

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA**

eSCHOLAR LLC,

Plaintiff,

v.

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

Defendants.

Case No. 8:20-cv-135

**BRIEF IN SUPPORT OF
DEFENDANTS' MOTION TO
DISMISS AND IN
OPPOSITION TO PLAINTIFF'S
MOTION FOR PRELIMINARY
INJUNCTION**

Defendants Nebraska Department of Education ("Department"), and Dean Folkers and Matt Hastings, in their individual capacities, submit this brief in support of their motion to dismiss and in opposition to Plaintiff's motion for preliminary injunction.¹ Both motions are address herein in the interests of judicial economy and recognizing many of Defendants' arguments on both motions are the same.

eScholar's Amended Complaint does not resolve the jurisdictional issues, and only adds more defendants and additional claims to which Defendants are immune. The Department is immune from the requested preliminary injunctive relief, the Defendants have not waived sovereign immunity, and eScholar does not seek injunctive relief against employees acting in their official capacity.

¹ Defendants recognize the jurisdictional arguments presented herein are similar to those made in response to the Order to Show Cause at Filing 22. However, on May 19, 2020, the Magistrate Judge indicated the Plaintiff had complied with the Court's prior order and required the Defendants respond to Plaintiff's Amended Complaint by June 2, 2020. Filing 29. Defendants assert the jurisdictional issues remain and seek a decision on those issues prior to committing substantial resources to addressing the merits of Plaintiff's copyright infringement claims against the Department.

ARGUMENT

I. The Department is immune from the copyright claims.

In Claims Two and Three, eScholar purports to assert copyright claims against the Department. Filing 16. The Supreme Court recently determined that the states retained their sovereign immunity from copyright claims despite an attempted abrogation in 17 U.S.C. § 501(a). *Allen v. Cooper*, No. 18-877, 2020 WL 1325815, at *9 (U.S. Mar. 23, 2020). The Supreme Court specifically held that Article I constitutional powers did not grant Congress authority to abrogate the states' Eleventh Amendment sovereign immunity for copyright claims and that the attempted abrogation in 17 U.S.C. § 501(a) was not a valid exercise of congressional power under Section 5 of the Fourteenth Amendment. *Id.* at *4-8. eScholar has not identified a valid abrogation of the Department's Eleventh Amendment sovereign immunity and this Court correctly noted it lacks jurisdiction.

eScholar now claims the Department contractually waived Eleventh Amendment immunity. Filing 21 at 3-5. This contention is not supported by law. The Department is not authorized to waive Nebraska's Eleventh Amendment immunity. "While it is true that a state may waive Eleventh Amendment immunity through its conduct, a state official may waive the state's immunity only where specifically authorized to do so by that state's constitution, statutes, or decisions." *Santee Sioux Tribe of Nebraska v. State of Neb.*, 121 F.3d 427, 431 (8th Cir. 1997) (internal citations omitted).

eScholar incorrectly asserts that state law is not applicable to the issue of whether the Department has waived sovereign immunity. Filing 27. As the Supreme

Court reasoned in *Lapides v. Bd. of Regents of Univ. Sys. of Ga.*, 535 U.S. 613, 622-23 (2002), the question of whether sovereign immunity has been waived requires the Court to review “state laws, rules, or activities.” As the Court further explained, when the State’s participation in federal court is involuntary, as it is in this case, the waiver rules are different. *Id.* at 622.

The Nebraska Constitution provides: “The state may sue and be sued, and the Legislature shall provide by law in what manner and in what courts suits shall be brought.” Neb. Const. art. V, § 22. “This provision permits the State to lay its sovereignty aside and consent to be sued on such terms and conditions as the Legislature may prescribe. It is not self-executing, but instead requires legislative action for waiver of the State’s sovereign immunity.” *Zawaideh v. Neb. Dep’t of Health & Human Servs.*, 285 Neb. 48, 54 (2013). The Nebraska Constitution is clear that only a legislative act may waive the State’s Eleventh Amendment immunity. *Id.* That did not occur here.

eScholar’s analysis ignores these important principles of Nebraska state law and Eighth Circuit precedent, and relies upon out of circuit and factually distinguishable cases. Filing 21 at 3-4. In both *Pettigrew v. Oklahoma ex rel., Oklahoma Dept. of Public Safety*, 722 F.3d 1209, 1214-15 (10th Cir. 2013), and *Oracle America, Inc. v. Oregon Health Insurance Exchange*, 145 F.Supp.3d 1018, 1029 (D. Ore. 2015), the courts relied upon statutory and court-interpreted general consents to suit in court for contractual claims coupled with specific contractual provisions permitting suit in federal court to find a waiver of sovereign immunity.

But the Nebraska Legislature has not passed a general consent to suit on contractual issues and the Nebraska Supreme Court has held that only an action by the Legislature can waive the State's sovereign immunity. *Zawaideh v. Neb. Dep't of Health & Human Servs.*, 285 Neb. 48, 54 (2013).

II. The Department is immune from the contract claim.

The Department is a constitutional agency of the State of Nebraska. Neb. Const. art. VII, § 2. The State Contract Claims Act, Neb. Rev. Stat. § 81-8,302 *et seq.*, contains a limited waiver of sovereign immunity and prescribes a specific process with which a prospective plaintiff must comply to bring a contract claim against the State. See Neb. Rev. Stat. § 81-8,306 ("The State Contract Claims Act shall provide the exclusive remedy for resolving contract claims."); *Planned Parenthood of Nebraska and Council Bluffs v. Curtiss*, 2005 WL 8176074, at *7 (D. Neb. March 22, 2005); *Lundberg v. University of Nebraska*, 1996 WL 883606, at *11 (D. Neb. Nov. 25, 1996); *Eyo v. State*, 1995 WL 935758 (D. Neb. March 8, 1995).

Under the State Contract Claims Act, the Department may only be sued in the District Court of Lancaster County and only after eScholar fulfills the prerequisites found in the Act. Neb. Rev. Stat. § 81-8,305. Similar to the State Tort Claims Act, Nebraska's waiver of sovereign immunity under the State Contract Claims Act does not waive its immunity in federal court. See *Hess v. Port Authority Trans-Hudson Corp.*, 513 U.S. 30, 39-40 (1994) ("The Eleventh Amendment largely shields States from suit in federal court without their consent, leaving parties with claims against a State to present them, if the State permits, in the State's own tribunals."); see *Planned Parenthood of Nebraska and Council Bluffs v. Curtiss*, 2005

WL 8176074, at *7 (D. Neb. March 22, 2005). Nebraska has not waived sovereign immunity for contract claims in federal court. See *Santee Sioux Tribe v. Nebraska*, 121 F.3d 427, 430 (8th Cir. 1997).

III. The Department is immune from the trade secrets claims.

In Claims Four and Five, eScholar purports to assert trade secrets claims against the Department under state law. Filing 16 at 27-30, ¶¶ 124-137. The Nebraska Trade Secrets Act did not expressly waive the state's sovereign immunity or the state's Eleventh Amendment immunity.

First, the underlying dispute is a “dispute regarding a contract” and “the State Contract Claims Act shall provide the exclusive remedy for resolving contract claims.” Neb. Rev. Stat. §§ 81-8,303(1) and 81-8,306. As addressed above, that limited waiver of sovereign immunity, and eScholar's failure to comply with the Act, prevents this Court's jurisdiction.

Second, the generic reference to “government, governmental subdivision or agency” in the definition of “person” in the Trade Secrets Act is not enough to waive sovereign immunity. Neb. Rev. Stat. § 87-502. Nor is a statement that, “[a]ctual or threatened misappropriation may be enjoined[.]” where there is no reference to whom may be enjoined or a specific waiver for the injunction to come from a federal court. Neb. Rev. Stat. § 87-503(1). “A waiver of sovereign immunity is found only where stated by the most express language of a statute or by such overwhelming implication from the text as will allow no other reasonable construction.” *Amend v. Nebraska Pub. Serv. Comm'n*, 298 Neb. 617, 624, 905 N.W.2d 551, 557 (2018); See also *Santee Sioux Tribe of Nebraska v. State of Neb.*, 121 F.3d 427, 430 (8th Cir.

1997). The test to determine that a State has waived its immunity is stringent. *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 241 (1985). Federalism requires that the waiver be “clear and unequivocal.” *Burk v. Beene*, 948 F.2d 489, 493 (8th Cir. 1991).

The definition of person does not include a waiver of sovereign immunity; neither is there a clear or unequivocal waiver in any other portion of the Trade Secrets Act. Neb. Rev. Stat. § 87-502. eScholar has not pointed to a single instance in statute where the Legislature has waived the State’s immunity from suit in federal court here. Nor has eScholar pointed to a single instance where Nebraska Courts have interpreted the Trade Secrets Act to contain a waiver of sovereign immunity for an agency of Nebraska in any court. No such waiver exists and the Department is immune.

IV. The *Ex Parte Young* doctrine is inapplicable to this case.

In Claims Five and Six, eScholar attempts to work around immunity but names the wrong defendants. Filing 16. Injunctive relief is not available against state officials who are sued in their individual capacities. *Ex Parte Young*, 209 U.S. 123 (1908); *Hafer v. Melo*, 502 U.S. 21 (1991); *Brown v. Montoya*, 662 F.3d 1152 (10th Cir. 2011). The *Ex Parte Young* doctrine permits an equitable suit against a government official in his official capacity to enjoin the official from prospective unconstitutional behavior under the title of his office even if the injunction restricts the State’s ability to act. *Ex Parte Young*, 209 U.S. 123, 159-60 (1908). The official who acts unconstitutionally is said to be stripped of his official capacity and then may be enjoined as though an individual. *Id.* at 160.

eScholar has not sued a government official. Filing 16. Instead, eScholar has sued the Department and two Department employees, Hastings and Folkers, in their individual capacities. *Id.*

An attempted injunction of these particular employees in their individual capacities would not meet the purposes of an *Ex Parte Young* exception to hold state officials responsible to federal law to protect federal rights. eScholar attempts to obtain an injunction to prevent Hastings and Folkers from performing certain acts as employees of the Department. Filing 16 at 31, ¶¶ 145-147. Hastings' and Folkers' purported responsibility for the use of the ADVISOR Person ID system for the Department is not derived from their individual capacities, but by a result of their employment by the Department. Filing 16 at 31 ¶145. The Court should dismiss all claims for injunctive relief against any defendant in his or her individual capacity.

V. The Court lacks jurisdiction over the Plaintiffs Motion for a Preliminary Injunction against the Department.

Plaintiffs' Motion for Preliminary Injunction was filed shortly after the initial Complaint and only seeks to preliminarily enjoin the Department. Filing 5. After the Amended Complaint added new claims and parties, eScholar did not amend their request for preliminary injunctive relief. To the extent the initial motion remains pending, the Court should deny it because the Court lacks jurisdiction over the claims against the Department. Filing 5. Plaintiff cannot satisfy the four factors set forth in *Dataphase Systems, Inc. v. C L Systems, Inc.*, 640 F.2d 109, 112-13 (8th Cir. 1981), without jurisdiction. As discussed above, eScholar has failed to show there is federal abrogation of State sovereign immunity for copyright claims, that the State

Contract Claims Act permits suit in federal court, or that the Department can waive Eleventh Amendment immunity through contract. If eScholar can overcome these jurisdictional issues, the Department respectfully requests leave to address the *Dataphase* factors in supplemental briefing.

CONCLUSION

Defendants are immune from eScholar's claims, the Court lacks jurisdiction, the claims should be dismissed, and preliminary injunctive relief against the Department should be denied.

Submitted May 29, 2020.

**NEBRASKA DEPARTMENT OF
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HASTINGS, in his individual
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CERTIFICATE OF COMPLIANCE

Pursuant to NECivR 7.1(d), I certify that this brief contains 2,155 words as counted by the Microsoft Word 2016 word processing software used to generate the brief. The word count function of this software was applied to include all text, including the caption, headings, footnotes, and quotations.

BY: s/ Charles E. Chamberlin
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CERTIFICATE OF SERVICE

I hereby certify that on May 29, 2020, I electronically filed the foregoing Brief with the Clerk of the United States District Court for the District of Nebraska using the CM/ECF system causing notice of such filing to be sent to all CM/ECF parties.

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