”); S.C. Code § 15-77-50.

In that same connection, the appellate courts of this State have long held that state actors from sibling states cannot be sued in South Carolina courts. See, e.g., Newberry v. Georgia Dep’t of Indus. Trade, 286 S.C. 574, 336 S.E.2d 464 (1985) (“Therefore, we hold, as a matter of comity and public policy, a non-consenting sister state [defined in a footnote as “one protected by sovereign immunity”] may not be sued in tort in South Carolina.”). By the same logic, and according to the expressed will of the General Assembly, South Carolina state actors are not amenable to suit in the courts of any other state, including those of North Carolina.

Perhaps most importantly, the United States Supreme Court literally—in 2019—just decided a case on this very point, which vindicates the position taken by the School in this case. In Franchise Tax Board of California v. Hyatt, the Supreme Court squarely addressed the constitutionality of a private party seeking civil relief from a state actor in any forum other than a forum in which the opposing state has expressly consented to be sued. 139 S. Ct. 1485, 1496-98 (2019). The holding in Hyatt is clear: it is unconstitutional for a state—or one of its actors—to be subject to suit in any forum whatsoever, in derogation of its inherent immunity, unless the state has consented to the jurisdiction of that forum; any judgment, verdict, or award contrary to this

constitutional principle is void. In short, what ATNSC has done—in pursuing its claim against the School in both arbitration and North Carolina courts—is neither constitutional nor supported by an adequate jurisdictional basis.

The School raised these arguments at every relevant point of the arbitration proceeding, including:

1. In its answer to the arbitration complaint, (attached hereto as **Attachment B**);
2. In a motion to dismiss the arbitration complaint, (attached hereto as **Attachment C**);
3. In a renewed motion to dismiss prior to the arbitration hearing, (attached hereto as **Attachment D**);
4. In a notice of protest, provided to the arbitrator at the commencement of the arbitration hearing, (attached hereto as **Attachment E**); and,
5. In a post-hearing motion to vacate, (attached hereto as **Attachment F**).

Each of these jurisdictional objections were consistently disregarded, in complete derogation of the South Carolina Constitution, the South Carolina Code, the South Carolina Supreme Court, and the Constitution of the United States. The School is hopeful that now, finally, this Court will vindicate its immunities as a South Carolina state actor, acknowledge the fact that the underlying arbitration proceedings are void, and refuse to endorse a judgment that should never have been entered.

PART III: ATNSC'S COUNTERCLAIM MUST BE DISMISSED.

By way of counterclaim to the School's complaint for declaratory judgment, ATNSC has sued the School for breach of contract and for quantum meruit. This is the exact same claim for which relief was sought by ATNSC in the arbitration proceeding. The fact that ATNSC has sued

the School, again, for a third time, on the same claim betrays its lack of confidence in the jurisdictional propriety of the arbitration award.

In any event, at this procedural stage, since ATNSC continues to assert that the arbitration award is valid, then the simple fact is that the counterclaim is not a live controversy. Presumably, it is moot unless and until this Court holds the arbitration proceeding void. Accordingly, the counterclaim must be dismissed under Rules 12(b)(1) & (6), SCRPC.

CONCLUDING STATEMENT

For the foregoing reasons, the School respectfully requests a decision which grants its Motion for Judgment on the Pleadings as to the declaratory relief of invalidity, which denies ATNSC's effort to enroll the jurisdictionally defective foreign judgment against the School, and which grants the School's motion to dismiss the counterclaim, and further, provides for such other relief as the Court deems just and proper.

Respectfully submitted,

s/ Steven Edward Buckingham

Steven Edward Buckingham, Esq. (S.C. Bar No. 75089)
The Law Office of Steven Edward Buckingham, LLC
16 Wellington Avenue
Greenville, SC 29609
(o) 864.735.0832
(e) seb@buckingham.legal

Attorney for The NEXT School, Inc.

Filed this 21st Day of May, 2020.
Greenville, South Carolina

ATTACHMENT A

as “**the School**”). The principal of the School at the time in question was Defendant Greenberg (hereafter, “**the Principal**”).

In general, Plaintiff alleges that during the 2016-2017 scholastic year, he was wrongfully disciplined by, and ultimately expelled from, the School. It is further alleged that the School, including the Principal, made a criminal referral to the Oconee County Sheriff’s Office without a good faith basis, ultimately resulting in charges that were initially brought against Plaintiff being dismissed *nolle prosequi*.

Plaintiff has alleged that he sustained damages as a direct and proximate consequence of Defendants’ wrongful conduct. To that end, Plaintiff has filed this Complaint, which is comprised of six causes of action: (1) gross negligence; (2) false imprisonment; (3) malicious prosecution; (4) abuse of process; (5) defamation; and (6) breach of contract. Defendants’ Motion to Dismiss attacks the legal sufficiency of each of these causes of action, and those arguments are considered in turn below.

DISCUSSION OF LAW

At the outset, the Court perceives that Plaintiff’s claim can be divided between his tort-based causes of action, (Counts 1-5), and his contract-based cause of action, (only Count 6). The Court also perceives that, in general, the allegations against Defendants can be divided between those against the School and the Principal, in the Principal’s official capacity, and those against the Principal in his individual capacity only.

I. TO THE EXTENT THAT PLAINTIFF HAS ALLEGED A BREACH OF CONTRACT AGAINST THE PRINCIPAL, THAT ACTION IS DISMISSED AGAINST THE PRINCIPAL IN BOTH HIS INDIVIDUAL AND OFFICIAL CAPACITIES.

It is not immediately clear from the face of the Complaint whether the Principal is intended to be named as a party-defendant in connection with the contract-based cause of action.

out at South Carolina Code § 15-78-110. According to Defendants' argument, since the Complaint was filed on November 21, 2019, any allegations of tort-based conduct against Defendants that occurred prior to November 21, 2017 are time-barred.

Plaintiff's first argument against the applicability of the Tort Claims statute of limitations is that the Safe School Climate Act, S.C. Code § 59-63-110 et seq., has abrogated, in part, the portion of the Tort Claims Act that would extend its protections to charter schools and their agents. The Court is not convinced. There do not appear to be any decisions from the courts of this State which suggest that such an abrogation has occurred, and, in fact, the Safe School Climate Act states in no uncertain terms that "[t]his section does not create or alter tort liability." Id. § 59-63-150(A). Accordingly, it is the determination of this Court that the Tort Claims Act has not been abrogated by the Safe School Climate Act.

Plaintiff next contends that the two-year statute of limitation established by the Tort Claims Act is inapplicable, and that, under the extending provisions of S.C. Code § 15-78-110, the proper limitations period is three years. The extending provisions that Plaintiff refers to are triggered when a complainant has presented a claim against a state actor in the manner required by S.C. Code § 15-78-80. It is Plaintiff's contention that he has met this triggering event by the filing of a prior verified complaint against the School. (C.A. No. 2017-CP-23-00014.) Consequently, Plaintiff argues, he is subject to a three-year statute of limitations, and his tort-based claim is viable.

Having given due consideration to the previously filed verified complaint,¹ and measured the contents of that filing against the requirements of S.C. Code § 15-78-80, the Court declines

¹ To the extent the Court is not allowed to consider the previously filed verified complaint under a limited Rule 12(b)(1) or (6) analysis, the Court has nonetheless considered the prior complaint in the manner consistent with the standards set out in Rule 12(b) and Rule 56, SCRCF.

Plaintiff's invitation to apply the three-year statute of limitations. It is the Court's determination that, while Plaintiff's prior complaint was verified, the totality of requirements established by § S.C. Code § 15-78-80 were not met by that pleading. Accordingly, the two-year statute of limitations is the applicable standard, which results in a determination that Plaintiff's tort-based actions are time-barred.

It is important, however, to note that the Tort Claims Act applies only to employees of the public body who perpetrate wrongful conduct while engaged in the course and scope of their employment; it does not shield an employee who commits tortious acts while acting outside such course and scope. This requires the Court to give special attention to the Principal.

The Complaint alleges that the Principal committed the wrongful acts alleged in both his official and his individual capacities. Certainly, at this procedural stage, Plaintiff has the ability to plead facts in the alternative, which he appears to have done here. For purposes of the tort-based actions, though, this results in the circumstance where the Principal is subject to two different statutes of limitation. To the extent it is alleged that the Principal engaged in tortious conduct while in the course and scope of his employment with the School, claims against the Principal are subject to the Tort Claims Act and its two-year statute of limitations; to the extent that the Principal's wrongful conduct is alleged to have occurred beyond the course and scope of his employment, the Tort Claims Act is inapplicable, and the ordinary three-year statute of limitations applies, S.C. Code § 15-3-530.

In sum, it is the determination of the Court that Plaintiff's tort-based actions against the School and the Principal, but only in the Principal's official capacity, are immediately subject to dismissal under the Tort Claims Act statute-of-limitations based on the allegations of the Complaint. However, to the extent that the Complaint asserts tort-based actions against the

Principal in which the wrongful conduct allegedly occurred outside the course and scope of the Principal’s employment with the School, such actions remain viable under the applicable statute of limitation.

III. PLAINTIFF’S CONTRACT-BASED CAUSE OF ACTION AGAINST THE SCHOOL IS SUBJECT TO PARTIAL DISMISSAL.

Defendants’ final argument is that Plaintiff’s breach of contract action, which is ostensibly based on the provisions of a school’s charter or student handbook, must be dismissed for lack of the essential elements of an enforceable agreement; that is, an offer, an acceptance, and an exchange of consideration. In support of their argument, Defendants have cited to several cases, from both state and federal courts around the country, which have so held. However, in terms of South Carolina authority, there do not appear to be any reported decisions on point, one way or the other, either acknowledging or invalidating such actions. Because Plaintiff’s action for breach of contract appears—under its unique circumstances—to be a case of first impression in this State, the Court declines the opportunity to dismiss the action at this point, but will allow the theory to proceed so that a more complete record may be developed.

CONCLUDING STATEMENT OF JUDGMENT

For the foregoing reasons, and to the extent described above, it is the determination of the Court that:

1. The School’s Motion to Dismiss the tort-based actions set out in Counts 1-5 of the Complaint is **GRANTED**;
2. The Principal’s Motion to Dismiss the tort-based actions set out in Counts 1-5 of the Complaint is **GRANTED**, but only to the extent the actions are brought against the Principal in his official capacity as an employee of the School;

3. The Principal’s Motion to Dismiss the tort-based actions set out in Counts 1-5 of the Complaint is **DENIED**, but only to the extent the actions are brought against the Principal in his individual capacity;
4. The School’s Motion to Dismiss the contract-based action set out in Count 6 of the Complaint is **DENIED**; and,
5. The Principal’s Motion to Dismiss the contract-based action set out in Count 6 of the Complaint is **GRANTED**.

The Clerk is directed to ensure that the dismissals herein granted are reflected in the records of the Court.

It is **SO ORDERED**.

R. Lawton McIntosh
Judge, Tenth Judicial Circuit

_____, 2020
Anderson, South Carolina



Oconee Common Pleas

Case Caption: Edward M Alexander VS The Next School Inc , defendant, et al

Case Number: 2019CP3700716

Type: Order/Dismissal

S/R. LAWTON McINTOSH

S/R.LAWTON McINTOSH

Electronically signed on 2020-03-02 12:52:54 page 8 of 8

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ATTACHMENT B

BEFORE THE AMERICAN ARBITRATION ASSOCIATION

| | | |
|----------------------------------|---|----------------------------------|
| AT-NET SERVICES—CHARLOTTE, INC., |) | Case No.: 01-18-0004-2576 |
| |) | |
| |) | |
| Claimant, |) | |
| |) | |
| v. |) | <u>ANSWER OF THE NEXT SCHOOL</u> |
| |) | |
| THE NEXT SCHOOL, |) | |
| |) | |
| Respondent. |) | |

COMES NOW the NEXT School, by and through its undersigned counsel, and in response to the allegations of the Complaint, would respectfully show unto this tribunal as follows:

FOR A FIRST DEFENSE TO THE COMPLAINT
(General Denial)

1. Unless expressly admitted, qualified, or otherwise explained, each and every allegation of the Complaint is denied.

FOR A SECOND DEFENSE TO THE COMPLAINT
(Specific Responses)

- 2. Paragraph 1 of the Complaint is admitted, on information and belief.
- 3. Paragraph 2 of the Complaint is admitted in part. Specifically, it is admitted that Respondent is organized as a not-for-profit corporation under the laws of the State of South Carolina, and that it maintains its principal place of business in Greenville County, South Carolina. However, importantly, under South Carolina law, Respondent is also “considered a public school and part of the South Carolina Public Charter School District.” S.C. Code § 59-40-40(2)(a). This places Respondent in the unusual position of being both a private entity and a state actor. See

McNaughton v. Charleston Charter Sch. for Math & Science, Inc., 768 S.E.2d 389, 399 (S.C. 2015).

4. Paragraph 3 of the Complaint is stated in the form of a legal conclusion to which no response is required, and none shall be deemed as having been given. To the extent that the allegations of Paragraph 3 require some other or further response, such allegations are denied. Respondent reserves all right to raise any applicable defense of limitation and/or repose.

5. Paragraph 4 of the Complaint is stated in the form of a legal conclusion to which no response is required, and none shall be deemed as having been given. To the extent that the allegations of Paragraph 4 require some other or further response, such allegations are denied.

6. Responding to Paragraph 5 of the Complaint, it is admitted only that Respondent entered into an information services technology agreement with an entity called “AT-Net Services, Inc.” To the extent that the allegations of Paragraph 5 require some other or further response, they are denied.

7. Paragraph 6 of the Complaint is denied.

8. Paragraph 7 of the Complaint is denied.

9. Responding to Paragraph 8 of the Complaint, it is admitted that Respondent is still in possession of certain equipment that was supplied, but denies the allegations and inferences that could be drawn therefrom that Respondent “failed” to pay for the same. To the extent that the allegations of Paragraph 8 require some other or further response, they are denied.

10. Responding to Paragraph 9 of the Complaint, it is admitted that Claimant initially commenced a claim against Respondent in a jurisdictionally improper venue, and that the agreement at issue does contain an arbitration clause. To the extent that the allegations of Paragraph 10 require some other or further response, they are denied.

11. Paragraph 10 of the Complaint is denied.
12. Paragraph 11 of the Complaint is denied.

FOR A THIRD DEFENSE TO THE FIRST CAUSE OF ACTION
(Breach of Contract)

13. Respondent incorporates its foregoing responses and defenses into this defense, to the extent that such foregoing responses and defenses are not inconsistent with the defense that follows.

14. Responding to Paragraph 12 of the Complaint, it is admitted only that Respondent entered into an information services agreement with “AT-Net Services, Inc.” To the extent that the allegations of Paragraph 12 require some other or further response, they are denied.

15. Paragraph 13 of the Complaint is denied.
16. Paragraph 14 of the Complaint is denied.
17. Paragraph 15 of the Complaint is denied.
18. Paragraph 16 of the Complaint is denied.
19. Paragraph 17 of the Complaint is denied.

FOR A THIRD DEFENSE TO THE SECOND CAUSE OF ACTION
(Quantum Meruit)

20. Respondent incorporates its foregoing responses and defenses into this defense, to the extent that such foregoing responses and defenses are not inconsistent with the defense that follows.

21. Paragraph 19 of the Complaint is denied.
22. Paragraph 20 of the Complaint is denied.

23. Paragraph 21 of the Complaint is denied.
24. Paragraph 22 of the Complaint is denied.
25. Paragraph 23 of the Complaint is denied.
26. Paragraph 24 of the Complaint is denied.

FOR A THIRD DEFENSE TO THE THIRD CAUSE OF ACTION
(Attorneys' Fees)

27. Respondent incorporates its foregoing responses and defenses into this defense, to the extent that such foregoing responses and defenses are not inconsistent with the defense that follows.

28. Responding to Paragraph 26 of the Complaint, it is admitted the agreement between Respondent and a fictitious legal entity contains an attorneys' fee provision. To the extent that the allegations of Paragraph 26 require some other or further response, they are denied.

29. Paragraph 27 of the Complaint is denied.

30. Paragraph 28 of the Complaint is denied.

31. Paragraph 29 of the Complaint is stated in the form of a legal conclusion to which no response is required, and none shall be deemed as having been given. To the extent that the allegations of Paragraph 29 require some other or further response, such allegations are denied.

32. Paragraph 30 of the Complaint is denied.

FOR A THIRD DEFENSE TO THE PRAYER FOR RELIEF

33. Respondent incorporates its foregoing responses and defenses into this defense, to the extent that such foregoing responses and defenses are not inconsistent with the defense that follows.

34. Responding to the Paragraph which begins with the word “Wherefore,” and consisting of all subparts thereafter, such paragraph constitutes a prayer for relief to which no response is required, and none shall be deemed as having been given. To the extent that such paragraph requires a response, it is denied.

FOR A FOURTH DEFENSE TO THE COMPLAINT
(Lack of Jurisdiction/Sovereign Immunity)

35. Respondent incorporates its foregoing responses and defenses into this defense, to the extent that such foregoing responses and defenses are not inconsistent with the defense that follows.

36. As alleged previously, Respondent occupies an unusual position in that it is both a private entity and a state actor. And as a state actor, Respondent is entitled to the protections of sovereign immunity which exist under South Carolina law. Among those protections is the privilege of immunity from suit in any court or tribunal, except those venues for which the State of South Carolina has expressly waived immunity. Under South Carolina law, neither the State nor its political subdivisions—including Respondent—are amenable to suit in any court or proceeding other than those which are instituted in the courts of the State of South Carolina. Accordingly, this tribunal is without jurisdiction, and the arbitration proceeding must be dismissed.

FOR A FIFTH DEFENSE TO THE COMPLAINT
(Lack of Standing to Sue)

37. Respondent incorporates its foregoing responses and defenses into this defense, to the extent that such foregoing responses and defenses are not inconsistent with the defense that follows.

38. On December 8, 2014, Claimant filed a bankruptcy petition. (Case No. 14-32047 (Bankr. W.D.N.C.)) Claimant was not discharged from bankruptcy until October 5, 2016.

39. The commencement of a bankruptcy petition resulted in the creation of a bankruptcy estate. This is a legally distinct entity, with legally distinct rights and obligations of payment, from the underlying debtor, AT-Net Services—Charlotte, Inc. Specifically, from the creation of the bankruptcy estate until the date on which the bankruptcy court confirms a plan for the repayment of creditors, all assets generated by the bankruptcy estate belong to the bankruptcy estate, not the underlying debtor.

40. In Claimant's case, the bankruptcy court did not confirm a repayment plan until January 1, 2016. Therefore, any assets generated by Claimant—such as a right to payment—during the period from December 8, 2014 through January 1, 2016 are the sole and exclusive property of the bankruptcy estate—not of any private party in its own capacity.

41. This analysis has particular relevance to Claimant. In 2017, a third party brought suit against Claimant for breach of contract; Claimant countersued for failure to make payment. (Case No.: 17-CVS-084 (Gaston Co., N.C.)) The court dismissed a substantial portion of the counterclaim because Claimant's bankruptcy—and the subsequent creation of a bankruptcy estate—meant that there was a lack of standing for Claimant to sue for the portion of work undertaken during the existence of the bankruptcy estate.

42. This is relevant in the instant matter because, in part and perhaps in whole, the work for which Claimant has sued Respondent was undertaken during the existence of the bankruptcy estate. And to that extent, the claim must be dismissed.

FOR A SIXTH DEFENSE TO THE COMPLAINT
(Modification & Failure to Perform)

43. Respondent incorporates its foregoing responses and defenses into this defense, to the extent that such foregoing responses and defenses are not inconsistent with the defense that follows.

44. It was, at all relevant times, the understanding of the parties to the pertinent agreement that Claimant would seek reimbursement for owed through a program maintained by the Federal Communications Commission (“the FCC”) known as E-rate. Respondent undertook all necessary and appropriate action to enable Claimant to seek its reimbursement. Yet, inexplicably, Claimant failed to do so.

45. The expectation that Claimant would seek reimbursement through E-rate represents a modification of the pertinent agreement, and Claimant’s failure to seek such reimbursement constitutes a breach, all of which is raised as a defense to the claim presented.

FOR A SEVENTH DEFENSE TO THE COMPLAINT
(Failure to Mitigate)

46. Respondent incorporates its foregoing responses and defenses into this defense, to the extent that such foregoing responses and defenses are not inconsistent with the defense that follows.

47. As alleged in the foregoing defense, Claimant had, and is believed to continue to have, the opportunity to seek reimbursement through the FCC’s E-rate program. Respondent has provided all necessary, appropriate, and reasonable assistance to enable Claimant to seek such reimbursement, yet Claimant—by and through its own failure to take action—has not done so. Claimant’s failure to mitigate its damages by refusing to take even the simplest of actions in

furtherance of protecting its own financial rights is hereby raised as a defense to any amount of liability which Claimant may ultimately be entitled to recover from Respondent.

PRAYER FOR RELIEF

WHEREFORE, having fully responded to the allegations of the Complaint, Respondent respectfully requests a determination which results in the dismissal of these proceedings and of the claim in its entirety.

Respectfully submitted,

s/ Steven Edward Buckingham

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Attorney for The NEXT School

Filed this 4th Day of December, 2018.
Greenville, South Carolina

ATTACHMENT C

BEFORE THE AMERICAN ARBITRATION ASSOCIATION

| | | |
|-------------------------------------|---|--|
| AT-NET SERVICES—CHARLOTTE, INC., |) | Case No.: 01-18-0004-2576 |
| |) | |
| |) | |
| Claimant, |) | |
| |) | |
| v. |) | <u>MOTION TO DISMISS OF THE NEXT SCHOOL</u> |
| |) | |
| THE NEXT SCHOOL, |) | |
| |) | |
| Respondent. |) | |

COMES NOW the NEXT School, by and through its undersigned counsel, and pursuant to the applicable Rules of Procedure, respectfully submits this Motion to Dismiss. The basis for this Motion is grounded in the doctrine of sovereign immunity, which divests this tribunal of jurisdiction to hear and decide this case, all as briefly explained in Respondent’s Answer.

Respondent hereby reserves the right to prepare and provide a memorandum in support of this Motion once an arbitrator has been identified, and once a schedule for the case has been established.

Respectfully submitted,

s/ Steven Edward Buckingham

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Attorney for The NEXT School

Filed this 4th Day of December, 2018.
Greenville, South Carolina

BEFORE THE AMERICAN ARBITRATION ASSOCIATION

| | | |
|----------------------------------|---|---|
| AT-NET SERVICES—CHARLOTTE, INC., |) | Case No.: 01-18-0004-2576 |
| |) | |
| |) | |
| Claimant, |) | |
| |) | |
| v. |) | <u>MEMORANDUM IN SUPPORT OF THE MOTION</u> |
| |) | <u>TO DISMISS OF THE NEXT SCHOOL</u> |
| THE NEXT SCHOOL, |) | |
| |) | |
| Respondent. |) | |

The NEXT School, Respondent, by and through its undersigned counsel, respectfully submits this memorandum in support of the previously filed motion to dismiss. The basis for this motion is grounded in the doctrine of sovereign immunity, for the reasons explained below.

As discussed in Paragraph 3 of Respondent’s Answer and the defenses associated therewith, The NEXT School, Inc. (“NEXT”) is a public, not-for-profit corporation which operates free public schools in South Carolina. NEXT is a public, not-for-profit corporation because this is the type of corporate organization required by the South Carolina Charter School Act. S.C. Code § 59-40-40(1). Consistent with the Charter School Act, NEXT holds a charter from the South Carolina Public Charter School District, which is a political subdivision of the State of South Carolina. The charter issued by the Public Charter School District authorizes NEXT to operate public schools within the state. Accordingly, the most substantial part of NEXT’s funding consists of public money from the Public Charter School District. Consequently, NEXT “is, for purposes of state law and the state constitution, considered a public school and part of the South Carolina Public Charter School District.” *Id.* § 59-40-40(2)(a).

Accordingly, NEXT is regarded by the State of South Carolina as a “state actor.” NEXT “is a state actor because it is classified as a public school; is funded by state money; and created by virtue of state law in furtherance of the state’s duty to provide public education pursuant to

Article XI, section 3 of the South Carolina Constitution.” McNaughton v. Charleston Charter Sch. for Math & Science, Inc., 768 S.E.2d 389, 399 (S.C. 2015).

As a state actor, NEXT may only be sued in a court or tribunal for which the State of South Carolina has given its consent to be sued. In that connection, the State of South Carolina has, through its legislature, established that the only venue in which a South Carolina state actor may be sued is the courts of the State of South Carolina. S.C. Code § 15-77-50.

To the extent that Claimant contends the State of South Carolina has somehow waived sovereign immunity, it is the burden of Claimant to show where, in South Carolina law, such a waiver has been established.

WHEREFORE, Respondent respectfully requests that this arbitration proceeding be dismissed.

Respectfully submitted,

s/ Steven Edward Buckingham

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Attorney for The NEXT School

Filed this 6th Day of December, 2018.
Greenville, South Carolina

ATTACHMENT D

BEFORE THE AMERICAN ARBITRATION ASSOCIATION

| | | |
|-------------------------------------|---|--|
| AT-NET SERVICES—CHARLOTTE, INC., |) | Case No.: 01-18-0004-2576 |
| |) | |
| |) | |
| Claimant, |) | |
| |) | |
| v. |) | <u>RENEWED MOTION TO DISMISS OF</u> |
| |) | <u>THE NEXT SCHOOL</u> |
| THE NEXT SCHOOL, |) | |
| |) | |
| Respondent. |) | |

COMES NOW the NEXT School, by and through its undersigned counsel, and pursuant to the applicable Rules of Procedure, respectfully submits this Motion to Dismiss. The basis for this Motion is grounded in the doctrine of sovereign immunity, which divests this tribunal of jurisdiction to hear and decide this case.

This is a renewed Motion. At the outset of these proceedings, but before the selection of an arbitrator, Respondent filed a Motion which asserted sovereign immunity as a complete defense to all proceedings before this tribunal. The motion was submitted to Mr. Germani, of the AAA, who, by letter dated December 21, 2018, declined to address the substance of the jurisdictional argument presented, reserving it instead for the determination of the arbitrator.

In furtherance of this Motion, Respondent would incorporate the arguments presented in its previously filed supporting memorandum, as well as its pre-hearing memorandum, submitted contemporaneously herewith.

Respectfully submitted,

s/ Steven Edward Buckingham

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Attorney for The NEXT School

Filed this 28th Day of April, 2019.
Greenville, South Carolina

ATTACHMENT E

BEFORE THE AMERICAN ARBITRATION ASSOCIATION

| | | |
|-------------------------------------|---|-----------------------------|
| AT-NET SERVICES—CHARLOTTE, INC., |) | Case No.: 01-18-0004-2576 |
| |) | |
| |) | |
| Claimant, |) | |
| |) | |
| v. |) | <u>NOTICE OF PROTEST OF</u> |
| |) | <u>THE NEXT SCHOOL</u> |
| THE NEXT SCHOOL, |) | |
| |) | |
| Respondent. |) | |

The NEXT School, Respondent, hereby gives notice of protest as to participation in the instant arbitration proceeding, consistent with its position that the doctrine of sovereign immunity prohibits Respondent, as an actor of the State of South Carolina, from being subject to legal proceedings in any forum other than those expressly authorized by the South Carolina General Assembly. To the extent that Respondent participates in the instant arbitration proceeding, Respondent is doing so under protest, subject to and without waiving its jurisdictional defense.

Respectfully submitted,

s/ Steven Edward Buckingham

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Attorney for The NEXT School

Filed this 2^d Day of May, 2019.
Greenville, South Carolina

ATTACHMENT F

BEFORE THE AMERICAN ARBITRATION ASSOCIATION

| | | |
|-------------------------------------|---|---|
| AT-NET SERVICES—CHARLOTTE, INC., |) | Case No.: 01-18-0004-2576 |
| |) | |
| |) | |
| Claimant, |) | |
| |) | |
| v. |) | <u>RESPONDENT’S RENEWED OBJECTION TO</u> |
| |) | <u>JURISDICTION AND MOTION TO VACATE THE</u> |
| THE NEXT SCHOOL, |) | <u>DECISION OF THE ARBITRATOR</u> |
| |) | |
| Respondent. |) | |

COMES NOW the NEXT School, Respondent, by and through its undersigned counsel, and pursuant to the applicable Rules of Procedure, respectfully submits this Renewed Objection to Jurisdiction and Motion to Vacate the Decision of the Arbitrator. The basis for this Motion is grounded in the doctrine of sovereign immunity, which divests this tribunal of jurisdiction not only to hear this dispute, but also to decide any matter related to this dispute on its merits.

In furtherance of this Motion, Respondent would incorporate the arguments presented in its previously filed memorandum in support of its initial Motion to Dismiss, its Renewed Motion to Dismiss, its pre-hearing memorandum, those asserted at the arbitration hearing on May 2, 2019, and the Notice of Protest presented at the arbitration hearing.

In brief, Respondent’s argument is simple. It is uncontroverted—under the laws of the State of South Carolina, the decisions of the South Carolina Supreme Court, and the testimony elicited at the arbitration hearing—that Respondent is “a public school and part of the South Carolina Public Charter School District.” S.C. Code § 59-40-40(2)(a). Respondent is therefore regarded by the State of South Carolina as a “state actor;” “it is classified as a public school; is funded by state money; and created by virtue of state law in furtherance of the state’s duty to provide public education pursuant to Article XI, section 3 of the South Carolina Constitution.”

McNaughton v. Charleston Charter Sch. for Math & Science, Inc., 768 S.E.2d 389, 399 (S.C. 2015).

As a state actor, Respondent may only be sued in a court or tribunal for which the State of South Carolina has given its express consent to be sued. In that connection, the State of South Carolina has, through its legislature, established that the only venue in which a South Carolina state actor may be sued is the courts of the State of South Carolina. (S.C. Code § 15-78-10(e); S.C. Code § 15-77-50.)

To be clear, there is no authority whatsoever to suggest that the State of South Carolina has consented to the submission of disputes affecting state actors to arbitration tribunals. There are no constitutional provisions, no legislative enactments, no judicial decisions—nothing—to support the proposition that a South Carolina state actor is subject to arbitration.

Complainant’s counsel argued that the South Carolina case of Kinsey Constr. Co. v. South Carolina Dep’t of Mental Health, 249 S.E.2d 900 (S.C. 1978), established the proposition that—by merely entering into a contract with a private party—actors of the State of South Carolina have consented to a blanket waiver of the protections afforded through sovereign immunity. Kinsey is bad law, and has been expressly overruled by the South Carolina Supreme Court. Unisys Corp. v. South Carolina Budget & Control Bd., 551 S.E.2d 263 (S.C. 2001).

Perhaps most importantly, the United States Supreme Court literally just decided a case on this very point. In Franchise Tax Board of California v. Hyatt, the Supreme Court squarely addressed the constitutionality of a private party seeking civil relief from a state actor in any forum other than a forum in which the opposing state has expressly consented to be sued. No. 17-1299 (May 13, 2019). The holding in Hyatt is clear: it is unconstitutional for a state—or one of its actors—to be subject to suit in any forum whatsoever, in derogation of its inherent immunity,

unless the state has consented to the jurisdiction of that forum; any judgment, verdict, or award contrary to this constitutional principle is void.

And so it is with the present dispute. Respondent has raised sovereign immunity as a complete jurisdictional defense at every stage in this arbitration proceeding. It has participated in these proceedings subject only to its constant jurisdictional objection. Respondent would respectfully request the arbitrator to reconsider her decision on the issues raised by sovereign immunity—in light not only of the uncontroverted fact that Respondent is a state actor, and not only that South Carolina has waived immunity for state actors only to the extent that proceedings for relief occur in the courts of the State of South Carolina—but also that the United States Supreme Court has just declared all judgments against state actors in derogation of sovereign immunity unconstitutional and void.

WHEREFORE, Respondent respectfully requests the arbitrator to reconsider her decision regarding the existence of jurisdiction, and on that basis, to vacate the award rendered.

Respectfully submitted,

s/ Steven Edward Buckingham

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Attorney for The NEXT School

Filed this 15th Day of May, 2019.
Greenville, South Carolina

BEFORE THE AMERICAN ARBITRATION ASSOCIATION

| | | |
|-------------------------------------|---|---|
| AT-NET SERVICES—CHARLOTTE, INC., |) | Case No.: 01-18-0004-2576 |
| |) | |
| |) | |
| Claimant, |) | |
| |) | |
| v. |) | <u>RESPONDENT’S RESPONSE IN OPPOSITION TO</u> |
| |) | <u>CLAIMANT’S STATEMENT OF DAMAGES &</u> |
| THE NEXT SCHOOL, |) | <u>FEES</u> |
| |) | |
| Respondent. |) | |

COMES NOW the NEXT School, Respondent, by and through its undersigned counsel, and in response to Respondent’s Statement of Damages and Fees, respectfully submits this objection. Consistent with the continuous protests that Respondent has lodged, this tribunal—from the outset—has lacked jurisdiction to not only hear this dispute, but also to decide any matter related to this dispute on its merits. The absence of jurisdiction also prohibits this tribunal from making any award of damages, interest, and fees associated with its decision. The tribunal’s decision and the award presently at issue are both void ab initio. This result is compelled by not only the laws and constitution of the State of South Carolina, but also—as recently established in the Franchise Tax Board of California v. Hyatt case decided by the Supreme Court—the Constitution of the United States.

WHEREFORE, Respondent respectfully submits that Claimant is not entitled to any amount of damages, interest, and fees, as the underlying decision of this tribunal is unsupported by any legitimate jurisdictional basis.

Respectfully submitted,

s/ Steven Edward Buckingham

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Attorney for The NEXT School

Filed this 20th Day of May, 2019.
Greenville, South Carolina

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

DEFENDANT AT-NET SERVICES-CHARLOTTE, INC.’S RESPONSE IN OPPOSITION TO THE NEXT SCHOOL, INC.’S MOTION FOR JUDGMENT ON THE PLEADINGS, MOTION TO DISMISS & MOTION FOR RELIEF FROM JUDGMENT

AT-NET Services-Charlotte, Inc.,)
)
 Plaintiff,)
)
 vs.)
)
 The NEXT School, Inc.,)
)
 Defendant.)
)

C. A. No. 2020-CP-23-00969

The defendant and counterclaimant, AT-NET Services – Charlotte, Inc. (“AT-NET”) respectfully submits this memorandum in opposition to The NEXT School, Inc.’s (“NEXT”) consolidated memorandum in support of its motion for judgment on the pleadings, motion to dismiss, and motion for relief from judgment.

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. *See* Master Services Agreement, attached as **Exhibit A**. 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. *See* Contract at Articles 13 & 18.1. 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. *See* Email Correspondence Between Mr. Rothstein and Mr. Holtgrewe, October 2, 2017, attached as **Exhibit B** (Rothstein: “What is your basis for disregarding the mandatory arbitration provision in Article 18.1 of the Master Services 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.”). 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.**” *See Id.* October 4, 2017 (emphasis added).

Based on NEXT’s demands, AT-NET agreed to dismiss the North Carolina lawsuit without prejudice and proceed to arbitration. *See* Email from Holtgrewe to Rothstein, November 16, 2017, attached as **Exhibit C**. 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. *See* Email from Buckingham to John Germani, January 9, 2019, attached as **Exhibit D**. 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.

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.” *See See* Order and Judgment Confirming Arbitration Award, attached as **Exhibit E** at ¶ 5. 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. *Id.* 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. NEXT continues to raise the same arguments that were repeatedly rejected by the AAA but which it failed to raise before the North Carolina Superior Court. For the reasons stated herein, this court should deny NEXT's motions.

Argument

I. This court lacks subject matter jurisdiction over this dispute

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 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)). “Accordingly, applying both the plain language of the Act and the cases of other states interpreting similar provisions, South Carolina courts do not have subject matter jurisdiction to consider a motion to review an arbitration award issued in a proceeding conducted in New York pursuant to the parties' written agreement.” *Id.*

Because the parties agreed to arbitration in North Carolina this court does not have subject matter jurisdiction to review the confirmed award. NEXT's motions seeking to invalidate a sister's state's arbitration award should be denied.

II. NEXT consented to arbitration

NEXT argues that because it is a state actor, it may not be sued in a sister state. 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. Because the California Tax Board was immunized from suit in California for the actions complained of by Hyatt, California did not consent to suit and, therefore, the claim could not proceed in Nevada. Id. at 1496 - 1497. Thus, "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. Id. at 1496-1497 *see also* Hill v. Freedman, No. WD 82657, 2020 WL 2529022, at *5 (Mo. Ct. App. May 19, 2020) ("In an intervening decision, the 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."); All Olympia Gymnastic Ctr. Inc. v. Nassar, No. 218CV10540JLSKES, 2020 WL 1955307, at *3 (C.D. Cal. Mar. 9, 2020) ("the Supreme Court observes in Hyatt that one

constitutional limitation on the sovereignty of the States of the Union is ‘the inability of one State to hale another into its courts without the latter’s consent.’ Unless the Supreme Court was referring to affirmative consent, sister States must have a jurisdictional vehicle by which to determine whether such consent exists.”).

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 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. This interpretation was confirmed in Melton v. Crowder, 317 S.C. 253, 254–56, 452 S.E.2d 834, 834–36 (1995). In Melton, a North Carolina Highway Patrolman pursued a suspect across the North Carolina State line into Chesterfield County. Id. at 835. A crash occurred resulting in injuries to the plaintiff that were caused by the negligence of the North Carolina Highway Patrolman. Id. The plaintiff sued the North Carolina Highway Patrol and the trial court granted the North Carolina Highway Patrol’s 12(b)(1) and (2) motions, dismissing for lack of jurisdiction based upon the doctrine of sovereign immunity. Id. The trial court found that North Carolina was a non-consenting state that may not be sued in South Carolina because all tort actions against the State and its agencies must be heard by the North Carolina Industrial Commission. Id.

In reversing the trial court, the Supreme Court phrased the question before it as follows: “The sole issue before this Court is whether North Carolina is a consenting state subject to suit in tort in South Carolina.” Id. In answering the question in the affirmative and distinguishing its Newberry decision, the Supreme Court stated:

The Court in Newberry found that Georgia was a non-consenting sister state because Georgia had not consented to suit where an agency did not have liability insurance coverage. 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, Melton could maintain a suit in North Carolina. Accordingly, we find that North Carolina is a consenting state and reverse the trial court’s dismissal for lack of jurisdiction.

Id. at 835-836.

Thus, the relevant question is whether South Carolina has consented to suit for the breach of contract claims brought by AT-NET. It has. “A sovereign is not immune from suit based on its breach of a contractual obligation.” 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.” *See* NEXT Memorandum at 4. NEXT fails to discuss, however, whether a state entity may be bound to an agreement to arbitrate. South Carolina has previously held that a state entity may be compelled to arbitrate where it has entered into a valid arbitration agreement. In Trident Technical College v. Lucas & Stubbs, LTD., 286 S.C. 98 (1985), Trident Technical College (“TTC”) and Lucas & Stubbs, LTD (“L&S”) entered into a standard form AIA contract with Creed & Sons, Inc. for the construction of the college’s campus. Id. TTC

is a state entity created by the legislature. *See* S.C. Code 59-53-410, *et. seq.* According to the background of the case as recited by the Supreme Court, “[o]n April 21, 1980 Creed demanded arbitration pursuant to the contract. TTC refused to arbitrate and on April 30, 1980 Creed petitioned this Court to compel TTC to arbitrate under the Federal Arbitration Act, 9 U.S.C. §§1-14. On May 20, 1980 a hearing was held before the Honorable Walter J. Bristow, who issued an order finding that the federal act was applicable and requiring TTC to arbitrate.” *Id.*; *see also South Carolina Public Service Authority v. Great Western Coal, Inc.*, 312 S.C. 559, 437 S.E.2d 22 (1993); *The Hous. Auth. of City of Columbia v. Cornerstone Hous., LLC*, 356 S.C. 328, 334, 588 S.E.2d 617, 620 (Ct. App. 2003). NEXT points to no statute that would forbid it from agreeing to arbitration or being compelled to arbitrate. Even if such a state law statute did exist, it would be preempted in this case by the Federal Arbitration Act, 9 U.S.C.A. § 1, *et. seq.* because the agreement to arbitrate between the parties involves a transaction in interstate commerce. *Munoz v. Green Tree Financial Corp.*, 343 S.C. 531, 538, 542 S.E.2d 360, 364 (2001).

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 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 waived sovereign immunity for breach of contract claims and NEXT consented to arbitration in North Carolina. Pursuant to *Hyatt*, *Newberry*, *Melton*, and *Trident*, NEXT can be compelled to arbitrate in North Carolina for breach of contract and its motion should be denied.

III. NEXT is not entitled to sovereign immunity from suit in a foreign court

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 the state 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.

IV. The North Carolina court possessed subject matter jurisdiction to confirm the arbitration award

The UEFJA provides that NEXT may only seek relief from the North Carolina judgment “on any other ground for which relief from a judgment of this State is allowed.” S.C. Code § 15-35-940(A). The only ground advanced by NEXT seeking relief from the judgment is that the North Carolina court lacked subject matter jurisdiction. NEXT’s memorandum, however, is imprecise in its discussion of the question of subject matter jurisdiction. “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 of Mecklenburg County to entertain the confirmation proceeding. The North Carolina Superior Court possessed subject matter jurisdiction sufficient to confirm the award and NEXT's complaints should have been brought in that forum prior to confirmation.¹

NEXT failed to file or serve any motion or notice seeking to vacate or modify the arbitration award within the time period provided pursuant to the arbitration act or prior to confirmation. *See* Order at ¶ 5. Having failed to object to confirmation of the award, the award is now final. Even if this court did have jurisdiction to review a sister court's confirmation of an arbitration award, the grounds now advanced by NEXT are waived due to its failure to raise the grounds with the North Carolina court prior to confirmation.

Conclusion

For the foregoing reasons, NEXT's motions should be denied.

Respectfully submitted,

s/Adam C. Bach

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Attorneys for Defendant AT-NET Services-
Charlotte, Inc., a Private Corporation
Incorporated & Existing under the Laws of
the State of North Carolina

May 26, 2020

Greenville, South Carolina

¹ It should be noted that the litigants in Hyatt proceeded in Nevada court, with the California Tax Board raising its objections and arguments to the Nevada court, rather than filing a collateral attack on the judgment in California, as NEXT does here.

Exhibit A



Master Services Agreement

Prepared for NEXT High School

Prepared For: Zach Eikenberry
Contact Phone: (765) 418-1739

Submitted By: Brent Amyette
864-370-8247

Date: Jun-29-2015



Master Services Agreement

MASTER SERVICES AGREEMENT

THIS MASTER SERVICES AGREEMENT (hereinafter referred to as "Agreement") between AT-NET Services, Inc. located at 9625-D Southern Pine Blvd., Charlotte, NC 28273 (hereinafter referred to as "Service Provider") and NEXT High School, Federal Tax Identification No: _____, located at 2000 Wade Hampton Blvd.

Greenville, SC 29615

United States (hereinafter referred to as "Customer").

WITNESSETH

IN CONSIDERATION OF the mutual benefits and obligations set forth in this Agreement, the receipt and sufficiency of which is hereby acknowledged, the Customer and Service Provider (collectively "Parties") agree as follows:

2

Article 1 - Scope and Schedule

1.1 Scope of Work. If Customer hereby engages the Service Provider for a project the Customer will be provided with the scope of work and services (collectively "Services"), as well as such other Services as the Customer and the Service Provider may agree upon from time to time (see paragraph 2.2 below for Change Orders).

1.2 Schedule of Work. Within a reasonable time following execution of this Agreement, Service Provider will furnish to Customer a detailed Schedule of Work ("Schedule") when applicable, with any and all needed documentation, which shall then be incorporated into this Agreement.

1.3 Schedules for Services. Schedules and quotes for Service ("Schedules") under this Agreement will be made by separate written documents signed by authorized representatives of both parties. A form of Schedule is attached hereto as Attachment A and by this reference made a part hereof. The duration, price, description and any other requirements for the Services to be rendered will be set forth in the

Schedule. The Schedule will also specify the Premises(s) where the Services will be performed. Each Schedule which references this Agreement will be governed by the terms and conditions contained in this Agreement. Upon execution by both parties, any Schedule shall become binding according to its terms and shall incorporate the terms of this Agreement.

In no event shall Service Provider perform any Services hereunder unless Customer has signed a Schedule authorizing such Services consistent with the requirements of this Agreement, and any Services performed by Service Provider without a Schedule signed by an authorized representative of Customer or exceeding the duration stated in the Schedule shall be performed at no charge to Customer. Commencement of the Services described in such Schedule shall be deemed acceptance by Service Provider of the terms of this Agreement and such Schedule. At Customer's request, Service Provider shall execute a master agreement for services with any affiliate of Customer containing substantially the same terms and conditions set forth in this document and make any Services rendered to Customer available to such affiliate at the same prices contained in any Schedule unless the location or other circumstances render it impractical or unreasonable.

Article 2 - Payment and Performance

2.1 Payment. Payment shall be made in accordance with a payment schedule for projects and net 20-day terms on all other orders or requests for service. AT-NET has the right to charge a late payment charge on all account balances, which remain unpaid and outstanding beyond the date payment, is due. The late payment charge shall be 1.5% of the outstanding balance per month for each month, or partial month, such unpaid balance remains outstanding with a minimum fee of \$35.00. Customer agrees to pay collection, AT-NET normal rack rates for time spent collecting and legal fees to effect settlement. Customer's failure to make any payments in accordance with the payment schedule shall constitute a material breach of this Agreement, and in any such instance, Service Provider may, at its discretion, 1) elect, without incurring any liability, to terminate this Agreement and retain all funds previously received

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Project Start date cannot be provided without a signed purchase order, statement of work, master services agreement and any and all required payments. Upon receipt of above mentioned documents, a detailed schedule of work will be provided with mutually agreed upon dates. Product delivery dates are subject to change based on manufacturer's availability of product. Any and all product found to be on backorder or delayed shipment for any reason will not affect payment required for all other delivered products.

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AT-NET Services

Master Services Agreement

from Customer, or 2) cease all Services until Customer pays current any outstanding invoices. *Any and all issues with invoices must be disputed in writing within 30 days of invoice date. Any disputes made after 30 days will not be honored.*

2.2 **Change Orders** - The Parties contemplate that additional and/or different Services may be required over the course of a project or service engagement ("Change Orders"). If/When such Change Orders are desired, the Customer shall complete and submit a Change Order Request Form to the Service Provider's Authorized Representative. The Service Provider shall, within a reasonable time, review the Customer's request and submit to the Customer a proposed Change Order, which will detail the change requested, the price of the requested change, and will be signed by Service Provider. Customer must then sign the Change Order and return to Service Provider through the Authorized Representative of the Service Provider. The Parties agree that the pricing and scope of work shall be independently negotiated in each instance and that each such Change Order must be evidenced in a separate writing and signed by each Party. All change orders will be subject to and governed by this agreement.

2.3 **Service Provider's Right to Cure.** If the Service Provider refuses or fails to supply enough properly skilled workers, proper materials, or maintain the Schedule due to its own fault, or it disregards laws, ordinances, rules, regulations or orders of any public authority having jurisdiction, or otherwise is guilty of a material breach of a provision of this Agreement, and fails within five (5) working days after receipt of written notice (by certified mail) to commence and continue satisfactory correction of such default then the Customer shall have the right to terminate this Agreement.

2.4 **Payment Bond Review.** If Service Provider so requests, Customer shall provide for review and copying any Payment Bond that may exist with regard to a Project.

2.5 **Owner's Ability to Pay.** Service Provider shall have the right to receive from Customer information relative to the Owner's financial ability to

pay for the Work.

Article 3 - Confidentiality

3.1 **Customer's Confidential Information.** The Service Provider agrees that it will not disclose, divulge, reveal, report, or use, for any purpose, any confidential information with respect to the business of the Customer, which the Service Provider has been granted access to, except as may be necessary or desirable to further the business interests of the Customer. This obligation will survive indefinitely upon termination of this Agreement.

3.2 **Return of Customer's Property.** Upon the expiration or termination of this Agreement, the Service Provider will return to the Customer any property, documentation, records, or confidential information which is the property of the Customer.

Article 4 - Ownership of Materials

4.1 **Customer's Ownership of Materials.** All materials developed, produced, or in the process of being so under this Agreement, will be the property of the Customer. The use of the mentioned materials by the Customer will not be restricted in any manner.

4.2 **Limitation of Liability.** Service Provider shall bear no liability for damage to such materials except for any damage that may be directly caused the gross negligence of willful misconduct of the Service Provider.

Article 5 - Assignment

5.1 **No Assignment without Consent.** The Service Provider will not voluntarily or by operation of law assign or otherwise transfer its obligations under this Agreement without the prior written consent of the Customer.

Article 6 - Capacity/Independent Service Provider

6.1 **Service Provider as Independent Service Provider.** The Parties acknowledge and agree that Service Provider is acting as an independent Service Provider and not as an employee of Customer. The

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Project Start date cannot be provided without a signed purchase order, statement of work, master services agreement and any and all required payments. Upon receipt of above mentioned documents, a detailed schedule of work will be provided with mutually agreed upon dates. Product delivery dates are subject to change based on manufacturer's availability of product. Any and all product found to be on backorder or delayed shipment for any reason will not affect payment required for all other delivered products.



AT-NET Services

Master Services Agreement

Parties further acknowledge and agree that this Agreement does not create a partnership or joint venture between them, but is exclusively an agreement for service.

9625-D Southern Pine Blvd, Charlotte, NC 28273
Fax Number: 864-679-0007

Or to such other address as to which Service Provider may from time to time notify the other.

Service Provider shall be an independent Service Provider in all respects and, except as expressly provided in this Agreement, Service Provider and its employees shall not be subject to the control and supervision of Customer as to the means and manner of performing Service Provider's Services hereunder. Service Provider shall have complete control of its organization and shall exercise direct supervision, control, and direction of work performed by its employees and shall be solely responsible for all Workers' Compensation Act obligations, if any. Further, Service Provider is solely responsible for determining the method and amount of all wage and benefit payments, all hiring, firing or discipline of its employees as well as all policies and procedures related thereto. Accordingly, Service Provider agrees that the working conditions and employment terms of its employees, while established and maintained by Service Provider, shall meet the standards required by all applicable federal and state laws and regulations. In acknowledgment that Service Provider's employees are the employees of Service Provider only, Service Provider will have each employee performing duties pursuant to this Agreement individually read and sign a separate document entitled "Waiver of Employment and Nondisclosure Agreement".

Article 9 - Costs and Legal Expenses

9.1 Attorney's Fees. In the event a legal dispute arises pertaining to this Agreement, Service Provider will be entitled to recover, in addition to any other damages or award, its costs, all expenses, employee time at rack rates, and reasonable attorney's fees associated with the action.

Article 10 - Entire Agreement

10.1 Entire Agreement. This writing and its attachments, and applicable Schedules for Service and their incorporated attachments, signed by both parties, constitute the final and complete written expression of all the terms of this Agreement between the parties and supersede all prior agreements between the parties, written or oral, relating to the subject matter hereof. There are no prior or contemporaneous agreements or representations not included or provided for herein. This Agreement may not be amended except by written instrument, executed by authorized representatives of both parties.

Article 11 - Limitation of Liability

11.1 Limitation of Liability. NOTWITHSTANDING ANYTHING ELSE HEREIN, ALL LIABILITY OF AT-NET UNDER THIS AGREEMENT OR OTHERWISE SHALL BE LIMITED TO MONEY PAID TO AT-NET UNDER THIS AGREEMENT DURING THE SIX (6) MONTH PERIOD PRECEDING THE EVENT OR CIRCUMSTANCES GIVING RISE TO SUCH LIABILITY AND IN THE CASE OF DAMAGES RELATING TO ANY ALLEGEDLY DEFECTIVE OR INFRINGING PRODUCT, SHALL, UNDER ANY LEGAL OR EQUITABLE THEORY, BE FURTHER LIMITED TO THE PURCHASE PRICE PAID BY PURCHASER FOR SUCH PRODUCT. IN NO EVENT SHALL AT-NET BE LIABLE FOR ANY INCIDENTAL OR CONSEQUENTIAL DAMAGES, LOST PROFITS, OR LOST DATA, OR ANY OTHER INDIRECT DAMAGES EVEN IF AT-NET HAS BEEN INFORMED OF THE POSSIBILITY THEREOF.

Article 7 - Modification of Agreement

7.1 Modifications Must be In Writing. Any amendment or modification of this Agreement, or additional obligation assumed by either party in connection with this Agreement, will only be binding if evidenced in a writing signed by an Authorized Representative of each party.

Article 8 - Notice

8.1 Notice. All notices, requests, demands or other communications required or permitted by the terms of this Agreement will be given in writing and delivered to the Parties as follow

AT-NET Services Inc. Attention: Legal Department

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Initials *JSU*

Project Start date cannot be provided without a signed purchase order, statement of work, master services agreement and any and all required payments. Upon receipt of above mentioned documents, a detailed schedule of work will be provided with mutually agreed upon dates. Product delivery dates are subject to change based on manufacturer's availability of product. Any and all product found to be on backorder or delayed shipment for any reason will not affect payment required for all other delivered products.

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Master Services Agreement

Article 12 - Indemnification

12.1 Customer/Service Provider Indemnification Obligations. The Service Provider will indemnify and hold the Customer harmless from any claims against the Customer by any other party, arising directly or indirectly out of alleged errors and/or omissions related to the Services by the Service Provider. Customer shall indemnify and hold Service Provider harmless from any claims against the Service Provider which arise from any services, materials, or work provided by anyone other than Service Provider.

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.

Article 14 - Severability

14.1 The provisions of this Agreement are to be construed separately, and if any one or more of the provisions hereof are not given legal effect by a court of competent jurisdiction, such provision(s) shall drop out of the Agreement and the Agreement shall be construed and enforced as it is written without such provision(s).

Article 15 - Waiver

15.1 Waiver. The waiver by either party of a breach, default, delay or omission of any of the provisions of this Agreement by the other party will not be construed as a waiver of any subsequent breach of the same or other provisions.

Article 16 - Warranties

16.1 Service Provider Warranty. Service Provider shall provide Customer a warranty on its Infrastructure and Cabling work against all deficiencies and defects in workmanship for a period of one (1) year and a warranty on its Engineering Services (i.e. Microsoft, Cisco, etc.) for thirty (30) days, from the date of substantial completion of all or a designated portion of the Service Provider's work or acceptance or use by the Customer of designated equipment and/or material, whichever is sooner. The

warranty shall only cover work performed at the original time of installation, and such warranty applies only insofar as the alleged defect or deficiency relates to errors or omissions of Service Provider's personnel. Materials shall be warranted in accordance with their respective manufacturer's warranties only. Manufacturer specific warranties are available upon request.

16.2 Customer Warranties. Customer warrants as follows:

- a. Customer shall provide Service Provider access to all areas specified for work, including necessary access badges, keys, and combinations to complete work in a timely manner.
b. Customer shall identify and protect all critical existing equipment.
c. Customer shall supply any electrical power services required to complete the work.
d. Customer shall provide any and all documentation, information, drawings, schematics, or otherwise for Service Provider to insure work is performed properly.

16.3 Warranty. Service Provider represents, warrants and covenants that all employees of Service Provider will be qualified and capable of performing the Services provided to Customer in a competent and professional manner and that such Services will be performed in a good and workmanlike manner in accordance with the specifications and/or exhibits attached hereto and incorporated herein. Further, Service Provider represents, warrants and covenants that all Deliverables shall be conveyed to Customer free and clear of all liens or other encumbrances and that such Deliverables and the sale and use of them will not infringe or contribute to the infringement of any patent, trademark, copyright or corresponding or similar right.

Article 17 - Service Provider's Insurance

17.1 Policy Limits. Customer and Service Provider agree that the insurance policy secured by Service Provider, the Certificate of which is attached hereto,

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AT-NET Services

Master Services Agreement

provides sufficient coverage for all contingencies. The Parties further agree that Service Provider shall bear no liability in excess of its policy limits under any circumstances.

- There will be a one hour minimum charge for all onsite service calls. Subsequent billings are in ½ hour increments.
- Customer will direct all calls to 866-706-0886 (24x7x365)
- There is a trip charge of \$90.00 for onsite support. If vendor is required to travel outside of AT-NET's metropolitan area, a quote will be submitted for travel.

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.

Article 20 - Return Policy

20.1 Return Policy. Customer's right to return hardware and software is subject to the return policies imposed by the applicable manufacturer. No credit for items delivered to Customer will be issued by AT-NET without prior written approval from AT NET. Such approval, when provided, must be in the form of a written Return Material Authorization (RMA), which must accompany the returned items. An RMA must be requested by Customer from AT-NET within thirty (30) days from the original ship date, unless a shorter period is required by the applicable manufacturer. Customer agrees to indemnify and hold harmless AT-NET from any and all losses sustained by AT-NET as a result of Customer's return of items delivered to Customer and AT-NET pursuant to the terms herein. Items returned pursuant to the foregoing procedure may be subject to a restock fee (25% minimum) of Customer's cost, which Customer shall pay to AT NET. Returned items must be in the original shipping cartons, undamaged, unused, unopened, and unaltered. Equipment received without an RMA and or in a condition other than described entitles the AT-NET the right to refuse return of the items or impose additional charges, which Customer agrees to pay. Opened software is not returnable. All shipments of returned items must be shipped prepaid by Customer to AT NET's warehouse location specified in the RMA. Upon receipt of the returned items, AT-NET will inspect such items for compliance with the foregoing conditions for proper return. A credit for properly returned items will be entered against the original invoice for the ordered items. All RMA's issued are valid for fifteen (15) days from the date the RMA is issued after which time the RMA will be cancelled. Returns received without proper authorization may be subject to additional

Article 19 - Labor Rates

19.1 Standard Labor Rates. All customers without an AT-NET SLA Amendment will incur the Standard Labor Rates below for all engineering, infrastructure and security services as shown in Exhibit 1:

6

| | |
|------------------------------|-------------------|
| Level 1:Engineer | \$135.00 per hour |
| Level 2:Engineer | \$175.00 per hour |
| Level 3:Engineer | \$225.00 per hour |
| Developer | \$225.00 per hour |
| Infrastructure Technician | \$65.00 per hour |
| Physical Security Technician | \$85.00 per hour |

- *** 8:00AM to 5:00PM: Normal Rate
- *** 5:01PM to 7:59AM: 1.5 Times Normal Rate
- *** Holidays and Weekends: 2 Times Normal Rate

Federal Holidays
http://www.opm.gov/Operating_Status_Schedules/fedhol

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Initials *[Signature]*

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AT-NET Services

Master Services Agreement

fee(s), which Customer agrees to pay.

Article 21 - Tax, Shipping and Delivery

21.1 Tax. Customer agrees to pay to Service Provider all applicable taxes from all regulatory entities whether or not the appropriate taxes were quoted or invoices initially. Furthermore, Customer agrees to indemnify Service Provider from all taxes, penalties, interest, and fees not initially collected and owed in relation to orders placed, requested, or received by Customer.

21.2 Shipping and Delivery. Customer shall be responsible for all freight, handling and insurance charges. Unless given written instructions by Customer, AT-NET shall select the carrier. In no event shall AT-NET have any liability in connection with shipment, nor shall the carrier be considered an agent of AT NET. AT-NET shall not be liable for damage or penalty for delay in delivery or for failure to give notice of any delay. Unless otherwise agreed in writing, all freight charges for drop shipments via surface or the manufacturer or AT NET will prepay airfreight. Surface freight charges for such shipments shall be added to the charges listed on the invoice provided by AT-NET to Customer, and Customer agrees to reimburse AT-NET for such freight charges as they appear on the invoice. In addition, unless expressly specified otherwise in the applicable Quota, Customer shall accept and pay for partial shipments of goods. Risk of loss shall pass from AT-NET to Customer upon delivery to the common carrier (P.O.B. origin).

Article 22 - Cancellation of Orders

22.1 Cancellation of Orders. No Customer Order can be cancelled by Customer without the written consent of AT-NET and such consent shall be provided at AT-NET's sole discretion. Customer agrees to indemnify and hold harmless AT-NET from any and all losses sustained by AT-NET as a result of Customer's cancellation of or change in a Customer Order, which has been accepted by AT NET. If AT-NET withholds its consent to the cancellation of a Customer Order, AT-NET will deliver the ordered items to Customer, and payment in full will be due from Customer for such items. If the cancelled items are returnable the Customer is subject to a 25% minimum restocking fee.

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Initials *JK*

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Master Services Agreement

AT-NET Services Inc.

By: [Signature]

Print Name: DAVID M. BERMAN

Its: COO

Date: 7/2/15

8

NEXT High School

By: [Signature]

Print Name: Zach [Signature]

Its: Foundry CEO

Date: 7/1/2015

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ELECTRONICALLY FILED - 2020-May-26 10:20 AM - GREENVILLE - COMMON PLEAS - CASE#2020CP2300969

Exhibit B

From: David Rothstein <drothstein@rothsteinlawfirm.com>
Sent: Wednesday, October 04, 2017 12:23 PM
To: Matthew Holtgrewe
Cc: seb@buckingham.legal
Subject: RE: At-Net Services-Charlotte, Inc. v. The Next School
Attachments: nextatnetcontract051816.pdf; nextatnetemailthread.pdf

Matt. With all due respect, I believe you have misread N.C. Gen. Stat. § 1-75.4(5). I am not sure which sub-section you are relying on, but they all seem to address contracts to be performed in NC. Even if Section 1-75.4(5) could be read liberally to apply to the transactions with The Next School, personal jurisdiction in this case would appear to violate the due process of my client, because my client has done nothing to purposefully avail itself of the privilege of conducting activities in N.C. and does not have sufficient minimum contacts with N.C. under the International Shoe doctrine.

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. Please let me know your client's decision by next Wednesday, October 11, 2017, so I will have sufficient time to prepare and file a motion to dismiss, if necessary.

On the merits of the claims, I am attaching two documents to this email to corroborate my previous arguments: (1) the Contract for Services and/or Products E-Rate Funding Year 2016/2017, which is on page 7 of the proposal prepared by Brent Amyette; and (2) email thread between Anthony Thomas, COO of Next, and Annette Coxe of At-Net Services. On June 20, 2017, Ms. Coxe stated, "I called USAC and found out that I had put the wrong date on the form so I had to change it and send it in again. Just disregard that on the statement. I still don't understand the process but hopefully we'll get our money before the end of the year! LOL!!!" Mr. Thomas responded, in part, "May I share your statement and your note that the \$41,228 can count against our payables. This is key to our year-end is the month and we are clearing up our payables issues. Please advise if the \$41,228.57 as a credit is okay to At-Net against what we owe." Ms. Coxe responded, "I'm OK with that." I don't think this could be more clear. At-Net repeatedly assured Next that it had expertise in handling the E-Rate program and that it would bear responsibility for securing the payments directly from the government.

If you want to discuss any of this further, please let me know. I will look forward to hearing from you soon. Thank you. Dave.

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From: Matthew Holtgrewe [mailto:mholtgrewe@ebcmlaw.com]
Sent: Tuesday, October 03, 2017 9:52 AM
To: David Rothstein <drothstein@rothsteinlawfirm.com>
Cc: seb@buckingham.legal
Subject: RE: At-Net Services-Charlotte, Inc. v. The Next School

David,

Personal jurisdiction in this matter is based on N.C. Gen. Stat. § 1-75.4(5), which provides NC courts with personal jurisdiction over any action where defendant purchased goods and/or services from the state of NC.

As for the arbitration provision, arbitration is waivable. If Next does not wish to waive the arbitration provision, I'm happy to stay the state court action and proceed to arbitration.

I will discuss the points you raised with my client. That being said, it can sometimes take a bit of time before I hear back from him, so if you could provide the materials you referenced in your email, that might facilitate things.

Best,
Matt

Matthew M. Holtgrewe
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From: David Rothstein [<mailto:drothstein@rothsteinlawfirm.com>]
Sent: Monday, October 02, 2017 5:24 PM
To: Matthew Holtgrewe <[mholgrewe@ebcmlaw.com](mailto:mholtgrewe@ebcmlaw.com)>
Cc: seb@buckingham.legal
Subject: RE: At-Net Services-Charlotte, Inc. v. The Next School

Matt. Thank you for sending this to me. I have two questions for you after reviewing your complaint and the Master Services Agreement: (1) What is your basis for attempting to assert personal jurisdiction over Next High School in Mecklenburg County, NC? As you may know, Next High School is a public, charter school in S.C. and has no connection with N.C. at all. My understanding is that Next dealt only with a local representative in SC named Brent Amyette, who has an 864-area code business number, which is local to the upstate of S.C. Furthermore, I did not see any type of waiver of personal jurisdiction or forum selection clause provision in the contract. (2) What is your basis for disregarding the mandatory arbitration provision in Article 18.1 of the Master Service 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.

With regard to the merits of the claim, I have reviewed a document entitled "Contract for Service and/or Products, E-Rate Funding Year 2016/2017," which provides, in relevant part, "If the Schools and Libraries Division ('SLD'), Administrator of the Universal Services Support Mechanism, or its successor, should fail to approve all of or any part of the services and products covered by this contract, the Applicant shall have the right, at its option, to cancel this contract, as to that part of the services and products disallowed for discount pricing. All funding is based on the Applicant receiving funding from SLD. The Applicant must also have sufficient funds available to purchase the equipment. If funds are not available, the Applicant shall have the right, at its option, to cancel this contract." Furthermore, I also have reviewed an email thread between Next High School's COO, Anthony Thomas, and Annette Coxé at At-Net, where she agrees that \$41,228.57 of the outstanding balance should be credited against the account payable balance because At-Net was supposed to recover that amount directly from E-Rate. Next was repeatedly assured by the sales rep at At-Net that they were experts at recovering the funds through the E-Rate program. If there is anything more that Next can do to assist in this process from their end, they are certainly willing to cooperate in that regard.

Please check with your client about these issues and get back with me before the end of the week. Thank you. Dave.

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drothstein@rothsteinlawfirm.com
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From: Matthew Holtgrewe [<mailto:mholtgrewe@ebcmlaw.com>]
Sent: Wednesday, September 20, 2017 9:21 AM
To: David Rothstein <drothstein@rothsteinlawfirm.com>
Cc: seb@buckingham.legal
Subject: RE: At-Net Services-Charlotte, Inc. v. The Next School

David,

Attached is a copy of the Master Service Agreement governing the relationship between the parties.

Best,
 Matt

Matthew M. Holtgrewe
 Erwin, Bishop, Capitano & Moss, P.A.
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 Charlotte, N.C. 28211
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 (704) 716-1201 - fax
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From: David Rothstein [<mailto:drothstein@rothsteinlawfirm.com>]
Sent: Tuesday, September 19, 2017 4:38 PM
To: Matthew Holtgrewe <[m Holtgrewe@ebcmlaw.com](mailto:mholtgrewe@ebcmlaw.com)>
Cc: seb@buckingham.legal
Subject: At-Net Services-Charlotte, Inc. v. The Next School

Matt. As I mentioned to you on the phone this afternoon, I am representing The Next School in the above-referenced case. I have reviewed the complaint and am just getting up to speed on the case. Can you please send me a copy of the actual contract at issue in your complaint? Also, if you have any other information that would be helpful in educating me about the specific allegations in your case and you would be willing to provide that to me through informal discovery, I would be very grateful. I will look forward to working with you on this case. Thanks, Dave.

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Exhibit C

Matthew Holtgrewe

From: David Rothstein <drothstein@rothsteinlawfirm.com>
Sent: Thursday, November 16, 2017 12:16 PM
To: Matthew Holtgrewe
Cc: Christine Morrow
Subject: RE: At-Net Services-Charlotte, Inc. v. The Next School

Thanks, Matt. Please get the voluntary dismissal filed before the end of the day on Friday, because as I understand the Local Rules in Mecklenburg County, I have to go on-line and schedule a hearing on the motion through the Court's on-line calendaring system within 3 days after the motion is filed. I have some time this afternoon or tomorrow if you want to discuss the case further or the logistics of the arbitration. Next week, I will be leaving town early on Wednesday for a family Thanksgiving trip. I might be able to schedule a call on Monday or Tuesday of next week if you cannot do it this week. Thanks, Dave.

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From: Matthew Holtgrewe [mailto:mholtgrewe@ebcmlaw.com]
Sent: Thursday, November 16, 2017 11:00 AM
To: David Rothstein <drothstein@rothsteinlawfirm.com>
Cc: Christine Morrow <cmorrow@ebcmlaw.com>
Subject: RE: At-Net Services-Charlotte, Inc. v. The Next School

David,

My client is amenable to a dismissal without prejudice, and proceeding directly to arbitration. I'll get the dismissal drafted and filed, then I'd like to schedule a time to speak about arbitration logistics.

Best,
 Matt

From: David Rothstein [mailto:drothstein@rothsteinlawfirm.com]
Sent: Tuesday, November 14, 2017 3:35 PM
To: Matthew Holtgrewe <mholtgrewe@ebcmlaw.com>
Subject: RE: At-Net Services-Charlotte, Inc. v. The Next School

Matthew. Attached please find a courtesy copy of Defendant's Motion to Dismiss for Lack of Personal Jurisdiction or, in the Alternative, to Compel Arbitration in the above-referenced case, which motion is being sent out today for filing with the Mecklenburg County Clerk of Superior Court. I have not heard back from you about this case, and Defendant's time to respond to the complaint, with the 30-day extension, is rapidly approaching. I am hopeful that you will agree to

dismiss the complaint without prejudice to avoid the necessity of a hearing and judicial determination on this motion. Please let me know if you would like to discuss this further. Thank you, Dave.

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From: Matthew Holtgrewe [<mailto:mholtgrewe@ebcmlaw.com>]
Sent: Monday, October 16, 2017 4:34 PM
To: David Rothstein <drothstein@rothsteinlawfirm.com>
Subject: RE: At-Net Services-Charlotte, Inc. v. The Next School

30 day extension is confirmed, Dave.

Matthew M. Holtgrewe
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From: David Rothstein [<mailto:drothstein@rothsteinlawfirm.com>]
Sent: Monday, October 16, 2017 4:33 PM
To: Matthew Holtgrewe <[mholgrewe@ebcmlaw.com](mailto:mholtgrewe@ebcmlaw.com)>
Subject: RE: At-Net Services-Charlotte, Inc. v. The Next School

Matt. Can you confirm a 30-day extension to respond to your complaint? That would make my motion to dismiss or to compel arbitration/answer due on Friday, November 17, 2017, if you have not withdrawn the complaint or agreed to a stay before then. Thanks, Dave.

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(864) 232-5870
(864) 241-1386 (fax)
drothstein@rothsteinlawfirm.com
www.rothsteinlawfirm.com

From: Matthew Holtgrewe [<mailto:mholtgrewe@ebcmlaw.com>]
Sent: Friday, October 13, 2017 12:16 PM
To: David Rothstein <drothstein@rothsteinlawfirm.com>
Subject: RE: At-Net Services-Charlotte, Inc. v. The Next School

Dave,

I'll need to speak with my client again before making a final call on personal jurisdiction or arbitration venues. If there is no case law or rule governing venue, we can try to work out a mutually agreeable location.

As for the merits, At-Net agreed to assist Next in obtaining funding from E-Rate, but they never agreed to do work for free, nor did they agree to assume the risk in the event E-Rate funding fell through.

I'll be back in touch as soon as I speak with my client.

Best,
Matt

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From: David Rothstein [<mailto:drothstein@rothsteinlawfirm.com>]
Sent: Wednesday, October 11, 2017 4:55 PM
To: Matthew Holtgrewe <[mholgrewe@ebcmlaw.com](mailto:mholtgrewe@ebcmlaw.com)>
Subject: RE: At-Net Services-Charlotte, Inc. v. The Next School

Matt. I believe that Next was served on 9/18, so I have calendared our response as being due on 10/18. I would prefer a dismissal without prejudice, rather than a stay, because I do not agree that personal jurisdiction is proper in N.C. Do you have any thought about where to do the arbitration? My people are all in the Greenville, SC area, and never had any dealings with anyone outside of SC other than through email and phone. Also, have you had a chance to look over the documents from one of my last emails to you? It certainly seems like your client's representative agreed to seek payment through the ERate program directly, and to remove that \$40-something thousand from the account receivable balance. Deducting that amount plus the interest claimed puts the amount due at about \$3500, which I think my people offered to pay. Arbitration through the AAA is going to cost your client over \$1,000 just to file, depending on how much they ultimately claim is at issue. I know that Next had some issues with the performance of the contract, but they have not yet canceled the contract, to my knowledge. Dave.

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drothstein@rothsteinlawfirm.com
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From: Matthew Holtgrewe [<mailto:mholtgrewe@ebcmlaw.com>]
Sent: Wednesday, October 11, 2017 4:09 PM
To: David Rothstein <drothstein@rothsteinlawfirm.com>
Cc: seb@buckingham.legal
Subject: RE: At-Net Services-Charlotte, Inc. v. The Next School

David,

I haven't had a chance to file a stay and move the case to arbitration, but I plan on doing so this week. I don't have your response deadline readily available, but this email can serve as my agreement not to seek any default with the courts, and to move the case to arbitration. Before I file anything, I will give you an opportunity to review.

Best,
 Matt

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From: David Rothstein [<mailto:drothstein@rothsteinlawfirm.com>]
Sent: Wednesday, October 04, 2017 12:23 PM
To: Matthew Holtgrewe <[m Holtgrewe@ebcmlaw.com](mailto:mholtgrewe@ebcmlaw.com)>
Cc: seb@buckingham.legal
Subject: RE: At-Net Services-Charlotte, Inc. v. The Next School

Matt. With all due respect, I believe you have misread N.C. Gen. Stat. § 1-75.4(5). I am not sure which sub-section you are relying on, but they all seem to address contracts to be performed in NC. Even if Section 1-75.4(5) could be read liberally to apply to the transactions with The Next School, personal jurisdiction in this case would appear to violate the due process of my client, because my client has done nothing to purposefully avail itself of the privilege of conducting activities in N.C. and does not have sufficient minimum contacts with N.C. under the International Shoe doctrine.

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. Please let me know your client's decision by next Wednesday, October 11, 2017, so I will have sufficient time to prepare and file a motion to dismiss, if necessary.

On the merits of the claims, I am attaching two documents to this email to corroborate my previous arguments: (1) the Contract for Services and/or Products E-Rate Funding Year 2016/2017, which is on page 7 of the proposal prepared by Brent Amyette; and (2) email thread between Anthony Thomas, COO of Next, and Annette Coxe of At-Net Services. On June 20, 2017, Ms. Coxe stated, "I called USAC and found out that I had put the wrong date on the form so I had to change it and send it in again. Just disregard that on the statement. I still don't understand the process but hopefully we'll get our money before the end of the year! LOL!!!" Mr. Thomas responded, in part, "May I share your statement and your note that the \$41,228 can count against our payables. This is key to our year-end is the month and we are clearing up our payables issues. Please advise if the \$41,228.57 as a credit is okay to At-Net against what we owe." Ms. Coxe responded, "I'm OK with that." I don't think this could be more clear. At-Net repeatedly assured Next that it had expertise in handling the E-Rate program and that it would bear responsibility for securing the payments directly from the government.

If you want to discuss any of this further, please let me know. I will look forward to hearing from you soon. Thank you.
 Dave.

David E. Rothstein
 Certified Specialist in Employment and Labor Law (S.C.)
 (Also licensed in North Carolina)
 Rothstein Law Firm, PA
 1312 Augusta Street
 Greenville, SC 29605
 (864) 232-5870
 (864) 241-1386 (fax)
drothstein@rothsteinlawfirm.com
www.rothsteinlawfirm.com

From: Matthew Holtgrewe [<mailto:mholtgrewe@ebcmlaw.com>]
Sent: Tuesday, October 03, 2017 9:52 AM

To: David Rothstein <drothstein@rothsteinlawfirm.com>
Cc: seb@buckingham.legal
Subject: RE: At-Net Services-Charlotte, Inc. v. The Next School

David,

Personal jurisdiction in this matter is based on N.C. Gen. Stat. § 1-75.4(5), which provides NC courts with personal jurisdiction over any action where defendant purchased goods and/or services from the state of NC.

As for the arbitration provision, arbitration is waivable. If Next does not wish to waive the arbitration provision, I'm happy to stay the state court action and proceed to arbitration.

I will discuss the points you raised with my client. That being said, it can sometimes take a bit of time before I hear back from him, so if you could provide the materials you referenced in your email, that might facilitate things.

Best,
 Matt

Matthew M. Holtgrewe
 Erwin, Bishop, Capitano & Moss, P.A.
 4521 Sharon Road, Suite 350
 Charlotte, N.C. 28211
 (704) 716-1204
 (704) 716-1201 - fax
[mholgrewe@ebcmlaw.com](mailto:mholtgrewe@ebcmlaw.com)
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From: David Rothstein [<mailto:drothstein@rothsteinlawfirm.com>]
Sent: Monday, October 02, 2017 5:24 PM
To: Matthew Holtgrewe <[mholgrewe@ebcmlaw.com](mailto:mholtgrewe@ebcmlaw.com)>
Cc: seb@buckingham.legal
Subject: RE: At-Net Services-Charlotte, Inc. v. The Next School

Matt. Thank you for sending this to me. I have two questions for you after reviewing your complaint and the Master Services Agreement: (1) What is your basis for attempting to assert personal jurisdiction over Next High School in Mecklenburg County, NC? As you may know, Next High School is a public, charter school in S.C. and has no connection with N.C. at all. My understanding is that Next dealt only with a local representative in SC named Brent Amyette, who has an 864-area code business number, which is local to the upstate of S.C. Furthermore, I did not see any type of waiver of personal jurisdiction or forum selection clause provision in the contract. (2) What is your basis for disregarding the mandatory arbitration provision in Article 18.1 of the Master Service 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.

With regard to the merits of the claim, I have reviewed a document entitled "Contract for Service and/or Products, E-Rate Funding Year 2016/2017," which provides, in relevant part, "If the Schools and Libraries Division ('SLD'), Administrator of the Universal Services Support Mechanism, or its successor, should fail to approve all of or any part of the services and products covered by this contract, the Applicant shall have the right, at its option, to cancel this contract, as to that part of the services and products disallowed for discount pricing. All funding is based on the Applicant receiving funding from SLD. The Applicant must also have sufficient funds available to purchase the equipment. If funds are not available, the Applicant shall have the right, at its option, to cancel this contract." Furthermore, I also have reviewed an email thread between Next High School's COO, Anthony Thomas, and Annette Coxé at At-Net, where she agrees that \$41,228.57 of the outstanding balance should be credited against the account payable balance because At-Net was supposed to recover that amount directly from E-Rate. Next was repeatedly assured by the sales rep at At-Net that they were experts at recovering the funds through the E-Rate program. If there is anything more that Next can do to assist in this process from their end, they are certainly willing to cooperate in that regard.

Please check with your client about these issues and get back with me before the end of the week. Thank you. Dave.

David E. Rothstein
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drothstein@rothsteinlawfirm.com
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From: Matthew Holtgrewe [<mailto:mholtgrewe@ebcmlaw.com>]
Sent: Wednesday, September 20, 2017 9:21 AM
To: David Rothstein <drothstein@rothsteinlawfirm.com>
Cc: seb@buckingham.legal
Subject: RE: At-Net Services-Charlotte, Inc. v. The Next School

David,

Attached is a copy of the Master Service Agreement governing the relationship between the parties.

Best,
Matt

Matthew M. Holtgrewe
Erwin, Bishop, Capitano & Moss, P.A.
4521 Sharon Road, Suite 350
Charlotte, N.C. 28211
(704) 716-1204
(704) 716-1201 - fax
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From: David Rothstein [<mailto:drothstein@rothsteinlawfirm.com>]
Sent: Tuesday, September 19, 2017 4:38 PM
To: Matthew Holtgrewe <mholtgrewe@ebcmlaw.com>
Cc: seb@buckingham.legal
Subject: At-Net Services-Charlotte, Inc. v. The Next School

Matt. As I mentioned to you on the phone this afternoon, I am representing The Next School in the above-referenced case. I have reviewed the complaint and am just getting up to speed on the case. Can you please send me a copy of the actual contract at issue in your complaint? Also, if you have any other information that would be helpful in educating me about the specific allegations in your case and you would be willing to provide that to me through informal discovery, I would be very grateful. I will look forward to working with you on this case. Thanks, Dave.

David E. Rothstein
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(Also licensed in North Carolina)
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(864) 232-5870
(864) 241-1386 (fax)
drothstein@rothsteinlawfirm.com
www.rothsteinlawfirm.com

Exhibit D

Matthew Holtgrewe

From: Steven Edward Buckingham <seb@buckingham.legal>
Sent: Wednesday, January 9, 2019 1:20 PM
To: Germanij@adr.org
Cc: Matthew Holtgrewe
Subject: RE: At-Net Services-Charlotte, Inc. v. The Next School - Case 01-18-0004-2576

John: Mr. Holtgrewe and I were speaking earlier today about the selection of the arbitrator. I expect that we will be responding to you about that tomorrow.

Matthew also raised to my attention that I had not confirmed with you the location for the arbitration. Subject to and without waiving any objection that my client may have to jurisdiction and/or venue, which we continue to assert, Charlotte is an acceptable forum.

Thanks.

From: Germanij@adr.org <Germanij@adr.org>
Sent: Thursday, January 03, 2019 2:20 PM
To: Steven Edward Buckingham <seb@buckingham.legal>; mholtgrewe@ebcmlaw.com
Subject: At-Net Services-Charlotte, Inc. v. The Next School - Case 01-18-0004-2576

Hello,

Please review the attached correspondence regarding the above-referenced case.

Feel free to contact me with any questions, comments or concerns you have related to this matter.

Thank you.



John Germani
Manager of ADR Services

American Arbitration Association
International Centre for Dispute Resolution
T: 800 925 0155 F: 877 395 1388 E: Germanij@adr.org
2200 Century Parkway, Suite 300, Atlanta, GA 30345
adr.org | icdr.org | aaamediation.org

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Exhibit E

STATE OF NORTH CAROLINA
COUNTY OF MECKLENBURG

FILED IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
19-CVS-18853

2020 MAY 27 PM 10:05

AT-NET SERVICES-CHARLOTTE, INC., INC., O.S.C.

Plaintiff / Claimant,

v.

THE NEXT SCHOOL,

Defendant / Respondent.

**ORDER AND JUDGMENT
CONFIRMING ARBITRATION AWARD**

This matter came before the Court pursuant to N.C.G.S. § 1-569.22, on Plaintiff AT-Net Services-Charlotte, Inc.'s ("At-Net") Motion to Confirm Arbitration Award and Enter Judgment Based on Award (the "Motion") entered on May 23, 2019 by Carolyn Hopkins Carlburg. For the reasons stated below, the Court concludes that At-Net's Motion should be granted and that judgment should be entered in favor of At-Net:

1. At-Net and The Next School ("Next") entered into a written contract on July 2, 2015 entitled the Master Services Agreement. The Master Services Agreement provides for arbitration in the event of a dispute between the parties.
2. At-Net commenced arbitration proceedings against Defendant The Next School ("Next") with the American Arbitration Association in November 2018.
3. Carolyn Hopkins Carlburg conducted the arbitration hearing in Mecklenburg County on May 2, 2019, and entered an Interim Award on May 12, 2019.
4. The Final Arbitration Award was issued on May 23, 2019, a true and accurate copy of which was attached to the Motion and the Affidavit of Matthew M. Holtgrewe.

5. 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.

6. 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.

NOW, THEREFORE, it is hereby ordered that:

1. The Final Arbitration Award entered on May 23, 2019 by Carolyn Hopkins Carlburg, attached hereto, is confirmed; and

2. In accordance with the Final Arbitration Award, Defendant Next is liable to Plaintiff At-Net:

- a. In the principal amount of \$45,852.00, plus interest at the legal rate of 8% per annum from May 24, 2019 until paid, with costs taxed to Defendant Next;
- b. \$24,980.77 in interest through May 23, 2019;
- c. \$15,051.00 for attorney's fees;
- d. \$2,775.00 in arbitration costs; and,
- e. \$200.00 in court costs.

Ordered this 26th day of November, 2019.


Superior Court Judge Presiding

**AMERICAN ARBITRATION ASSOCIATION
Commercial Arbitration**

In the Matter of the Arbitration between:

At-Net Services - Charlotte, Claimant
Represented by Matthew Michael Holtgrewe
Erwin, Bishop, Capitano & Moss, P.A.

-v-

The Next School, Respondent
Represented by Steven E. Buckingham
Buckingham Law
CASE NUMBER: 01-18-0004-2576

FINAL AWARD OF THE ARBITRATOR

I, THE UNDERSIGNED ARBITRATOR, having been designated in accordance with Article 18 of the parties' Master Services Agreement, effective July 2, 2015, having been duly sworn, and the evidentiary hearing conducted in accordance with the Commercial Rules of the American Arbitration Association, and having fully reviewed and considered the written documents submitted to me by the parties, and the oral testimony of the parties' witnesses during the evidentiary hearing and having previously rendered an Interim Award, I hereby make my FINAL AWARD as follows:

1. Respondent's Motion to Dismiss [and Notice of Protest] is denied.
2. Respondent is liable to Claimant for total damages in the amount of \$85,884.08 as follows:
 - A. Breach of the parties' Master Services Agreement [MSA], Articles 1.3, 2.1, 2.2, 2.5, 7.1, 9.1, 10.1, 13 and 18, in the amount of \$45,852.00;
 - B. Interest thereon [late payment fees] in accordance with the parties' MSA [Article 2.1] in the amount of \$24,980.77;
 - C. Claimant's attorney's fees in accordance with the parties' MSA [Article 9.1 in the amount of \$15,051.00;

The administrative filing fees of the American Arbitration Association, in the amount of

\$1,725.00, and the fee of the Arbitrator in the amount of \$2,100, shall be borne by Respondent. Therefore, Respondent shall reimburse Claimant the sum of \$2,775.00 for said fees previously incurred by Claimant, upon demonstration by Claimant that said fees have been paid in full.

All of the above referenced damages and fees shall be paid by Respondent to Claimant within thirty (30) days from the date of this Final Award.

This Final Award shall be made in full settlement of all claims made in this Arbitration. All claims not expressly granted herein are hereby denied.

I, Carolyn Hopkins Carlburg, do hereby affirm upon my oath as Arbitrator that I am the individual described hereinabove, who executed this instrument, which is my Final Award.

/ss/ Carolyn Hopkins Carlburg

May 23, 2019

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF GREENVILLE) THIRTEENTH JUDICIAL CIRCUIT

THE NEXT SCHOOL, INC., a Public,) C.A. No. 2019-CP-23-06745
Not-for-Profit Corporation Incorporated)
& Existing under the Laws of the State of)
South Carolina,)
)
Plaintiff,)

vs.)

MOTION OF THE NEXT SCHOOL, INC. FOR
THE COURT TO ALTER OR AMEND ITS
DECISION OF JULY 7, 2020

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.)

AT-NET SERVICES—CHARLOTTE,) C.A. No.: 2020-CP-23-00969
INC.,)
)
Plaintiff,)

vs.)

THE NEXT SCHOOL, INC.,)
)
Defendant.)

COMES NOW The NEXT School, Inc.—Plaintiff in one civil action, Defendant in another—
and pursuant to Rule 59 of the South Carolina Rules of Civil Procedure, respectfully submits this
Motion for the Court to Alter or Amend its Decision of July 7, 2020 (“**the Decision**”). Specifically,
the Court is requested to reconsider its decision as to the following particulars:

I. THE SCHOOL IS A STATE ACTOR.

Throughout the Decision, the Court has referred to the School as a “political subdivision,” not a “state actor.” On this basis, the Court concluded that the School was not entitled to enjoy the same privileges and immunities as “state actors,” including the immunity from suit in any forum other than the courts of the State of South Carolina. This was error.

First, the Court is invited to reconsider the relevant provisions of the South Carolina Code which state, in no uncertain terms, that free public charter schools—like NEXT—are, “for purposes of state law and the state constitution, considered a public school and part of the South Carolina Public Charter School District.” S.C. Code § 59-40-40(2)(a). The Court is also invited to consider applicable decisions of the State’s appellate courts, which have formally recognized free public charter schools as “state actors.” They are considered state actors “because [they are] classified as a public school; [are] funded by state money; and [are] created by virtue of state law in furtherance of the state’s duty to provide public education pursuant to Article XI, section 3 of the South Carolina Constitution.” McNaughton v. Charleston Charter Sch. for Math & Science, Inc., 411 S.C. 249, 266, 768 S.E.2d 389, 399 (2015).

There should be no genuine dispute about the School’s status. The School’s charter—issued by the Public Charter School District—is attached hereto as Attachment A. Additionally, and as explained earlier in these proceedings, the School has already been recognized by the courts of this State as a state actor. See Or. Granting in Part the School’s Mot. Dismiss, Alexander v. The NEXT School, Inc. et al., 2019-CP-37-00716 (Oconee County, S.C. Mar 2, 2020) (McIntosh, J.).

The Court is also invited to reconsider its decision that “political subdivisions” of the State of South Carolina do not enjoy the same privileges and immunities as “state actors.” The

undersigned counsel is not aware of any provision of the State Constitution or Code which supports this proposition, nor is the undersigned aware of any supporting South Carolina appellate decision. To the contrary, it appears as though the characterization of “political subdivision” and “state actor” is, under State law, a distinction without a difference. Accordingly, even if the School were only a “political subdivision,” it would still be entitled to the protections from suit established by the General Assembly in favor of public bodies.

In any event, the Court is respectfully requested to amend its Decision to hold that the School is a state actor, or alternatively, that the difference between a “state actor” and “political subdivision” is immaterial to the issues presented in this case.

II. UNDER THE SOUTH CAROLINA CONSTITUTION AND CODE, STATE ACTORS ARE SUBJECT TO SUIT ONLY IN THE COURTS OF THE STATE OF SOUTH CAROLINA.

The Decision holds that South Carolina state actors may be subjected to suit in a jurisdiction other than the courts of the State of South Carolina. This was error. There is no authority to support this proposition. To the contrary, the Code states explicitly that South Carolina has withheld its consent to be sued in any state court beyond the boundaries of the State of South Carolina. S.C. Code § 15-78-20(e). Outside of claims arising under the Fourteenth Amendment of the Federal Constitution, the undersigned is not aware of any authority from this State which would suggest that this limitation has been abrogated.

The Decision couches the limitation expressed in Code § 15-78-20(e) as one of venue and not jurisdiction. This is error. Jurisdiction is the power of a tribunal to hear and decide a case. By § 15-78-20(e), the General Assembly has clearly expressed its will that no court—other than the courts of the State of South Carolina—have jurisdiction to hear lawsuits involving the State or its actors. Therefore, § 15-78-20(e) is not only a venue limitation, it is also a jurisdictional limitation, which should be accorded great respect under the federal principles of comity that allegedly exist

among the States. Tailored to the circumstances of this case, the South Carolina General Assembly has not given the courts of the State of North Carolina authority to hear and decide cases involving South Carolina state actors; in fact, just the opposite. The General Assembly has said explicitly that no court—other than the courts of this State—can hear and decide cases involving the State or its actors.

In that same connection, there does not appear any authority to support the proposition that a South Carolina state actor can be compelled to participate in arbitration proceedings under the Federal Arbitration Act, or that the Federal Arbitration Act preempts any state law limiting the jurisdiction of non-South Carolina tribunals to hear and decide cases involving South Carolina state actors. Nowhere is such a waiver established in the South Carolina Code, and nowhere does the Federal Arbitration Act expressly preempt a State's rights under the Eleventh Amendment.

The Decision suggests that the School has waived its jurisdictional arguments to arbitrability by participating in an agreement that contained an arbitration clause, and separately, by an assertion by the School's prior legal counsel that the School would insist on arbitration. However, it is axiomatic that jurisdiction—when lacking—cannot be created by an agreement of the parties, or that the lack of jurisdiction can be waived. This is especially true when the waiver alleged would be binding upon a state actor where the state has not consented to jurisdiction.

III. THE UNDERLYING ARBITRATION PROCEEDINGS AND AWARD ARE VOID.

For the foregoing reasons, the School could not have been compelled to participate in the underlying arbitration proceedings. It did so only under protest. And, because the underlying proceedings are void, the arbitrator's award is also void.

IV. THE ENROLLMENT OF THE ARBITRATION AWARD IN NORTH CAROLINA WAS VOID.

Consistent with the foregoing discussion, even if the arbitration proceedings were not void, the fact that AT-Net enrolled its judgment in North Carolina renders that enrolled judgment void. North Carolina state courts have no authority—no jurisdiction—over South Carolina state actors. It was error for this Court to award the North Carolina court full faith and credit when, quite clearly, the North Carolina court gave the laws of its southern sibling—particularly regarding the existence of jurisdiction over the School—very little consideration.

CONCLUDING STATEMENT

For the foregoing reasons, the School respectfully requests a decision which grants its Motion to Alter or Amend the Decision of July 7, 2020, which would result in the Court granting a judgment in the School's favor as to the declaratory relief of invalidity sought, which would deny AT-Net's effort to enroll the jurisdictionally defective foreign judgment against the School, which would grant the School's motion to dismiss the counterclaim, and further, which would provide for such other relief as the Court deems just and proper.

This Motion incorporates all prior pleadings, motions, memoranda, and attachments filed in connection therewith. Furthermore, the School reserves the right to supplement this Motion with a memorandum and/or further attachments in advance of a hearing on this matter.

Respectfully submitted,

s/ Steven Edward Buckingham

Steven Edward Buckingham, Esq. (S.C. Bar No. 75089)
The Law Office of Steven Edward Buckingham, LLC
16 Wellington Avenue
Greenville, SC 29609
(o) 864.735.0832
(e) seb@buckingham.legal

Attorney for The NEXT School, Inc.

Filed this 16th Day of July, 2020.
Greenville, South Carolina

ATTACHMENT A

Charter School Contract

Section One: Introduction and Recitals

This Contract is made and entered into between The NEXT School, aka NEXT High School (Charter School or School), a public charter school organized as a nonprofit corporate entity (the "School") and the South Carolina Public Charter School District Board of Trustees (the "Sponsor", from which the School requested its Charter and which granted approval for the School's Charter. School and Sponsor may be collectively referred to as the "Parties."

- 1.1 **Reference to the South Carolina Charter Schools Act.** *WHEREAS, the South Carolina General Assembly has enacted the South Carolina Charter Schools Act, S.C. Code Ann. §§59-40-10, and following, for certain purposes as enumerated in S.C. Code Ann. §59-40-20.*
- 1.2 **Reference to the submission date of the charter application.** *WHEREAS, on July 1, 2013, an Application was submitted by the planning committee of the School for formation of a public charter school as a school of the Sponsor.*
- 1.3 **Reference to approval date.** *WHEREAS, on September 12, 2013, the Sponsor approved the School's charter application and granted the School a charter ("Charter") for an initial term of ten years; NOW THEREFORE, in consideration of the foregoing recitals and the mutual understandings and covenants contained herein, the Parties agree as set forth below.*
- 1.4 **Reference to previous agreement(s).** *The Charter and the Charter application along with all attachments and exhibits thereto are incorporated into this agreement by reference.*

Section Two: Establishment of School

- ✓ 2.1 **Term.** *In accordance with S.C. Code Ann. §59-40-110(A), the term of the Charter is ten years, beginning on July 1, 2015. This Contract is effective as of the date of execution and shall terminate on July 1, 2025, unless terminated sooner pursuant to Section 12.3 or 12.5 of this Contract.*
- 2.2 **Legal status.** *The School is incorporated as a South Carolina non-profit corporation. The School shall continue to operate as a South Carolina non-profit corporation during the term of this contract and shall assure that its operation is in accordance with its articles of incorporation and bylaws. The School shall notify the Sponsor promptly of any change in its corporate status.*

The School is organized and maintained as a separate legal entity from the Sponsor for all purposes of this Contract. Pursuant to S.C. Code Ann. §59-40-40 (4), the Sponsor is the School's Local Education Agency (LEA) and the School is a school within that LEA. As such, the School is subject to state and federal statutes, laws and regulations that apply to all public schools unless excepted by State charter school law (see § 59-40-50(A)). The School must comply with all Sponsor policies and procedures, as amended from time to time.
- 2.3 **Pre-opening conditions.** *The School's Charter provided for the School to open for the 2014-2015 school year. However, the School is not prepared to do so and by mutual agreement, the School's deadline for beginning operations is July 1, 2015. In order to begin instructing students for the 2015-2016 school year, the School must satisfy all of the pre-opening conditions set forth in Attachment A by the timelines contained therein. These timelines may be modified only by written agreement of the Parties. The Parties agree that failure to comply with the timelines in Attachment A constitutes a material breach of the Agreement and is grounds for revocation of the Charter.*

Section Three: Sponsor/School Relationship

3.1 Sponsor responsibilities, roles, powers, and performance expectations.

Pursuant to S.C. Code Ann. §59-40-40 (4), the Sponsor is the School's Local Education Agency (LEA) and the School is a school within that LEA.

- A. Oversight and monitoring.** *In accordance with S.C. Code Ann. § 59-40-55, the Sponsor shall:*
- i. monitor, in accordance with the terms of the Contract, the performance and legal/fiscal compliance of the School to include collecting and analyzing data to support ongoing evaluation according to the Contract;*
 - ii. conduct or require oversight activities that enable the Sponsor to fulfill its responsibilities outlined in the law, including conducting appropriate inquiries and investigations, only if those activities are consistent with the law, adhere to the terms of the contract, and do not unduly inhibit the autonomy granted to public charter schools;*
 - iii. collect in accordance with S.C. Code Ann. 59-40-140(H), an annual report from the School and submit the report to the South Carolina Department of Education (SCDE) by December 31.*
 - iv. notify the School of perceived problems when its performance or legal/fiscal compliance is unsatisfactory and provide a reasonable opportunity for the school to remedy the problem, unless the problem warrants immediate revocation and revocation timelines apply;*
 - v. take appropriate actions and exercise sanctions short of revocation, in response to deficiencies in School performance or legal/fiscal compliance. These actions or sanctions may include requiring the School to develop and execute a corrective action plan within a specified timeframe; and*
 - vi. determine whether the School's Charter merits renewal, nonrenewal, or revocation.*
- B. Access to records and right to review and inspect.** *The Sponsor has the right to inspect and review all School records established and maintained in accordance with the provisions of this Contract, State Board of Education (SBE) policies and regulations, and federal and state statutes, laws and regulations. The School has a duty to cooperate in making such School records and other information available in a timely manner upon request from the Sponsor. School records shall be open to inspection and review at no cost to the Sponsor and notwithstanding whether the School paid for the records or data included in the records. No formal request, including but not limited to requests pursuant to the Freedom of Information Act (FOIA) or the Family Educational Rights and Privacy Act (FERPA) shall be required. Information that must be made available for review and inspection includes, but is not limited to, the following:*
- i. School records including but not limited to student cumulative files, policies, and files related to special education and related services;*
 - ii. Financial records;*

- iii. *Records related to School's educational program including but not limited to curriculum, testing, discipline, special education, student life, extracurricular activities and the like;*
 - iv. *Personnel records, including but not limited to evidence of credentials and qualifications;*
 - v. *Evidence that criminal background checks of all school personnel have been conducted prior to hiring;*
 - vi. *School's operations, including, but not limited to, health, safety and occupancy requirements; and*
 - vii. *The Sponsor may make announced or unannounced visits to inspect the facility, interview personnel, or otherwise fulfill its oversight responsibilities.*
- C. **Access to data and information.** *The Sponsor shall timely provide the School with access to any data and information pertaining to the School that it receives from the State or other sources including but not limited to test scores, federal and state accountability data, special education data, student enrollment data, and funding information.*

3.2 School responsibilities, roles, powers, and performance expectations

The School must fulfill all duties and may exercise all powers as set forth in S.C. Code Ann. §59-40-50(B), which is incorporated herein by reference. As part of fulfilling its duties and in order to enable the Sponsor to carry out its oversight and monitoring responsibilities, the School agrees to the following:

- A. **Records.** *The School agrees to comply with all federal, state, and Sponsor record keeping requirements including those pertaining to students, governance, and finance. This includes maintaining up-to-date information about enrolled students in the Sponsor's student information system (SIS). In addition, the School shall ensure that records for students enrolling in other schools are transferred in a timely manner. Financial records shall be posted in accordance with the South Carolina Accounting Handbook, the Funding Manual, and South Carolina Audit Guide published by the SCDE and reconciled at least monthly.*
- B. **Access to records.** *The School shall maintain all records, including but not limited to those referenced in this Section and Section 3.1(B) of this Contract, at the School. School records shall be open to inspection, audit and review upon request by Sponsor and at no cost to Sponsor (except for the reasonable cost of copying if required by Sponsor), and except as may be limited by applicable state and federal laws, statutes and regulations.*
- C. **Notification provided to the Sponsor.** *The School shall immediately, and in no event longer than ten days, provide written notice to the Sponsor (and other appropriate authorities) in the following situations:*
 - i. *The discipline of employees at the School arising from misconduct or behavior that may have resulted in harm to students or others, or that constituted violations of law;*
 - ii. *Any complaints filed against the School by or with any governmental agency or in any court of law;*

- iii. *Conditions that may cause it to vary from the terms of this Contract, applicable Sponsor requirements, federal, and/or state laws, statutes, and regulations;*
 - iv. *Any circumstance requiring the closure of the School, including, but not limited to, a natural disaster, such as an earthquake, storm, flood or other weather related event, other extraordinary emergency, or destruction of or damage to the School facility;*
 - v. *The arrest of any members of the board of the School or School employees for a crime punishable as a felony or any crime related to the misappropriation or theft of funds;*
 - vi. *Misappropriation of funds;*
 - vii. *A default on any obligation, which shall include debts for which payments are past due by sixty (60) days or more;*
 - viii. *Any change in its corporate status with the South Carolina Secretary of State's Office as a nonprofit corporation;*
 - ix. *Any material change in insurance coverage;*
 - x. *Any change to the membership of the board or any changes to officers and directors;*
 - xi. *Any change to school administration; and*
 - xii. *Any changes in the by-laws of the nonprofit corporation.*
- D. Academic achievement.** *The School shall meet or make reasonable progress towards meeting or exceeding the performance goals as described in the Charter. In accordance with SBE Regulation 43-601, the School also shall demonstrate that student academic achievement is improving and shall provide evidence of increased student academic achievement for all students described in Section 1111(b)(2)(C)(v) of the Elementary and Secondary Education Act (ESEA).*
- E. Indemnification.** *Pursuant to S.C. Code Ann. §59-40-60(F)(14) and SBE Regulation 43-601, the School shall assume the liability for the activities of the School and agrees to indemnify and hold harmless the Sponsor, its servants, agents, and employees from any and all liability, damage, expense, causes of action, suits, claims, or judgments arising from injury to persons or property or otherwise that arises out of the act, failure to act, or negligence of the School, its agents and employees, in connection with or arising out of the activity of the School.*
- F. Insurance.** *The School must maintain liability insurance in accordance with S.C. Code Ann. §59-40-60(F) (15) and SBE Regulation 43-601. A current Certificate of Insurance shall be provided upon request by Sponsor.*
- G. Compliance reporting.** *As set forth in S.C. Code Ann. §59-40-50(B), the School shall adhere to the same health, safety, civil rights, and disability rights requirements as are applied to all statewide public schools. Accordingly, the School shall timely provide to the Sponsor any reports necessary and reasonably required for the Sponsor to meet its oversight and reporting obligations. Required reports include, but are not limited to, those listed below and must be in the form required by Sponsor.*
- i. *The School shall annually provide the District with an Annual Report by December 31. In accordance with S.C. Code Ann. §59-40-140(H), the report shall include all*

information required by the Sponsor and/or the SCDE and shall include, at a minimum: 1) the number of students enrolled in the School from year to year; 2) the success of students in achieving the specific educational goals for which the School was established; 3) an analysis of achievement gaps among major groupings of students in both proficiency and growth; 4) the identity and certification status of the teaching staff; 5) the financial performance and sustainability of the School; and 6) School board performance and stewardship, including compliance with applicable laws.

- ii. *The School shall provide the District with a copy of its annual independent audit by the due date as determined by the Sponsor.*
- iii. *The School shall maintain accurate and up to date student records in the SIS as determined by the Sponsor. Data supplied to the Sponsor shall fulfill all federal and state reporting requirements and deadlines. Data and documents submitted to the Sponsor shall be in formats compatible with those used by the Sponsor and approved by the Sponsor. The School shall employ or contract for appropriately qualified staff to maintain student records in the SIS. Said staff shall participate in data management training provided by the Sponsor and demonstrate competencies in data management as prescribed by the Sponsor.*
- iv. *By May 1st of the first calendar year of operation and each subsequent calendar year, the School shall provide the Sponsor with a school calendar setting forth the days the School will be in session.*
- v. *By June 30th of each calendar year, the School shall provide the Sponsor with its emergency/safety plan and submit the report required by the Department of Health and Environmental Control (DHEC) at the same time it is submitted to DHEC and in accordance with DHEC timelines.*

H. Electronic communications and data management systems. *The School shall adhere to the Sponsor's acceptable use policy to access Sponsor network resources.*

Section Four: Governance

- 4.1 Governance.** *The School's articles of incorporation and bylaws shall not conflict with the School's obligation to operate in a manner consistent with this Contract and the Charter. Similarly, the policies of the School's governing board shall provide for governance of the operation of the School in a manner consistent with this Contract and the Charter.*
- 4.2 Governing board.** *The School's governing board shall operate in accordance with the School's articles of incorporation and bylaws. The School shall ensure that the governing board membership is consistent with the requirements outlined in S.C. Code Ann. §59-40-50(B)(9). Additionally, the School, in accordance with S.C. Code Ann. §59-40-155(A), shall ensure that within one year of taking office, all persons elected or appointed as members of its board shall successfully complete an orientation program in the powers, duties, and responsibilities of a board member including, but not limited to, topics on policy development, personnel, instructional programs, school finance, school law, ethics, and community relations.*
- 4.3 Transparency.** *In accordance with S.C. Code Ann. §59-40-50(B)(10), both the School and its governing board shall be subject to the Freedom of Information Act. In addition, the governing board of the School shall notify the Sponsor in writing of any regular meeting of the board at least forty-eight (48) hours prior to the date on which such meeting is to occur and shall conduct all meetings consistent with the Freedom of Information Act. The School shall also ensure that its governing board adopts and*

strictly enforces a conflict of interest policy and that all board policies, meeting agendas, minutes, and related documents are readily available for public inspection.

- 4.4 Conflict of interest.** *The School's governing board shall establish a formal conflict of interest policy consistent with industry standards and all applicable federal and state statutes, laws, and regulations.*
- 4.5 Parental, educator, and community involvement.** *The School shall ensure parental, educator, and community involvement in accordance with the Charter. The School shall also ensure that its governing board consists of at least 50% members elected by parents and employees of the school as required by S.C. Code Ann. §59-40-50(9).*
- 4.6 Contracting with an Education Management Organization (EMO).** *The School and the Sponsor agree that the School does not intend to contract with an education management company (EMO) to manage its operations and perform functions such as hiring, professional development, public relations, marketing, enrollment of students and data analysis. Unless otherwise agreed in writing by the Sponsor, the School shall not have the authority to enter into a contract with an EMO.*

Section Five: Operation of School and Waivers

- 5.1 Operational powers.** *The School must limit operations to activities within the scope of the mission set forth in its articles of incorporation and the Charter.*
- 5.2 Transportation.** *Not applicable.*
- 5.3 Food services.** *Not applicable.*
- 5.4 Waivers.** [Reserved]

Section Six: School Enrollment and Demographics

- 6.1 School grade levels.** *In accordance with its Charter, the School will serve students in grade 9 in its first year of operation and add a grade each subsequent year until final build out at grade 12 in year four. The School shall not be permitted to modify the grade levels it serves without prior written approval of the Sponsor.*
- 6.2 Student demographics.** *School demographics are expected to be similar to that of the local school district in which the School is located, as set forth in the Charter.*
- 6.3 Maximum and minimum enrollment.** *The School may not exceed the projected enrollment as set forth in the Charter without express written permission of Sponsor. The Sponsor may limit enrollment to less than the projected enrollment amount based on available funding or school performance.*
- 6.4 Eligibility for enrollment.** *Enrollment in the School shall be open to any child who resides within the state and is eligible to attend public school, subject to space limitations. The School shall admit students in accordance with S.C. Code Ann. §59-40-50(B)(7) and as permitted or required by state and federal statutes, laws and regulations. In all cases, student recruitment and enrollment decisions shall be made in a nondiscriminatory manner specified by the School in the Charter. In all cases, student recruitment and enrollment decisions shall be made without regard to race, color, creed, national origin, sex, religion, ancestry, and disability.*
- 6.5 Enrollment procedures, priority enrollment, and dates of the enrollment period.** *The School shall follow enrollment procedures as set forth in the Charter and as permitted or required by state and federal statutes, laws and regulations. In accordance with S.C. Code Ann. §59-40-55(A)(10), the School*

shall notify the Sponsor of its enrollment procedures and dates of its enrollment period no less than sixty (60) days prior to the first day of each enrollment period.

- 6.6 Admission policies and procedures, including lottery procedures.** *The School shall follow the admission and lottery procedures as set forth in the Charter and as permitted or required by state and federal statutes, laws, regulations, and Sponsor policy. Any decision to deny admission to a student may be appealed to the Sponsor, as set forth in §59-40-50(C)(1).*
- 6.7 Discipline and expulsion procedures.** *The School shall follow discipline and expulsion procedures as set forth in the Charter and as permitted or required by state and federal statutes, laws, regulations, and Sponsor policy.*

Section Seven: Educational Program

- 7.1 Mission.** *The School's mission, as set forth in the Charter, shall be "to prepare young people for life after school." The School's governing board shall operate the School in a manner consistent with the mission statement. Revisions to the mission statement or general implementation thereof shall be considered a material change to the contract and shall require prior written approval of the Sponsor.*
- 7.2 Goals, objectives, and pupil achievement standards.** *The School shall meet or make reasonable progress towards meeting or exceeding the performance goals as described in the Charter and those required by state and federal laws, statutes and regulations. The School shall also meet or make reasonable progress toward meeting the academic performance standards and expectations as set forth in the Charter and those required by state and federal laws, statutes and regulations. Whether the School has met its goals, objectives, and pupil achievement standards, will be determined by the Sponsor's annual evaluation/review of the School and the implementation of any performance frameworks implemented by the Sponsor and provided to School. The specific form, terms, indicators, metrics, measures, and targets, used in the performance framework and the Sponsor's annual evaluation/review of the School, shall be disseminated by the Sponsor and will be binding on the School. In addition, components and requirements of the performance framework and annual evaluation/review may be modified or amended from time to time by the Sponsor. The Sponsor will solicit input from the School on the performance framework and its components.*
- 7.3 Description of the school's educational program.** *The School shall implement the educational program as outlined in the Charter.*
- 7.4 Curriculum.** *The School shall implement a project-based curriculum coupled with web-based instruction as outlined in the Charter. The School's curriculum shall meet or exceed any content standards adopted by the SBE and the Sponsor and shall be designed to enable each student to achieve these standards.*
- 7.5 Plan for evaluating pupil achievement and progress.** *The School shall evaluate pupil achievement and progress as outlined in the Charter. Pupil achievement and progress shall be evaluated by the Sponsor in accordance with the Sponsor's annual evaluation/review of the School, the implementation of any performance frameworks implemented by the Sponsor, and industry standards and practices.*
- 7.6 Graduation requirements.** *The School shall comply with state laws and regulations in order to meet requirements for students to earn a State-issued high school diploma.*
- 7.7 Education of students with disabilities.** *The School shall serve students with disabilities as required by state and federal statutes, laws, regulations, and Sponsor policies. The Sponsor is responsible for serving as the Local Education Agency ("LEA") as defined by state and federal statutes, laws and regulations. If, for any reason, it is determined by any competent authority (including but not limited*

to a duly constituted IEP Team as defined by the Individuals with Disabilities Education Improvement Act ("IDEA"), that the School is not capable of serving a student with disability as required by law, the Sponsor may enter into agreements with third parties, including other school districts, to provide services to student at the School's expense; provided however, that in no event shall the School's expense exceed the amount of state and federal funds allocated to the school for the student being served by the third party.

- 7.8 English language learners.** *The School shall provide resources and support to English language learners to enable them to acquire sufficient English language proficiency to progress academically. The School shall adhere to the Sponsor's procedures for identifying, assessing, and exiting English language learners.*
- 7.9 State Mandated Testing.** *The School shall ensure that all requirements for testing mandated by state or federal governments are met for each enrolled student.*

Section Eight: Financial Matters

- 8.1 Budget.** *The School must use the same budget codes as are required of school districts in the State. The budget shall be based on documented SCDE estimated revenues in accordance with the allocations in S.C. Code Ann. § 59-40-140(A)-(C). The School shall establish and maintain a positive ending net asset balance at the end of each fiscal year as evidenced in its audited financial statements as well as adequate operating reserves in order to avoid possible financial hardships. For purposes of calculating the net asset balance, deficit credits shall be included as a liability on the balance sheet of the School. When determining the reserve amount, the School shall take into account such factors as the School's mission and long-term strategy, current and future commitments and day-to-day operating costs. On or before April 30th of each year, the School shall submit to the Sponsor the School's proposed budget for the upcoming school year, with the School's final budget submitted to the Sponsor by July 31st.*
- 8.2 Audits.** *Pursuant to S.C. Code Ann. §59-40-50(B)(3), the School shall adhere to the same financial audits, audit procedures, and audit requirements as are applied to all other public schools. Sponsor may audit School records at any time. In addition, the School shall obtain at its expense and submit to the Sponsor an independent annual audit from a qualified auditing or accounting firm of all financial records. The audit and its findings shall be submitted in hard and electronic copy to the Sponsor by November 1 of each year for inclusion in the Sponsor's report to the SCDE. The School shall provide the Sponsor with contact information of the School's auditor (i.e. name, address, phone number (s) and email address).*
- 8.3 Revenues.** *The School shall record revenues in accordance with the South Carolina Accounting Handbook.*
- 8.4 Disbursement of per pupil revenue.** *The Sponsor shall provide 100 percent of the per pupil state revenues to the School minus the following: no more than two percent of the total state appropriations to cover the costs of overseeing the charter school, as provided by law, and deductions for purchased services and/or expenditures of the charter school that are paid at the Sponsor level.*
- A. *Pursuant to S.C. Code Ann. §59-40-140(B), the District shall receive and distribute state funds to the School as provided by the General Assembly on a monthly basis beginning in July of the School's fiscal year of operations.*
- B. *Pursuant to S.C. Code Ann. §59-40-140(C), the Sponsor shall during the School's fiscal year of operation, as received, and to the extent allowed by federal law, distribute to the School federal funds which are allocated to the Sponsor on the basis of the number of special*

characteristics of the students attending the School. These amounts must be verified by the SCDE before the first disbursement of funds.

- C. *Pursuant to S.C. Code Ann. §59-40-140(D), the Sponsor shall distribute within 10 business days after receipt of federal or state categorical aid funds, the proportional share of each categorical fund, for which the School qualifies unless the School is under revocation or nonrenewal and the Sponsor is under order to withhold payments to the School.*
- D. *For IDEA funds, the Sponsor shall provide funds under Part B of the No Child Left Behind Act to the School on the same basis as it provides funds to the other charter schools, including proportional distribution based on relative enrollment of children with disabilities; and at the same time as it distributes other federal funds to the other charter schools, consistent with state and federal statutes, laws, and regulations.*
- 8.5 Enrollment projections.** *Material changes in the School's enrollment shall be reported to the Sponsor. Any adjustments to enrollment, other than those outlined in the Charter must be presented to the Sponsor for review and approval.*
- 8.6 Liability.** *Pursuant to S.C. Code Ann. §59-40-190, the Sponsor is not liable for any of the debts of the School.*
- 8.7 Monthly and quarterly reporting.** *The School shall be responsible for entering a monthly upload of all financial transactions in the format prescribed by the Sponsor by the 10th day of the subsequent month and a yearly upload of the audited adjustments by November 15. In addition, the School shall be responsible for submitting a quarterly financial statement in the format prescribed by the Sponsor by the 15th day of the month following the end of each quarter. The Parties agree that it is the responsibility of the Sponsor to use any financial information it obtains, including reports and audits, to monitor the fiscal condition and compliance of the School.*
- 8.8 Non-commingling.** *Assets, funds, liabilities, and financial records of the School shall be kept separate from assets, funds, liabilities, and financial records of any other person, entity or organization.*
- 8.9 Accountability.** *Financial Resources are to be allocated, expended, and accounted for in accordance with accounting practices specified in the Financial Accounting Handbook, Funding Manual, the Audit Guide, and the Pupil and Staff Accountability Manual.*
- 8.10 Contracting, encumbrances and borrowing.** *Any contracts and/or leases entered into by the School, entered into after the date this contract is signed shall contain the following sentence: "No indebtedness of any kind incurred or created by the School shall constitute an indebtedness of the State or its political subdivisions, and no indebtedness of the School shall involve or be secured by the faith, credit or taxing power of the State or its political subdivisions." The School shall not extend the faith and credit of the Sponsor to any third person or entity. The School acknowledges that it has no authority to enter into a Contract that would bind the Sponsor, and the School's authority to contract is limited by the same provisions of law that apply to the Sponsor. Unless otherwise agreed in writing by the Sponsor, each contract or legal relationship entered into by the School will include the following provisions: a) The contractor acknowledges that the School is not an agent of the Sponsor, and accordingly contractor expressly releases the Sponsor from any and all liability under this agreement. b) Any financial obligations of the School arising out of the agreement are subject to annual appropriation by the Sponsor.*
- 8.11 Loans.** *No loans may be made by the School to any person or entity for any purpose.*

- 8.12 Gifts and donations.** *Awards, grants or gifts may be accepted by the School and its governing body to the extent allowed by S.C. Code Ann. §59-40-140(F) and (G). The School shall report to the Sponsor in its annual audit report all gifts, donations, or grants it receives in accordance with S.C. Code Ann. § 594050(B)(3) and §59-40-140(G).*
- 8.13 Non-appropriation of funds.** *The Sponsor's funding obligations under this Contract will be from year-to-year only and will not constitute a multiple fiscal year direct obligation of the Sponsor. The Sponsor's obligation to fund the School will terminate upon non-appropriation of funds for that purpose by the General Assembly for any fiscal year, any provision of this Contract to the contrary notwithstanding. The Parties further agree that the Sponsor has not irrevocably pledged and held for payment sufficient cash reserves for funding the School at or above the current year per pupil allocation or for providing services described herein for the entire term of the Contract.*
- 8.14 Inventory of fixed assets.** *The School shall arrange for an inventory of fixed assets, including furniture and equipment utilized by the school in its operations and including the identity of the owner of the furniture and equipment. The inventory shall include the purchase price and serial number of all fixed assets. The inventory shall occur annually. The School shall ensure that its lead administrator maintains the inventory on file in his/her office. The School shall provide a copy of the furniture and equipment inventory to the Sponsor's Finance Office for accounting purposes.*

Section Nine: Personnel

- 9.1 Employee and contractor status.** *The School shall employ or contract with such personnel as are required for the efficient and effective operation of the School. The School shall adopt and implement personnel policies to address, among other topics, the hiring, evaluation, and termination of employees, terms of employment and compensation consistent with the provisions of the Charter. All employees hired by the School will be employees of the School and not the Sponsor and will be employees at will, subject to SBE Reg 43-601(III)(M). All employee discipline decisions will be made by the School. Other terms of the employment relationship shall be described in an Employee Handbook, as set forth in the Charter.*
- 9.2 Background checks.** *The School shall establish and implement procedures for conducting background checks (including a check for a criminal record) of all employees and contractors to the extent required by applicable law, rules, and regulations. No teacher or administrator with a criminal record that would ordinarily preclude such individuals from obtaining a teacher license or from public school employment will be employed at the School or contracted with to provide services at the School.*
- 9.3 Staff evaluation procedures.** *The School shall employ procedures for the evaluation of staff as outlined by the charter. The School shall utilize a teacher evaluation process that will comply with South Carolina's comprehensive system for Assisting, Developing and Evaluating Professional Teaching (ADEPT).*
- 9.4 Grievance and termination procedures.** *The School shall adopt the procedures for employment and dismissal of teachers set forth in its Charter application and consistent with the requirements set forth in SBE Regulation 43-601(III)(M).*
- 9.5 Certification.** *In accordance with S.C. Code Ann. §59-40-50 (B)(6), the School shall hire or contract for at least one administrative staff member certified or experienced in the field of school administration. Pursuant to S.C. Code Ann. §59-40-50 (B)(5) and SBE Reg 43-601 II (H), the School's teachers of core academic areas shall be certified in their respective areas or hold a bachelor's or graduate degree in those areas.*

- 9.6 Non-discrimination.** *It shall be the policy of the School to make all decisions regarding recruitment, hiring, promotion, and all other terms and conditions of employment without regard to race, color, creed, religion, sex, national origin, age, disability, or other factors which cannot lawfully be the basis for an employment decision. The School shall follow all federal and state statutes, laws, and regulations regarding non-discrimination and enact specific policies and procedures consistent with those statutes, laws, and regulations. The School shall post on its website and any document it publishes for public consumption the name of the School employee to whom inquiries regarding the non-discrimination policies shall be made and the following notice: "The (name of the School) does not discriminate on the basis of race, color, national origin, sex, disability, or age in its programs and activities and provides equal access to the Boy Scouts and other designated youth groups." For further information on federal non-discrimination regulations, including Title IX, individuals may contact the Assistant secretary for Civil Rights at OCR.DC@ed.gov or call 1-800-421-3481.*

Section Ten: Service Contracts with the Sponsor

- 10.1 Direct costs.** *Not applicable.*
- 10.2 Sponsor services.** *Not applicable.*

Section Eleven: Facilities

- 11.1 Facility.** *The School shall ensure that it maintains facilities in compliance with all applicable local, state, and federal laws and regulations, including but not limited to those relating to accessibility and student safety. The School shall satisfy all permit, life, safety, and inspection requirements of the SCDE/Office of School Facilities (OSF.)*
- 11.2 Construction, renovation, and maintenance of facilities.** *The School shall be responsible for the construction, renovation, and maintenance of the facilities in accordance with the latest edition of the South Carolina School Facilities Planning and Construction Guide. The School shall obtain prior approval of the OSF for all work to facilities. The School shall also obtain an inspection and the approval of the OSF before occupancy and use.*

Section Twelve: Charter Renewal, Revocation, and School-Initiated Closure

- 12.1 Renewal timeline and process.** *The School shall submit its renewal application in accordance with the renewal timelines promulgated by the Sponsor in the year before the Charter expires. The Sponsor will act on the renewal application in accordance with renewal timelines promulgated by the Sponsor in the year before the Charter expires following a public hearing at which the School shall have the opportunity to address the Sponsor about its renewal request.*
- 12.2 Renewal application content.** *Pursuant to S.C. Code Ann. §59-40-110 (B), the School shall submit a charter renewal application to its sponsor containing (1) a report on the progress of the School in achieving the goals, objectives, pupil achievement standards, and other terms of the initially approved charter application, and (2) a financial statement that discloses the costs of administration, instruction, and other spending categories for the School that is understandable to the general public and that allows for comparison of these costs to other schools or other comparable organizations, in a format required by the SBE. The format of the renewal application shall be provided to the School by the Sponsor at least one year before the renewal application is due or by the date prescribed by the Sponsor of the year in which the application is due. The Sponsor may modify this format, but shall not do so prior to seeking input from the School. Failure to submit a renewal application is deemed to be conclusive evidence that the School has agreed to closure.*

- 12.3 Criteria for renewal, nonrenewal, and revocation.** *The Sponsor must revoke or not renew the School's Charter for any of the grounds provided by S.C. Code Ann. §59-40-110 (C), as they exist now, or may be amended.*
- 12.4 Revocation/nonrenewal and hearing procedures.** *In accordance with S.C. Code Ann. §59-40-110(D), at least sixty days before not renewing or terminating a charter school, the Sponsor shall notify in writing the School board of the proposed action. The notification shall specify the grounds for the proposed action in reasonable detail.*
- Pursuant to S.C. Code Ann. §59-40-110(F), the School board may request in writing a hearing before the sponsor within fourteen days of receiving notice of nonrenewal or revocation of the charter. Failure of the School board to make a written request for a hearing within fourteen days must be treated as acquiescence to the proposed action. Upon receiving a timely written request for a hearing, the sponsor shall give reasonable notice to the School board of the hearing date. The Sponsor shall conduct a hearing before taking final action. The Sponsor shall take final action to renew or to revoke a charter by the last day of classes in the last school year for which the charter school is authorized.*
- 12.5 School-initiated dissolution.** *Pursuant to S.C. Code Ann. §59-40-115, the School may terminate its contract with the Sponsor before the tenyear term of contract if both Parties agree to the dissolution. Should the School choose to terminate this Contract before the end of the Contract term, it may do so in consultation with the Sponsor at the close of any school year and upon written notice to the Sponsor given at least ninety days before the end of the school year. The School shall make every effort to provide notice of ten months to the Sponsor to allow families to take advantage of any available school choice enrollment dates.*
- 12.6 Return of property.** *Pursuant to S.C. Code Ann. §59-40-120, upon dissolution of the School, the School assets may not inure to the benefit of any private person. Any assets obtained through restricted agreements with a donor through awards, grants, or gifts must be returned to that entity. All other assets shall become the property of the Sponsor.*

Section Thirteen: General Provisions

- 13.1 Entire agreement/amendments.** *This Agreement constitutes the entire agreement between the Parties and all prior representations, understandings, and discussions are merged herein and superseded and cancelled by this Contract. Pursuant to S.C. Code Ann. §59-40-60(C), a material revision of the terms of the contract between the School and the Sponsor may be made only with the approval of both Parties and must be documented in a writing signed by both Parties.*
- 13.2 Non-assignment.** *Neither party to this Contract shall assign or attempt to assign any rights, benefits, or obligations accruing to the party under this Contract unless the other party agrees in writing to any such assignment.*
- 13.3 Governing law and enforceability.** *This Contract shall be governed and construed according to the laws and regulations of the State of South Carolina, as amended from time to time. If any provision of this Contract or any application of this Contract to the School is found contrary to law, such provision or application shall have effect only to the extent permitted by law.*
- 13.4 No waiver.** *The Parties agree that no assent, express or implied, to any breach by either of them of any one or more of the provisions of this Contract shall constitute a waiver of any other breach.*
- 13.5 No third-party beneficiary.** *The enforcement of the terms and conditions of this Contract and all rights of action relating to such enforcement shall be strictly reserved to the Sponsor and the School. Nothing contained in this Contract shall give or allow any claim or right of action whatsoever by any other or*

third person. It is the express intent of the Parties to this Contract that any person receiving services or benefits hereunder shall be deemed an incidental beneficiary only.

13.6 Notice. Any notice required or permitted under this Contract shall be in writing and shall be effective upon personal delivery (subject to verification of service or acknowledgement of receipt) or three days after mailing when sent by certified mail, postage prepaid to the respective addresses set forth below. Either party may change the address for notice by giving written notice to the other party.

Notice to the Sponsor shall be sent to: Superintendent, South Carolina Public Charter School District, Suite 201, 3710 Landmark Drive, Columbia, SC 29204

Notice to the School shall be sent to:

13.7 Severability. The terms of this Contract are severable. In the event that any of the provisions are determined to be unenforceable or invalid for any reason, the remainder of the agreement shall remain in effect, unless mutually agreed otherwise by the Sponsor and the School.

13.8 Authority to enter into contract. The School expressly affirms that the signatories on its behalf who sign below have the authority to enter into this Contract on behalf of the School and that the board of directors of the School has duly approved this Contract. The School shall provide a copy of its written resolution to the Sponsor authorizing the School to enter into this Contract.

13.9 Delegation. The School shall not delegate any of its rights, obligations, or responsibilities to any third party.

Intending to be legally bound hereby, the parties hereby execute the foregoing Charter School Contract this 2 day of October, 2014, with an effective date of October 2, 2014.

| | |
|---|---|
| <p>SOUTH CAROLINA PUBLIC CHARTER SCHOOL DISTRICT</p> <p>By: <u>Wayne Brazee</u></p> <p>Its: <u>SCPCSD Superintendent</u></p> | <p>THE NEXT SCHOOL, AKA NEXT HIGH SCHOOL</p> <p>By: <u>Zuley B. EJ</u></p> <p>Its: <u>Board Chairman</u></p> |
|---|---|

Attachments

Pre-opening Conditions



South Carolina Public Charter School District

Pre-Opening Requirements

Schools Opening in 2015-16

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Pre-opening Requirements are a set of actions/activities that the School must complete prior to opening. Such conditions demonstrate a school's readiness to receive students and begin instruction. *Pre-opening Requirements* include the submission of required documentation and an on-site visit to the School site prior to opening. In accordance with state law, the Charter, and the Contract, the South Carolina Public Charter School District may take action to delay the opening of a School or revoke the School's Charter if a school fails to satisfy any pre-opening condition in a sufficient/timely manner. A delay in opening the School will not operate to extend the term of the Charter or the Contract.

School Name: Next High School

| Category | Condition | Due Date | Complete |
|-----------------------------------|--|---------------------------|---------------|
| Facilities | Written and signed copy of facility lease, purchase agreement and/or other facility arrangements for primary and ancillary facilities as are needed for the School to operate for one year or more. | January 15, 2015 * | Yes/No |
| | Evidence that the School is of sufficient size and with a sufficient number of classrooms to serve the projected enrollment. Identify any repairs/renovations that need to be completed by school opening; the source of funding for the repairs and a timeline for completion. | January 15, 2015* | Yes/No |
| | Copy of certificate of occupancy. | 10 days prior to opening | Yes/No |
| | Safety and Emergency Plan. | 30 days prior to opening | Yes/No |
| | Copies of school fire safety/evaluation plans/maps are posted in each classroom and other rooms/areas where students may be present. | 10 days prior to opening | Yes/No |
| Administration | Hire a Head of School and submit contact info to SCPCSD | April 1, 2015* | Yes/No |
| Recruitment and Enrollment | Plans and timelines for student recruitment and enrollment, including lottery procedures. | October 1, 2014 | Yes/No |
| | Evidence that students representing 50% of the projected fall membership have enrolled, including name, address, grade, and prior school attended. | May 1, 2015 | Yes/No |

* These deadlines may not be modified or extended except in rare circumstances because it is typically not possible to open by the agreed date unless this deadline is met. Schools who fail to meet this deadline must seek an amendment to the Charter with a new opening date and, if granted, execute a contract with amended pre-opening conditions. In appropriate circumstances, other deadlines may be modified or extended by mutual agreement between the School and the District.

| | | | |
|----------------------|--|---------------------------------|--------|
| | Evidence that students representing 75% of the projected fall membership have enrolled, including name, address, grade, and prior school attended. | June 15, 2015 | Yes/No |
| Financial Operations | Copy of the School's board-approved budget, with detailed assumptions for all revenues and expenditures, for the first year of operation. | July 1, 2015 | Yes/No |
| | Monthly cash flow projection for the first year of operation. | July 1, 2015 | Yes/No |
| | Submit the name of your finance contact who will be responsible for district requirements such as audit submissions, monthly data entry, etc. | June 1, 2015 | Yes/No |
| Banking Information | Submit School Direct Deposit Authorization form to the Finance Department | | |
| Governance | Schedule of board meetings (including date, time, and location for the first year of operation). | July 1, 2015 | Yes/No |
| | Evidence that membership on the Planning Board of Directors is complete; provide board roster with contact information and that the required training has been completed | July 1, 2015 | Yes/No |
| | Copy of updated board bylaws including a conflict of interest policy, | July 1, 2015 | Yes/No |
| | Resume and affirmation of eligibility to serve for each school governing board member, including affirmation of: <ul style="list-style-type: none"> • Criminal background check for original and current school governing board members • Child abuse registry check for original and current school governing board members | July 1, 2015 | Yes/No |
| Insurance | Copy of certificate of insurance or insurance policy or binder. | July 1, 2015 | Yes/No |
| Operations | Detailed calendar approved by the School's Board of Directors for the first year of the School's operation. Identifying <ul style="list-style-type: none"> • opening day • ending day • end/start of reporting period • bell schedule by grade • teachers' names per course and times of course. | June 15, 2015 | Yes/No |
| | A list of course numbers that follow the SCDE's activity course manual that has been approved by the School's board. | June 15, 2015 | Yes/No |
| | Written documentation that the School has completed health, safety, and criminal background checks on all school staff and volunteers that come into direct contact with the School's students. | 30 days prior to opening | Yes/No |
| Special Education | Evidence that special education staff is hired to provide special education services, including appropriately certified teachers of record OR | 10 days prior to school opening | Yes/No |

| | | | |
|--|--|---|--------|
| | evidence that arrangements have been made for contracted services. | | |
| | Copy of the School's policies and procedures manual specifying the School's plan for compliance with state and federal requirements for identifying, evaluating, and providing services to students with disabilities. | 10 days prior to opening | Yes/No |
| English Language Learners | Evidence that the School has obtained sufficient resources (including staff) to identify the needs of English Learning Learners. | 30 days prior to opening | Yes/No |
| Staff | Contact information for the administration. | June 1, 2015 | Yes/No |
| | Written documentation verifying school personnel are appropriately certified, Highly Qualified and entered into the PCS system. | August 1, 2015 | Yes/No |
| | Contact information for school's technical liaison. | July 1, 2015 | Yes/No |
| Student Records and Information Management | A detailed plan regarding the collection and storing of academic, attendance, and discipline records. Such records should be compliant with the Family Educational Rights and Privacy Act (FERPA) and state records and retention schedules and regulations. | June 15, 2015 | Yes/No |
| | Contact information for staff member who will serve as the PowerSchool Coordinator. | June 15, 2015 | Yes/No |
| Transportation (if applicable) | Copy of transportation plan and related health/safety certificates. | 10 days prior to opening | Yes/No |
| EMO Contract (if applicable) | Copy of EMO contract for compliance review. | Prior to execution of Contract between school and SCPCSD. | Yes/No |

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

The NEXT School, Inc. Appellant,

v.

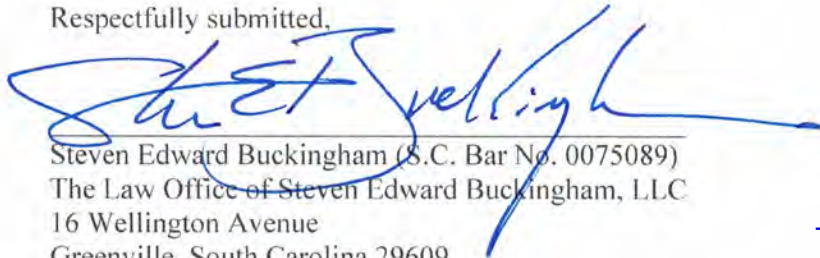
AT-NET Services—Charlotte, Inc. and American Arbitration
Association, Inc. Defendants,

Of which only AT-NET Services—Charlotte, Inc. is Respondent.

NOTICE OF APPEAL

The NEXT School, Inc. hereby appeals the following Orders of the Honorable Alex Kinlaw, Jr.: (1) an Order dated July 7, 2020, which is attached hereto as **Attachment A**; and (2) an Order dated March 25, 2021, which is attached hereto as **Attachment B**. Appellant received written notice of the entry of each Order on the date stamped on the respective Order’s margins.

Respectfully submitted,



Steven Edward Buckingham (S.C. Bar No. 0075089)
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Attorney for Appellant

Filed this 20th Day of April, 2021.
Greenville, South Carolina

Other Counsel of Record:

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Attorneys for Respondent

ATTACHMENT A

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.

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

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

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

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

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

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



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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ATTACHMENT B

STATE OF SOUTH CAROLINA)
)
COUNTY OF GREENVILLE)

IN THE COURT OF COMMON PLEAS
THIRTEENTH JUDICIAL CIRCUIT

C. A. No. 2019-CP-23-06745

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.)

ORDER

AT-NET Services-Charlotte, Inc.,)

C. A. No. 2020-CP-23-00969

Plaintiff,)

vs.)

The NEXT School, Inc.,)

Defendant.)

This matter came before me for a hearing on March 1, 2021 on The NEXT School, Inc.’s (“NEXT”) motion to alter or amend the judgment of this court entered on July 7, 2020. Present at the hearing on behalf of NEXT was Steven Edward Buckingham of the Law Office of Steven Edward Buckingham, LLC. Present at the hearing on behalf of AT-NET Services-Charlotte, Inc.

(“AT-NET”) was Adam C. Bach of the law firm Eller Tonnsen Bach, LLC. For the reasons stated herein, and in its original order, NEXT’s motion to alter or amend the court’s judgment is denied.

NEXT contractually agreed to arbitration in North Carolina, demanded that AT-NET arbitrate its claims against NEXT, and participated in the arbitration proceeding in North Carolina. After an arbitration award was entered against NEXT, AT-NET filed an action to confirm its award as provided for by North Carolina law. NEXT failed to appear or contest confirmation in that proceeding. The North Carolina Superior Court confirmed the award, and it became a judgment of the North Carolina Court (the “North Carolina Judgment”). As a judgment of a sister state, the judgment against NEXT is entitled to the Full Faith and Credit of courts in South Carolina under both the United States Constitution and the Uniform Enforcement of Foreign Judgment Acts (“UEFJA”), S.C. Code § 15-35-900, *et seq.*

The North Carolina Superior Court had subject matter jurisdiction to entertain confirmation of the arbitration award because it was statutorily empowered to do so. 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. This 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 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.”).

In its motion to reconsider, NEXT relies on three cases: 1) Newberry v. Georgia Dep’t of Indus. Trade, 286 S.C. 574, 336 S.E.2d 464 (1985); 2) Melton v. Crowder, 317 S.C. 253, 254–56,

452 S.E.2d 834, 834–36 (1995); and 3) Franchise Tax Board of California v. Hyatt, 139 S.Ct. 1485, 1496-1498 (2019). It is notable to the court that in each of these cases, the objecting state actor presented its jurisdictional arguments to the sister states’ courts and did not, as NEXT has done here, failed to appear. In Melton, the North Carolina Highway Patrol moved to dismiss an action in South Carolina circuit court based on lack of subject matter jurisdiction and lack of personal jurisdiction. *See Melton*, 452 S.E.2d at 835. The North Carolina Highway Patrol argued that under North Carolina law, North Carolina state actors could only be sued in the North Carolina Industrial Commission. In rejecting these arguments, the South Carolina Supreme Court held that “North Carolina’s partial waiver of [sovereign immunity] is sufficient to allow Melton to maintain his suit” in South Carolina.

Similarly, in Newberry, the State of Georgia presented its arguments concerning sovereign immunity to the courts of South Carolina. Newberry, 336 S.E.2d 464. Finally, in Hyatt, 139 S.Ct. at 1490-1491, the State of California spent 21 years in Nevada courts contesting Nevada’s ability to apply its sovereign immunity statute, rather than California’s, to an action against its Franchise Tax Board.

It is difficult for the court to believe that the Supreme Courts of both South Carolina and the United States failed to notice that the relevant state courts lacked subject matter jurisdiction to even hear and consider the matters before them. Instead, it is apparent that these courts possessed subject matter jurisdiction to hear and consider the objecting states’ sovereign immunity claims. Likewise, the North Carolina Superior Court possessed subject matter jurisdiction to hear and determine NEXT’s objections to the arbitration based on sovereign immunity grounds. NEXT failed to appear before the North Carolina Court and the North Carolina Judgment is final and entitled to Full Faith and Credit in South Carolina.

Further, even if NEXT had appeared in North Carolina to contest the award, South Carolina is amenable to suit in North Carolina based on South Carolina law. In its original motion seeking relief from the North Carolina Judgment, NEXT did not specify the basis for which it sought relief from the judgment but argued that sovereign immunity prevented it from being sued in North Carolina, citing to Newberry v. Georgia Dep't of Indus. Trade, 286 S.C. 574 (1985) and Franchise Tax Board of California v. Hyatt, 139 S. Ct. 1485 (2019). The issue in both Newberry and Franchise Tax Board was whether one state may exercise jurisdiction over another state despite that state's objection to the foreign state's proceedings. In both Newberry and Franchise Tax Board, the dispositive consideration was whether the state was a "consenting" state. The answer to this question depends on whether or not the state has waived sovereign immunity for the types of claims brought in the foreign court. *See Hyatt*, 139 S.Ct. at 1496-1497; Newberry, 336 S.E.2d at 464; Melton, 452 S.E.2d at 835-836. If it has, it is a "consenting" state and a foreign state court may choose to exercise jurisdiction over it. South Carolina has unquestionably waived sovereign immunity with regard to breach of contract claims. It is therefore a consenting state as to the claims brought by AT-NET, and the North Carolina judgment based on these claims is valid.

For these reasons, the North Carolina Judgment is valid and enforceable against NEXT. It is noteworthy, however, that NEXT appears to have shifted its position regarding whether a South Carolina state actor may be bound by an arbitration clause. In its original motions, NEXT argued that it could not be forced to arbitrate. Now it argues that it can be forced to arbitrate but only in South Carolina. This is noteworthy because the contract in this case involves interstate parties and the arbitration provision, therefore, is subject to the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1, *et seq.* The Supreme Court of the United States has held that "when parties agree to arbitrate all questions arising under a contract, the FAA supersedes state laws lodging primary

jurisdiction in another forum, whether judicial or administrative.” Preston v. Ferrer, 552 U.S. 346, 359, 128 S. Ct. 978, 987, 169 L. Ed. 2d 917 (2008). Thus, the FAA preempts contrary state law and, therefore, the underlying arbitration itself was proper in North Carolina.

Finally, NEXT argues that the North Carolina state court failed to engage in any analysis regarding NEXT’s amenability to suit in North Carolina. This is unsurprising since NEXT chose not to appear and present any of its arguments to the North Carolina court.

THEREFORE, for the reasons stated above in its original order, 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, NEXT’s motion to alter or amend the judgment of the court is DENIED.

AND IT IS SO ORDERED.

Judge, Thirteenth Judicial Circuit

Greenville, SC



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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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. 2020-CP-23-00969

AT-NET Services—Charlotte, Inc. Respondent,

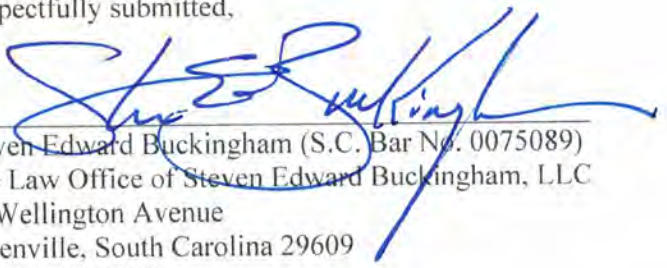
v.

The NEXT School, Inc. Appellant.

NOTICE OF APPEAL

The NEXT School, Inc. hereby appeals the following Orders of the Honorable Alex Kinlaw, Jr.: (1) an Order dated July 7, 2020, which is attached hereto as **Attachment A**; and (2) an Order dated March 25, 2021, which is attached hereto as **Attachment B**. Appellant received written notice of the entry of each Order on the date stamped on the respective Order’s margins.

Respectfully submitted,



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Filed this 20th Day of April, 2021.
Greenville, South Carolina

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Attorneys for Respondent

ATTACHMENT A

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.

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

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

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

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

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

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



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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ATTACHMENT B

STATE OF SOUTH CAROLINA)
)
COUNTY OF GREENVILLE)

IN THE COURT OF COMMON PLEAS
THIRTEENTH JUDICIAL CIRCUIT

C. A. No. 2019-CP-23-06745

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.)

ORDER

AT-NET Services-Charlotte, Inc.,)

C. A. No. 2020-CP-23-00969

Plaintiff,)

vs.)

The NEXT School, Inc.,)

Defendant.)

This matter came before me for a hearing on March 1, 2021 on The NEXT School, Inc.’s (“NEXT”) motion to alter or amend the judgment of this court entered on July 7, 2020. Present at the hearing on behalf of NEXT was Steven Edward Buckingham of the Law Office of Steven Edward Buckingham, LLC. Present at the hearing on behalf of AT-NET Services-Charlotte, Inc.

(“AT-NET”) was Adam C. Bach of the law firm Eller Tonnsen Bach, LLC. For the reasons stated herein, and in its original order, NEXT’s motion to alter or amend the court’s judgment is denied.

NEXT contractually agreed to arbitration in North Carolina, demanded that AT-NET arbitrate its claims against NEXT, and participated in the arbitration proceeding in North Carolina. After an arbitration award was entered against NEXT, AT-NET filed an action to confirm its award as provided for by North Carolina law. NEXT failed to appear or contest confirmation in that proceeding. The North Carolina Superior Court confirmed the award, and it became a judgment of the North Carolina Court (the “North Carolina Judgment”). As a judgment of a sister state, the judgment against NEXT is entitled to the Full Faith and Credit of courts in South Carolina under both the United States Constitution and the Uniform Enforcement of Foreign Judgment Acts (“UEFJA”), S.C. Code § 15-35-900, *et seq.*

The North Carolina Superior Court had subject matter jurisdiction to entertain confirmation of the arbitration award because it was statutorily empowered to do so. 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. This 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 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.”).

In its motion to reconsider, NEXT relies on three cases: 1) Newberry v. Georgia Dep’t of Indus. Trade, 286 S.C. 574, 336 S.E.2d 464 (1985); 2) Melton v. Crowder, 317 S.C. 253, 254–56,

452 S.E.2d 834, 834–36 (1995); and 3) Franchise Tax Board of California v. Hyatt, 139 S.Ct. 1485, 1496-1498 (2019). It is notable to the court that in each of these cases, the objecting state actor presented its jurisdictional arguments to the sister states’ courts and did not, as NEXT has done here, failed to appear. In Melton, the North Carolina Highway Patrol moved to dismiss an action in South Carolina circuit court based on lack of subject matter jurisdiction and lack of personal jurisdiction. *See Melton*, 452 S.E.2d at 835. The North Carolina Highway Patrol argued that under North Carolina law, North Carolina state actors could only be sued in the North Carolina Industrial Commission. In rejecting these arguments, the South Carolina Supreme Court held that “North Carolina’s partial waiver of [sovereign immunity] is sufficient to allow Melton to maintain his suit” in South Carolina.

Similarly, in Newberry, the State of Georgia presented its arguments concerning sovereign immunity to the courts of South Carolina. Newberry, 336 S.E.2d 464. Finally, in Hyatt, 139 S.Ct. at 1490-1491, the State of California spent 21 years in Nevada courts contesting Nevada’s ability to apply its sovereign immunity statute, rather than California’s, to an action against its Franchise Tax Board.

It is difficult for the court to believe that the Supreme Courts of both South Carolina and the United States failed to notice that the relevant state courts lacked subject matter jurisdiction to even hear and consider the matters before them. Instead, it is apparent that these courts possessed subject matter jurisdiction to hear and consider the objecting states’ sovereign immunity claims. Likewise, the North Carolina Superior Court possessed subject matter jurisdiction to hear and determine NEXT’s objections to the arbitration based on sovereign immunity grounds. NEXT failed to appear before the North Carolina Court and the North Carolina Judgment is final and entitled to Full Faith and Credit in South Carolina.

Further, even if NEXT had appeared in North Carolina to contest the award, South Carolina is amenable to suit in North Carolina based on South Carolina law. In its original motion seeking relief from the North Carolina Judgment, NEXT did not specify the basis for which it sought relief from the judgment but argued that sovereign immunity prevented it from being sued in North Carolina, citing to Newberry v. Georgia Dep't of Indus. Trade, 286 S.C. 574 (1985) and Franchise Tax Board of California v. Hyatt, 139 S. Ct. 1485 (2019). The issue in both Newberry and Franchise Tax Board was whether one state may exercise jurisdiction over another state despite that state's objection to the foreign state's proceedings. In both Newberry and Franchise Tax Board, the dispositive consideration was whether the state was a "consenting" state. The answer to this question depends on whether or not the state has waived sovereign immunity for the types of claims brought in the foreign court. *See Hyatt*, 139 S.Ct. at 1496-1497; Newberry, 336 S.E.2d at 464; Melton, 452 S.E.2d at 835-836. If it has, it is a "consenting" state and a foreign state court may choose to exercise jurisdiction over it. South Carolina has unquestionably waived sovereign immunity with regard to breach of contract claims. It is therefore a consenting state as to the claims brought by AT-NET, and the North Carolina judgment based on these claims is valid.

For these reasons, the North Carolina Judgment is valid and enforceable against NEXT. It is noteworthy, however, that NEXT appears to have shifted its position regarding whether a South Carolina state actor may be bound by an arbitration clause. In its original motions, NEXT argued that it could not be forced to arbitrate. Now it argues that it can be forced to arbitrate but only in South Carolina. This is noteworthy because the contract in this case involves interstate parties and the arbitration provision, therefore, is subject to the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1, *et seq.* The Supreme Court of the United States has held that "when parties agree to arbitrate all questions arising under a contract, the FAA supersedes state laws lodging primary

jurisdiction in another forum, whether judicial or administrative.” Preston v. Ferrer, 552 U.S. 346, 359, 128 S. Ct. 978, 987, 169 L. Ed. 2d 917 (2008). Thus, the FAA preempts contrary state law and, therefore, the underlying arbitration itself was proper in North Carolina.

Finally, NEXT argues that the North Carolina state court failed to engage in any analysis regarding NEXT’s amenability to suit in North Carolina. This is unsurprising since NEXT chose not to appear and present any of its arguments to the North Carolina court.

THEREFORE, for the reasons stated above in its original order, 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, NEXT’s motion to alter or amend the judgment of the court is DENIED.

AND IT IS SO ORDERED.

Judge, Thirteenth Judicial Circuit

Greenville, SC



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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CERTIFICATION OF APPELLANT'S COUNSEL

The undersigned counsel for Appellant hereby certifies that this Record on Appeal contains all material proposed to be included by the parties and not any other material.

I SO CERTIFY.

Respectfully,

s/ Steven Edward Buckingham

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Greenville, South Carolina
December 22, 2021