

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

eScholar LLC,

Case No. 8:20-cv-135 (CRG) (JMZ)

Plaintiff,

v.

**eScholar's REPLY BRIEF TO NDE'S
RESPONSE TO SHOW CAUSE ORDER**

NEBRASKA DEPARTMENT OF
EDUCATION, DEAN FOLKERS
in his individual capacity, and MATT
HASTINGS, in his individual capacity,

Defendants.

Plaintiff eScholar LLC respectfully submits this Reply to defendant Nebraska
Department of Education's Response to the Court's Order to Show Cause.

ARGUMENT

NDE's Response overlooks that whether a waiver of Eleventh Amendment sovereign immunity has occurred is a "question of federal law," rather than Nebraska state law. *Lapides v. Bd. of Regents of Univ. Sys. of Ga.*, 535 U.S. 613, 622-623, 122 S.Ct. 1640, 1645 (2002) (whether a waiver of Eleventh Amendment immunity by affirmative litigation occurred is a matter of "federal law"); *accord: Lee v. Prince George's County Public Schools*, 666 F.3d 244, 250 4th Cir. 2012); *Regents of the University of California v. Doe*, 519 U.S. 425, 429 n.5, 117 S.Ct. 900, 904 n.5 (1997) (whether state agency is an instrumentality that partakes of Eleventh Amendment immunity is a question of federal law); *accord: Rivera-Torres v. Sistema de Retiro para Maestros, Inc.*, 453 F.Supp.2d 383, 386 (D.P.R. 2006) ("The question of whether the SRM is an arm of the Commonwealth and thus entitled to share its Eleventh Amendment immunity is a question of federal law.")

The Nebraska Constitutional provision (Neb. Const. art. V, § 22), Nebraska statutes and Nebraska case law cited by NDE thus do not govern. In similar circumstances, *Stack v. Karnes*,

750 F.Supp.2d 892 (S.D. Ohio 2010) held:

While Ohio law is free to define and set forth the ability of political subdivisions, like Franklin County, to retain and ultimately waive immunity under state law, *the Eleventh Amendment is controlled as a matter of federal law. See Regents of Univ. of Cal. v. Doe*, 519 U.S. 425, 429 n. 5, 117 S.Ct. 900, 137 L.Ed.2d 55 (1997) (emphasis added). Thus, as a matter of federal law, Franklin County is without grounds to assert immunity from a Monell-based § 1983 claim.

Id. at 897 (emphasis added); *Baum Research and Development Co., Inc. v. University of Massachusetts*, 503 F.3d 1367, 1372 (Fed. Cir. 2007) (rejecting “The University[’s] . . . argu[ment] that Baum must affirmatively prove that the Massachusetts legislature delegated to the University the authority to include in the contract a waiver of immunity in federal court. . . [.]”)

Also, contrary to NDE’s suggestion, the decisions eScholar cites as favoring the finding of a waiver do not depend on a legislative grant of authority. Instead, they rely solely on contractual consent. *Baum, supra*, 503 F.3d at 1370 (“We agree with the district court that the contract terms are clear, and that the University agreed to submit to the jurisdiction of a federal court. . . [.]”); *Pettigrew v. Oklahoma ex rel. Oklahoma Dept. of Public Safety*, 722 F.3d 1209, 1211, 1215-1216 (10th Cir. 2013) (relying on Oklahoma rules of contract construction to reject the state’s argument that its contractual consent to suit in federal court was unenforceable); *Oracle America, Inc. v. Oregon Health Insurance Exchange*, 145 F.Supp.3d 1018, 1034 (D. Ore. 2015) (“the phrase ‘if in federal court’ must constitute a waiver or the phrase would appear to be meaningless in the context of Oracle’s copyright infringement claim against Oregon”).

Baum and *Pettigrew* have been properly interpreted as being based solely on contractual consent, rather than a legislative waiver. *Medsense v. University System of Maryland*, 420

F.Supp.3d 382, 395 (D. Md. 2019) (“[T]hose courts were able to conclude that those States had waived their Eleventh Amendment immunity *either* through express language contained within contractual agreements, see *Pettigrew* . . . and *Baum*. . . , *or* the state legislature(s) agreed to waive jurisdiction through statutory provisions, see *Port Authority Trans-Hudson Corp. v. Feeney*, 495 U.S. 299, 307-309 [1990].” (emphasis added)).

NDE’s apparent authority to agree to a forum selection further militates in favor of enforcing the contractual consent. *Oracle*, *supra*, 145 F.Supp.3d at 1037 (“the Court finds Oregon ‘clothed’ [the attorney general who negotiated the agreement] with apparent authority to bind Oregon to the [forum selection] provision[.]”); *Lapides*, *supra*, 122 S.Ct. at 1643 (finding the state attorney general’s lack of actual authority under state law to waive immunity by filing a federal action to be irrelevant).

Dated: April 29, 2020

eScholar LLC, Plaintiff

By: /s/ Richard J. Gilloon

Richard J. Gilloon, # 15397
Erickson I Sederstrom, P.C.
10330 Regency Parkway Drive, Suite 100
Omaha, NE 68114
(402) 397-2200
rgill@eslaw.com

Paul R. McMenamin
McMenamin Law Group
1140 Avenue of the Americas, 9th Floor
New York, New York 10036
paul@mcmenaminlawgroup.com
(917) 312-8334

Attorneys for Plaintiff eScholar, LLC