

**IN THE GEORGIA STATE-WIDE BUSINESS COURT**

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DAREN HOEFFNER,

Plaintiff,

v.

ED SHIELDS, PETER BROOKNER,  
and CONTROLLED ACCESS, INC.,

Defendants.

Case No. 21-GSBC-0029

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**ORDER DENYING PLAINTIFF’S MOTION FOR A  
CERTIFICATE OF IMMEDIATE REVIEW**

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The above-styled action is before the Court on Plaintiff Daren Hoeffner’s Motion for a Certificate of Immediate Review of the Court’s October 25, 2021 Order (“Motion”), which is made pursuant to O.C.G.A. § 5-6-34(b). Having considered the parties’ arguments related thereto, the Court hereby DENIES Plaintiff’s Motion.

In so doing the Court recognizes that, as a new institution, it has been and may continue to be faced with novel questions of law, both procedural and substantive. The question Plaintiff poses here, however—namely, “whether the inclusion of a permissive forum selection clause effects a waiver of a party’s statutory right to object to a transfer petition under this Court’s Enabling Legislation”—is neither novel nor terribly controversial. Pl.’s Reply Br. 2. Here, the parties knowingly,

voluntarily, and specifically designated this Court as the primary venue to resolve disputes arising from the agreement at issue, absent federal jurisdiction.<sup>1</sup> Order on Defs.’ Pet. to Transfer 4–5. There can be no legitimate question that the foregoing clearly and unambiguously “represents the parties’ agreement as to the most proper forum” for the instant dispute. *Atl. Marine Constr. Co. v. U.S. Dist. Court for the W. Dist. of Tex.*, 571 U.S. 49, 62 (2013) (quoting *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 31 (1988)).

Through its enforcement of the same, the Court’s orders on this question both protect the legitimate, bargained-for expectations of the parties and further vital interests of the justice system. *Id.* As the Supreme Court articulated in *Atlantic Marine*:

When parties have contracted in advance to litigate disputes in a particular forum, courts should not unnecessarily disrupt the parties’ settled expectations. A forum-selection clause, after all, may have figured centrally in the parties’ negotiations and may have affected how they set monetary and other contractual terms; it may, in fact, have been a critical factor in their agreement to do business together in the first place. In all but the most unusual cases, therefore, “the interest of justice” is served by holding parties to their bargain.

*Id.* at 66; see also Hannah L. Buxbaum, *The Interpretation and Effect of Permissive Forum Selection Clauses Under U.S. Law*, 66 Am. J. Compar. L. 127, 127 (2018)

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<sup>1</sup> The forum selection clause at issue clearly provides in relevant part: “Any legal . . . dispute arising out of or related to this Agreement . . . may be instituted in the federal courts of the United States of America or *in this order*: (1) the Business Court of the State of Georgia . . .” Defs.’ Ex. A ¶ 10.8 (emphasis added). Plaintiff notably does not address the clause’s “in this order” proviso anywhere in his papers.

“A forum selection clause is a form of contractual waiver. By this device, a contract party waives its rights to raise jurisdictional or venue objections if a lawsuit is initiated against it in the chosen court. If the forum selection is exclusive, then that party also promises not to initiate litigation anywhere other than in the chosen forum.” (punctuation omitted)); Stephen E. Sachs, *The Forum Selection Defense*, 10 Duke J. Const. L. & Pub. Pol’y 1, 7 (2014) (“Courts don’t recognize these waivers because contract law somehow trumps procedure, or because the parties are somehow entitled to override whatever the law actually requires. Rather our procedural law just happens to recognize a role for private understandings when allowing rights to be waived.” (footnote omitted)).

The Court’s orders find further support in countless decisions by the appellate courts of this State, which likewise recognize the validity of forum selection clauses like the one at issue here. *See, e.g., Cemex Constr. Materials Florida, LLC v. LRA Naples, LLC*, 334 Ga. App. 415, 416 (2015) (“Georgia has adopted the United States Supreme Court’s conclusion ‘that forum clauses are prima facie valid and should be enforced unless enforcement is shown by the resisting party to be “unreasonable” under the circumstances.’” (quoting *Park Ave. Bank v. Steamboat City Dev. Co.*, 317 Ga. App. 289, 293 (2012), *overruled on other grounds by Wang v. Liu*, 292 Ga. 568 (2013))); 7 *Ga. Jur.* § 3:20 (“A freely negotiated agreement containing a forum

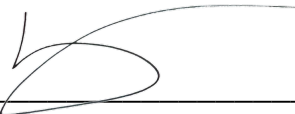
selection clause should be upheld absent a compelling reason such as fraud, undue influence, or overweening bargaining power.”)

As this Court has recognized in numerous instances to date, the General Assembly preserved, for similarly-situated parties, the right to object to (or “opt-out” of) this Court’s exercise of jurisdiction and venue in certain instances. But as with other procedural rights, such an objection can be waived by the parties, whether by operation of law (*e.g.*, failure to make a timely objection) or by agreement (*e.g.*, a forum selection provision), and perhaps through other means not now presented. *See, e.g., Hong & Men II LLC v. Diversified Dock Builders, LLC*, No. 21-GSBC-0021, at 3–4 (Ga. Bus. Ct. Oct. 7, 2021) (holding that the plaintiff was barred from objecting to the Court’s jurisdiction by failing to raise the objection within the statutorily-prescribed time period). Moreover, as this Court has already recognized, other requirements of the Court’s enabling legislation (particularly O.C.G.A. § 15-5A-4) (“Enabling Legislation”) are similarly waivable. *See Overlook Gardens Props., LLC v. ORIX USA, L.P.*, No. 20-GSBC-0002, at 2 n.2 (Ga. Bus. Ct. Mar. 25, 2021) (holding time limitations for consenting to transfer to be waivable by agreement of the parties). Though there are unquestionably outer bounds to litigants’ ability to waive the procedural requirements of this Court’s Enabling Legislation, the Court sees no rational reason—whether grounded in the text of the Enabling Legislation or otherwise—why commercial parties should not be permitted

to knowingly, voluntarily, and specifically consent to personal jurisdiction and venue of this Court. Such is consistent with longstanding Georgia law and such is the case here.

Although the Court recognizes that the question posed has not been previously addressed by this Court, or any other for that matter, the question itself is not so novel that it warrants the indefinite suspension of the underlying litigation. For all of the foregoing reasons, Plaintiff's Motion is hereby DENIED.

IT IS SO ORDERED this 3<sup>rd</sup> day of November, 2021.



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JUDGE WALTER W. DAVIS  
Georgia State-wide Business Court

*Hoeffner v. Shields, et al. (21-GSBC-0029)*  
*Order Denying Plaintiff's Motion for a*  
*Certificate of Immediate Review*

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