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IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

R. Lawton McIntosh, Circuit Court Judge

Appellate Case No. 2016-000662

Circuit Case No. 2015-CP-04-2161

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SC Court of Appeals

Mattress by Appointment, LLC,
a Florida limited liability company
f/k/a Carolina Bedding Direct, LLC,
a Florida limited liability company
Appellant,

v.

Retail Service Systems, Inc.,
Boxdrop Furniture, Inc.,
Carlton Scott Andrew,
and Darren Conrand
Respondents.

MEMORANDUM ADDRESSING ISSUE
OF APPEALABILITY

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Pursuant to the Court's April 4, 2016 letter, the respondents Retail Service Systems, Inc. and Carlton Scott Andrew submit this Memorandum addressing the issue of appealability. This appeal should be dismissed because (1) the circuit court's order does not involve the merits and does not affect the appellant's substantial rights; (2) the notice of appeal was not timely served; and (3) the appellant has waived any right to challenge the order appealed.

I. INTRODUCTION

This is an appeal from a January 26, 2016 circuit court order (the "Order") directing the appellant to amend its complaint by providing more definite and certain statements. The Order also required all parties to verify future pleadings, motions, filings, and discovery responses by the highest ranking corporate officer of each entity, the individual parties, and their respective attorneys. As discussed below, this appeal should be dismissed because the Order is not immediately appealable. It does not involve the merits or affect the appellant's substantial rights.

Further, this appeal should be dismissed because the appellant did not serve its Notice of Appeal until March 24, 2016, well past the 30-day deadline of Rule 203(b)(1), SCACR. In the circuit court the appellant filed what it called a "Motion to Reconsider, Amend or Alter Judgment." However, this motion did not stay the deadline to serve a Notice of Appeal.

Moreover, this appeal should be dismissed because the appellant waived any right to challenge the Order. The proper procedure to challenge the Order was to refuse to comply with the Order and then appeal after being held in contempt. The appellant chose not to follow this procedure. It instead attempted to divert the implementation of the

Order by filing a more definite and certain statement that did not fully comply with the Order. The Order forms the law of the case, and the appellant is bound by it.

II. PROCEDURAL HISTORY

This lawsuit is one of many related to the theft of respondent Retail Service System, Inc.'s ("RSS's") trade secrets. On October 4, 2013, RSS filed a lawsuit against Carolina Bedding Direct, LLC, Mattress by Appointment, LLC, and Does 1-50 in the District Court for the Southern District of Ohio (Case No. 2:13-cv-00994, "Ohio Case No. 1"). (Exhibit 1, Complaint, Ohio Federal Case No. 1). RSS asserted that Carolina Bedding Direct, LLC and Mattress by Appointment, LLC obtained and continue to use the trade secrets that belong to RSS. (Exhibit 1, ¶¶ 2, 37-38). The Ohio Complaint described Mattress by Appointment, LLC as being a Florida Limited Liability Company. (Exhibit 1, ¶ 7). It described Carolina Bedding Direct, LLC as a company that represented itself in Ohio secretary of state filings as a North Carolina Limited Liability Company, however the North Carolina secretary of state filings reflected that the company was dissolved as of October 18, 2011, so RSS believed the entity was Carolina Bedding Direct, LLC a Florida Limited Liability Company. (Exhibit 1, ¶ 6).

Both defendants retained counsel in Ohio Federal Case No. 1, and almost a year of litigation ensued between the parties relating to which parties were properly before the court, and whether service was proper on those parties. Ultimately, the court found that both parties were properly served, and entered a default against Carolina Bedding Direct, LLC formed in North Carolina ("CBD (NC)") and Mattress by Appointment, LLC

“MBA (FL) I).¹ (Exhibit 2, Ohio Federal Case No. 1, Docket). It also entered a permanent injunction against CBD (NC). (Exhibit 2, Docket Entry No. 117). On December 16, 2015, the court held a damages hearing against those entities. (Exhibit 2, Docket Entry No. 132). The court’s decision on damages is pending. (*See* Exhibit 2).

RSS filed a lawsuit on August 31, 2015 against Mattress by Appointment, LLC formerly known as Carolina Bedding Direct, LLC of Florida (“MBA (FL) II”), Mattress by Appointment, LLC of South Carolina (“MBA (SC)”), and Edwin Shoffner (the owner of both MBA (FL) II and MBA (SC)) in the United States District Court for the Southern District of Ohio (Case No. 2:15-cv-02769, “Ohio Federal Case No. 2”). (Exhibit 3, Ohio Federal Case No. 2, Docket). RSS has asserted there that MBA (FL) II, MBA (SC), and CBD (FL) are essentially the same companies or successors in interest to CBD (NC) and MBA (FL) I. (Exhibit 4, Complaint, Ohio Federal Case No. 2, ¶¶ 54-57). Ohio Federal Case No. 1 and Ohio Federal Case No. 2 have been designated by the federal courts as related. (Exhibit 2, p. 1).

On September 15, 2015, well after being sued in Ohio, the appellant filed the present case in South Carolina alleging that it was “Mattress by Appointment, LLC of Florida,” a Florida limited liability company, and “Mattress by Appointment, LLC of South Carolina,” a South Carolina limited liability company, both successors in interest to “Carolina Bedding Direct, LLC,” a Florida limited liability company. (Exhibit 5, South Carolina Complaint, ¶ 1). In its original Complaint, the appellant alleged that it became Mattress by Appointment, LLC, a Florida Limited Liability Company, on

¹These designations are for ease of reference only for the purposes of this Motion and Memorandum. The appellants in no way concede that any of the entities discussed herein are distinct.

January 27, 2014, (Exhibit 5, ¶ 8), the same day that RSS obtained the Judgment against Mattress by Appointment, LLC, a Florida Limited Liability Company, in Ohio Federal Case No. 1. The appellant asserted that it did not do business as Mattress by Appointment, LLC, a Florida Limited Liability Company, until February 4, 2014. (Exhibit 5, ¶ 9). In other words, the appellant alleged that it was not MBA (FL) I which existed prior to January 27, 2014 and was sued by RSS in Ohio Federal Case No. 1. Rather, it asserted that it was MBA (FL) II which allegedly began to exist on January 27, 2014 and began to do business as Mattress by Appointment, LLC on February 4, 2014, which was not sued by RSS in Ohio Federal Case No. 1.

On November 13, 2015, RSS, Andrew, Boxdrop, and Conrad, through their respective counsel, filed motions to dismiss the Complaint. (Exhibit 6, RSS and Andrew's Motion to Dismiss; Exhibit 7, Boxdrop's Motion to Dismiss; Exhibit 8, Conrad's Motion to Dismiss). The respondents' argument, among others, was that the appellant brought various causes of actions based on duties allegedly owed to MBA (FL) I and damages allegedly suffered by MBA (FL) I. (Exhibit 5, ¶¶ 22-26, 28, 35, 38, 45, 50-51). Yet, it specifically alleged that it was *not* MBA (FL) I. (Exhibit 5, ¶ 8).

The appellant did not file a response brief to the respondents' motions to dismiss. On January 26, 2016, the court held a motion hearing on the respondents' motions. (See Exhibit 9, Honorable Lawton McIntosh email). On January 26, 2016, the court entered the Order which is subject to this appeal.² (Exhibit 10, January 26, 2016 Order). The Order directed the appellant to file an amended complaint (which would be the

² The appellant stated that it mailed a copy of an Amended Complaint to the clerk for filing prior to the hearing on the respondents' motions. However, at the time of the hearing, the court did not have the Amended Complaint in its file, thus based the Order off the original Complaint. (See Exhibit 9).

appellant's second amended complaint) by February 5, 2016 providing more definite and certain statements. (Exhibit 10). The court also ordered all parties verify their future pleadings, motions, filings, and discovery responses by the highest ranking corporate officer of each entity, the individual parties, and their respective attorneys. (Exhibit 10). The court stated that after the appellant filed an amended complaint it would rule on the various motions to dismiss. (Exhibit 9).

On January 29, 2016, the appellant filed a "Verified Notice of Motion, Motion and Memorandum in Support of Motion to Reconsider, Amend or Alter Judgment." (Exhibit 11, Motion to Reconsider, Amend, or Alter Judgment). However, as discussed in detail below, this motion did not stay the time limits for the appellant to serve its Notice of Appeal. On February 8, 2016, respondents RSS and Andrew filed a response to the appellant's Motion. (Exhibit 12, RSS and Andrew's Response in Opposition to Plaintiff's Motion to Reconsider). Thereafter, the appellant filed a "Verified Reply in Support of Motion to Amend." (Exhibit 13, Verified Reply in Support of Motion to Amend).

On February 5, 2016, the appellant filed a Second Amended Complaint, which the appellant asserted was being filed pursuant to the Order entered on January 26, 2016. (Exhibit 14, Verified Second Amended Complaint, p. 1).

On February 19, 2016, respondents RSS and Andrew served a Motion to Dismiss the Second Amended Complaint. (Exhibit 15, Motion to Dismiss Second Amended Complaint). Among other reasons supporting dismissal, the respondents argued that the more definite and certain statements in the Second Amended Complaint do not fully

comply with the Order. (Exhibit 15). This motion, along with the previously filed motions to dismiss, are currently pending.

On February 24, 2016, the circuit court filed a form Order denying the plaintiff's "Motion to Reconsider." (Exhibit 16, Form 4 Order).

On March 24, 2016, the appellant served a Notice of Appeal, stating that it is "appeal[ing] the order of the Honorable R. Lawton McIntosh dated January 26, 2016." (Exhibit 17, Notice of Appeal).

III. THE JANUARY 26, 2016 ORDER IS NOT IMMEDIATELY APPEALABLE

"The right to appeal arises from and is controlled by statutory law." North Carolina Federal Sav. and Loan Ass'n v. Twin States Development Corp., 289 S.C. 480, 481, 347 S.E.2d 97 (1986). "Piecemeal appeals should be avoided and most errors can be corrected by the remedy of a new trial." Hagood v. Sommerville, 362 S.C. 191, 196, 607 S.E.2d 707, 709 (2005) (citing Breland v. Love Chevrolet Olds, Inc., 339 S.C. 89, 93, 529 S.E.2d 11, 13 (2000) (order denying motion for change of venue is not immediately appealable because any error in the order can be corrected by new trial); Senter v. Piggly Wiggly Carolina Co., 341 S.C. 74, 77-78, 533 S.E.2d 575, 577 (2000) (order denying bifurcation of trial on issues of liability and damages in personal injury case is not immediately appealable as affecting a substantial right); Townsend v. Townsend, 323 S.C. 309, 312, 474 S.E.2d 424, 427 (1996) (denial of motions for disqualification of a judge and for a continuance are interlocutory orders not affecting the merits, and thus are reviewable only on appeal from a final order); Collins v. Sigmon, 299 S.C. 464, 466, 385 S.E.2d 835, 836 (1989) (order allowing amendment of a pleading generally is not

immediately appealable); Ex parte Whetstone, 289 S.C. 580, 347 S.E.2d 881 (1986) (order directing a party or a non-party to submit to discovery is not immediately appealable; instead, the party or non-party must be held in contempt before an appeal may be taken challenging the validity of the discovery order); Tatnall v. Gardner, 350 S.C. 135, 138, 564 S.E.2d 377, 379 (Ct. App. 2002) (order denying motion to amend pleadings to assert third party claims was not immediately appealable because the order did not affect a substantial right)); *see also* Knowles v. Standard Sav. and Loan Ass'n, 274 S.C. 58, 59, 261 S.E.2d 49 (1979) (the rationale of restricting appellate review is to “prevent the debilitating effect on judicial administration caused by piecemeal appeal disposition of what is, in practical consequence, but a single controversy”).

“Absent some specialized statute, determining if an interlocutory order is immediately appealable depends on whether the order falls within one of the several categories of appealable judgments, decrees, or orders listed in S.C. Code Ann. § 14-3-330 in order to be immediately appealable.” Ex parte Capital U-Drive-It, Inc., 369 S.C. 1, 6, 630 S.E.2d 464, 467 (2006) (citations omitted). Section 14-3-330 limits the appeal from an interlocutory order as follows:

The Supreme Court shall have appellate jurisdiction for correction of errors of law in law case, and shall review upon appeal:

(1) Any intermediate judgment, order or decree in a law case involving the merits in actions commenced in the court of common pleas and general sessions, brought there by original process or removed there from any inferior court or jurisdiction, and final judgments in such actions; *provided*, that if no appeal be taken until final judgment is entered the court may upon appeal from such final judgment review any intermediate order or decree necessarily affecting the judgment not before appealed from;

(2) An order affecting a substantial right made in an action when such order (a) in effect determines the action and prevents a judgment from

which an appeal might be taken or discontinues the action, (b) grants or refuses a new trial or (c) strikes out an answer or any part thereof or any pleading in any action;

(3) A final order affecting a substantial right made in any special proceeding or upon a summary application in any action after judgment; and

(4) An interlocutory order or decree in a court of common pleas granting, continuing, modifying, or refusing an injunction or granting, continuing, modifying, or refusing the appointment of a receiver.

S.C. Code Ann. § 14-3-330 (1976) (*italics original*); *see also* Edwards v. SunCom, 369 S.C. 91, 94, 631 S.E.2d 529, 530 (2006). As explained below, the January 26, 2016 Order does not fall into any of the categories of Section 14-3-330, therefore this appeal must be dismissed.³

“An order ‘involves the merits,’ as that term is used in Section 14-3-330(1) and is immediately appealable when it finally determines some substantial matter forming the whole or part of some cause of action or defense.” Ex parte Capital U-Drive-It, Inc., 369 S.C. at 7, 630 S.E.2d at 467 (citations omitted). “The phrase ‘involving the merits’ is narrowly construed in modern precedent.” Ex parte Capital U-Drive-It, Inc., 369 S.C. at 7, 630 S.E.2d at 467; *see also* Mid-State Distributors, Inc., 310 S.C. at 334, 426 S.E.2d at 780 (“We have now defined ‘involving the merits’ in a more narrow fashion . . .”). “An order usually will be deemed interlocutory and not immediately appealable when there is some further act that must be done by the trial court prior to a determination of the parties’ rights.” Ex parte Capital U-Drive-It, Inc., 369 S.C. at 7, 630 S.E.2d at 467-68.

³ Subparts (3) and (4) do not apply here. This is not a special proceeding, it does not involve an application after judgment, the Order does not grant, continue, modify, or refuse an injunction, and the Order does not grant, continue, modify, or refuse to appoint a receiver.

The January 26, 2016 Order does not involve the merits. As stated by the court, after reading through the file in this matter, it had concerns as to the pending motions to dismiss and to this case. (Exhibit 9). It therefore ordered the appellant to provide more definite and certain statements and directed all parties to verify discovery responses and filings with the court. See State v. Brantley, 279 S.C. 215, 217, 305 S.E.2d 234, 235 (1983) (“[a] trial court has the inherent power to protect itself from indignities and to enable it effectively to administer its judicial functions”); Crestwood Golf Club, Inc. v. Potter, 328 S.C. 201, 212, 493 S.E.2d 826, 832 (1997) (the power of trial courts to dismiss a case for failure to prosecute is necessarily vested in trial courts to manage their own affairs so as to achieve orderly and expeditious disposition of cases); State v. Langford, 400 S.C. 421, 435, 735 S.E.2d 471, 478 (2012) (a court’s power to hear and decide cases carries with it the inherent power to control the order of its business).

South Carolina courts have long held that orders directing a party to provide more definite and certain statements are not immediately appealable. For example, in Pickett v. Fidelity & Casualty Co., 52 S.C. 584, 30 S.E. 614, 615 (1898), the circuit court ordered the appellant to amend his complaint to include numerous additional facts. The South Carolina Supreme Court held that the appeal was premature. At trial, the appellant would have the right to prove every fact alleged in his complaint as originally prepared, and whether he would be required to prove the additional allegations would depend upon the ruling of the trial judge at that time. Id. at 615.

In Dawkins v. Columbia Electric St. Ry. Light & Power Co., 82 S.C. 166, 63 S.E. 746 (1909), the Court relied on this reasoning to conclude that an order directing the appellants to file an amended answer stating additional facts did not involve the merits:

[E]ven conceding . . . that said paragraph was already definite and certain, then the order did not affect the merits, and the amendment may be regarded as immaterial by the trial judge, as its only purpose was to make the denials in the answer definite and certain, and not to require the setting forth of evidentiary matter. . . . “It seems that the appeal has been taken under a misapprehension as to the force and effect of the order requiring the amendments. A party is compelled to amend his complaint so as to conform to an order requiring amendments to be made, but the materiality of the amendment is a question to be determined by the judge before whom the case is tried. An order requiring amendments expends its force when the issues in conformity to it are presented upon the trial of the case, and when thus presented the trial judge is as untrammelled in considering the materiality of any allegations of the complaint as if the allegations had been inserted in the first instance by the plaintiff’s attorneys. In this case no allegations of the complaint were ordered to be struck out, but the plaintiff was required to insert additional allegations. The plaintiff will therefore have the right, upon the trial of the case, to prove every fact alleged in his complaint as originally prepared; and whether he will be required to prove the additional allegations will depend upon the ruling of the trial judge. Under these circumstances the appeal herein is premature.”

Dawkins, 82 S.C. at 166, 63 S.E. at 746-47 (quoting Pickett, 52 S.C. 584, 30 S.E. 614).

More recently, in Thornton v. South Carolina Elec. & Gas Corp., 391 S.C. 297, 306, 705 S.E.2d 475, 408 (Ct. App. 2011), the Court held that a partial summary judgment order prohibiting the appellants to allege a Mining Act violation (which they had not originally pled) did not involve the merits. The Court held that the order did not finally determine a substantial matter, as “[t]he [appellants] may still pursue their negligence claim as originally pled in their complaint. If the trial judge permits it in the exercise of discretion, they may introduce evidence that [the respondent] violated the Mining Act and argue the alleged violations are evidence of negligence.” Id.

As in Pickett, Dawkins, and Thornton, the Order here does not finally determine some substantial matter forming the whole or part of some cause of action or defense. By ordering the appellant to provide more definite and certain statements, the circuit court did not strike out any allegations of the appellant’s original complaint. Rather, it required

the appellant to insert additional allegations. The appellant had the right to include each and every allegation of its original Complaint in its Second Amended Complaint.

Moreover, the portion of the Order directing all parties and their attorneys to verify filings and discovery responses does not involve the merits. This is similar to Ex parte Whetstone, in which the circuit court ordered that a non-party attend a deposition and produce certain documents. 289 S.C. at 580, 347 S.E.2d at 881. The Court held that the order was interlocutory and not immediately appealable. Ex parte Whetstone, 289 S.C. at 580, 347 S.E.2d at 881. It stated that instead of immediately appealing, the appellant had two options: (1) comply with the order and waive any right to challenge it on appeal or (2) refuse to comply with the order and appeal after it has been held in contempt for its failure to comply. Ex parte Whetstone, 289 S.C. at 580-81, 347 S.E.2d at 881-82.

As explained in Section V, the appellant here did not refuse to comply with the Order and appeal after being held contempt. It submitted verifications pursuant to the Order.⁴ The verification requirement does not reach the “merits” of the action and the appellant has not “arrived at the end of the road.” See Mid-State Distributors, Inc., 310 S.C. at 334, 426 S.E.2d at 780; see also Patterson v. Spector Broadcasting Corp., 287 S.C. 249, 335 S.E.2d 803 (1985) (Mem. Opinion) (an appeal from an order compelling discovery is interlocutory and not immediately appealable); Ex parte Whetstone, 289 S.C. at 580, 347 S.E.2d at 881 (an appeal from an order compelling a non-party witness directing him to attend a deposition and produce certain documents is interlocutory and

⁴ As discussed below, the appellant also attempted to divert the implementation of the Order by filing more definite and certain statements that did not fully comply with the Order, thus it has waived any right to challenge the Order.

not immediately appealable); Knowles v. Standard Sav. and Loan Ass'n, 274 S.C. 58, 59, 261 S.E.2d 49 (1979) (Class certification is essentially procedural in nature and does not reach the “merits” of the underlying cause of action) (citing Ex Parte Ferguson, 82 S.C. 563, 64 S.E. 750 (1909) (an order requiring certain individuals be named as defendants is an administrative act not subject to appeal)).

Furthermore, the Order is not immediately appealable because it does not affect a substantial right. A party may immediately appeal an order “affecting a substantial right made in an action when such order (a) in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues the action, (b) grants or refuses a new trial or (c) strikes out an answer or any part thereof or any pleading in any action.” S.C. Code Ann. § 14-3-330(2). The Order here does not meet any of the requirements as stated in (a) – (c). The Order did not prohibit the appellant from including the allegations of its original Complaint in its Second Amended Complaint, it did not discontinue the action or prevent the appellant from proving any fact that originally alleged, and it does not strike out any portion of the appellant’s original Complaint.

South Carolina Courts have long held that orders that instruct a party to provide more definite and certain statements do not affect substantial rights. For example, in Thomas & Howard Co. v. Fowler, 226 S.C. 377, 378-79, 85 S.E.2d 278 (1955), the circuit court ordered the appellants to make their counterclaim more definite and certain by naming particular wholesalers who suddenly refused to grant appellants merchandise on credit. This information was in the possession of the appellants, and the Court was “unable to conceive of any logical reason why such information should not be furnished

[to] the respondent.” Thomas & Howard Co., 226 S.C. at 379, 85 S.E.2d at 278. It found that “no substantial right of the appellants [had] been invaded.” Thomas & Howard Co., 226 S.C. at 379, 85 S.E.2d at 278.

Similarly, in Brogdon v. Britton, 212 S.C. 75, 77, 46 S.E.2d 551, 553 (1948), the circuit court ordered the appellants to make their answer more definite and certain. The case involved defective cows, and the circuit court ordered the appellants to state additional facts including the identity of the person from whom the appellant purchased the cows, for what purpose the cows were purchased, to whom they were sold and for what purpose they were sold, who was in charge of the cows, who owned the cows, who gave instructions for the cows to be slaughtered, and who quarantined the cows. Brogdon, 212 S.C. at 78, 46 S.E.2d at 553. The Court held that an order requiring the appellants to furnish this information would not deprive them of any substantial right. Brogdon, 212 S.C. at 79, 46 S.E.2d at 554. To the extent the appellants knew the requested information, they would not be deprived of any right in being required to state the facts. To the extent that the appellants did not know the requested information, they could state so in their more definite and certain statement. Brogdon, 212 S.C. at 80, 46 S.E.2d at 554.

Like in Brogdon and Thomas, the circuit court here ordered that the appellant’s statement include the names and dates of incorporation of the appellant’s predecessor and successor entities, a brief description of how it became a successor to Carolina Bedding Direct, a Florida LLC as alleged, and facts to support allegations contained within the appellant’s original Complaint. This is information that forms the basis of the appellant’s action against the respondents, and there is no “logical reason why such information

should not be furnished.” See Thomas & Howard Co., 226 S.C. at 379, 85 S.E.2d at 278. The appellant was not deprived of any substantial right by being required to state these facts.

Moreover, the portion of the Order here directing all parties to verify discovery responses does not affect a substantial right under Section 14-3-330(2). It does not, in effect, determine the action, discontinue the action, or prevent a judgment from which an appeal may be taken. See S.C. Code Ann. § 14-3-330(2). Similarly, the South Carolina Supreme Court has held that an order directing a non-party witness to attend a deposition (which requires the non-party to take an oath) and produce certain documents is not directly appealable under Section 14-3-330. Ex parte Whetstone, 289 S.C. 580, 580-81, 347 S.E.2d 881, 881-82 (1986); see also Rule 30(c), SCRCPP (requiring that depositions be taken under oath). The Court has also held that an order directing a party to participate in discovery is interlocutory and not directly appealable. Ex parte Whetstone, 289 S.C. at 580, 347 S.E.2d at 881 (citing Patterson v. Specter Broadcasting, 287 S.C. 249, 335 S.E.2d 803 (1985); Lowndes Products, Inc. v. Brower, 262 S.C. 431, 205 S.E.2d 184 (1974)). The Order is not immediately appealable, therefore this appeal must be dismissed.

IV. THE NOTICE OF APPEAL WAS NOT TIMELY SERVED

This appeal must be dismissed because the appellant’s Notice of Appeal was not timely served. The appellant did not serve its Notice of Appeal until March 24, 2016, well past the 30-day deadline of Rule 203(b)(1), SCACR. In the circuit court, the appellant filed what it called a “Motion to Reconsider, Amend or Alter Judgment.” While the appellant never cited the Rule of Civil Procedure upon which it was relying, it

is clear that its motion could not be treated as a motion to alter or amend the judgment under Rule 59(e) of the South Carolina Rules of Civil Procedure. The appellant's motion did not stay the deadline to serve a Notice of Appeal.

Rule 203(b)(1) provides that “[w]hen a timely motion for judgment n.o.v. (Rule 50, SCRCPP), motion to alter or amend the judgment (Rules 52 and 59, SCRCPP), or a motion for a new trial (Rule 59, SCRCPP) has been made, the time for appeals for all parties shall be stayed and shall run from receipt of written notice of entry of the order granting or denying such motion.” Rule 203, SCACR. It is clear that the appellant's “Motion to Reconsider, Amend or Alter Judgment” is not a motion for judgment n.o.v. under Rule 50(b), a motion for a new trial under Rule 59(a), or a motion to amend the court's findings after the action was tried upon the facts without a jury or with an advisory jury under Rule 52(b). Further, as explained below, it is not a valid motion to alter or amend the judgment under Rule 59(e). Rule 59(e) applies only to final judgments. The January 26, 2016 Order is a non-final order.

Rule 59(e) states the following:

Motion to Alter or Amend a Judgment. A motion to alter or amend the judgment shall be served not later than 10 days after receipt of written notice of the entry of the order.

59(e), SCRCPP.

Courts have recognized that some motions to “reconsider” may be motions to “alter” or “amend” under Rule 59(e). *See, e.g., USAA Property and Cas. Ins. Co. v. Clegg*, 277 S.C. 543, 649-50, 661 S.E.2d 791, 794 (2008) (determining the timeliness of a Rule 59(e) motion to reconsider). However, to be a Rule 59(e) motion, the motion to

“reconsider,” “alter,” or “amend” must be a motion to reconsider, alter, or amend a final judgment.

By its very terms, Rule 59(e) only applies to final judgments. *See* Rule 59(e), SCRCF (“[a] motion to alter or amend **the judgment** shall be served not later than 10 days . . .”) (bold added); Rule 54(a), SCRCF (the term “[j]udgment” as used in these rules includes any decree or order which dismisses the action as to any party or finally determines the rights of any party”). The Order here is not a “judgment” because it does not dismiss the action as to any party, nor does it finally determine the rights of any party. Despite the title of the appellants’ Motion, it is not a motion under Rule 59(e) because it does not seek to reconsider, alter, or amend a “judgment.”

Federal courts also hold that Rule 59, FRCP, applies only to final judgments.⁵ *See Fayetteville Investors v. Commercial Builders, Inc.*, 936 F.2d 1462, 1472 (4th Cir. 1991) (“The district court correctly held that [the appellant’s] motion for reconsideration could not be treated under Rules 60 or 59, as these rules apply only to final judgments . . .”); *Spill the Beans, Inc. v. Sweettreats, Inc.*, 2009 WL 2929434, *1 (D.S.C. 2009) (unpublished) (“Rule 59(e) is an inappropriate vehicle for reconsideration of an interlocutory order”); (*Anderson v. Deere & Co.*, 852 F.2d 1244, 1246 (10th Cir. 1988) (“The ten-day period prescribed by Rule 59(e) begins to run only upon entry of a *final* judgment. Here the August 1985 orders were not final because they did not dispose of all parties and [the defendant’s] liability remained undetermined”); *Estate of Gaither ex rel. Gaither v. District of Columbia*, 771 F.Supp.2d 5, 8 n. 3 (D.D.C. 2011) (“Defendants also purport to rely upon Rule 59(e) of the Federal Rules of Civil Procedure as a basis for

⁵ Rule 59 of the South Carolina Rules of Civil Procedure “is substantially the Federal Rule.” (Rule 59, SCRCF, notes).

their Motion for Reconsideration . . . but Rule 59(e) does not apply where, as here, the underlying order is non-final”); Galvan v. Norberg, 678 F.3d 581, 587 n. 3 (7th Cir. 2012) (“Although we refer to the motion before Judge Chang as a motion to reconsider, the motion is not a traditional Rule 59(e) motion to reconsider, which can only follow a ‘judgment.’ . . . Rule 54(b) governs non-final orders and permits the revision at any time prior to the entry of judgment, thereby bestowing sweeping authority upon the district court to reconsider a new trial motion”).

Numerous states have reached the same conclusion. *See Doe v. Sovereign Grace Ministries, Inc.*, 217 Md. App. 650, 669, 94 A.3d 264, 275, cert. denied sub nom. Doe v. Sovereign Grace Ministries, 440 Md. 116, 99 A.3d 779 (2014) (“Here, the plaintiffs’ motion for reconsideration, filed within ten days of the entry of the May 23, 2013 order, had no impact on the time for filing a notice of appeal because the May 23, 2013 order was not a final judgment. The tolling effect of Rule 8–202(c) does not apply to a motion for reconsideration of a non-appealable interlocutory order, and has no bearing on the effectiveness of a notice of appeal filed while such a motion remains pending”)⁶; Lovelace v. Lovelace, 124 So. 3d 447 (Fla. Dist. Ct. App. 2013) (“The law in Florida is well settled that a motion for rehearing or reconsideration does not toll the time for filing an appeal from a non-final order reviewable pursuant to the provisions of Florida Rule of Appellate Procedure 9.130”)⁷; Ex parte Troutman Sanders, LLP, 866 So.2d 547, 549 (Ala. 2003) (“A Rule 59 motion may be made only in reference to a final judgment or

⁶ MD Rule Civ. Pro. 8-202(c) states that “[i]n a civil action, when a timely motion is filed pursuant to Rule 2-532 [motion for judgment notwithstanding the verdict], 2-533 [motion for new trial], or 2-534 [motion to alter or amend a judgment], the notice of appeal shall be filed within 30 days after (1) a notice withdrawing the motion or (2) an order denying a motion pursuant to Rule 2-533 or disposing a motion pursuant to 2-532 or 2-534 . . .”

⁷ Fla. Rule App. Pro. 9.130 authorizes the appeal of certain non-final orders.

order. ... Therefore, the tolling effect of Rule 59 is not involved with respect to motions to ‘reconsider’ interlocutory orders”).

Moreover, South Carolina case law makes it clear that Rule 59(e) applies only to final judgments. *See Pitman v. Republic Leasing Co., Inc.*, 351 S.C. 429, 432, 570 S.E.2d 187, 189 (Ct. App. 2002) (“[A] trial judge retains jurisdiction pursuant to Rule 59(e), SCRPC, to alter or amend a judgment within ten days of its issuance”); *Rutland v. Holler, Dennis, Corbett, Ormond & Garner*, 371 S.C. 91, 96, 637 S.E.2d 316, 319 (Ct. App. 2006) (“The established case law is that a trial judge loses jurisdiction over a case when time to file post-trial motions has elapsed”). The circuit court here did not lose jurisdiction within ten days after filing the Order. In fact, until the final judgment, it has the power to reconsider, amend, or alter the Order. *PPG Indus., Inc. v. Orangeburg Paint & Decorating Ctr., Inc.*, 297 S.C. 176, 183, 375 S.E.2d 331, 334 (Ct. App. 1988) (“A trial judge, until final judgment, controls the trial of the case before him, and as a general rule may amend, correct, modify, or otherwise change its findings of fact and conclusions of law before entry of judgment or decree”).

Rule 59(e), SCRPC, is inapplicable to the appellant’s “Motion to Reconsider, Amend or Alter Judgment.” It did not stay the time for the appellant to serve its Notice of Appeal. Because the appellant’s Notice of Appeal was served after the 30-day deadline of Rule 203(b)(1), SCACR, this appeal must be dismissed.

V. THE APPELLANT WAIVED ANY RIGHT TO CHALLENGE THE CIRCUIT COURT’S RULINGS AS STATED IN THE ORDER

If the appellant wished to challenge specific rulings as stated in the Order, it must have refused to comply, suffer contempt, and appeal from the contempt finding. For example, in *Ex parte Whetstone*, the circuit court ordered that a non-party attend a

deposition and produce certain documents. 289 S.C. at 580, 347 S.E.2d at 881. Rather than complying (or refusing to comply and being held in contempt), the non-party immediately appealed the circuit court's order. Ex parte Whetstone, 289 S.C. at 580, 347 S.E.2d at 881. The Court held that the order was interlocutory and not immediately appealable. Ex parte Whetstone, 289 S.C. at 580, 347 S.E.2d at 881. It stated that instead of immediately appealing, the appellant had two options: (1) comply with the order and waive any right to challenge it on appeal or (2) refuse to comply with the order and appeal after it has been held in contempt for its failure to comply. Ex parte Whetstone, 289 S.C. at 580-81, 347 S.E.2d at 881-82.

Similarly, in Davis v. Parkview Apartments, 409 S.C. 266, 280, 762 S.E.2d 535, 543 (2014), the circuit court issued orders directing the appellants to provide responses to certain discovery requests. Although the appellants did not agree with the orders, they did not follow the proper procedure to challenge the orders by refusing to comply, suffering contempt, and appeal from that contempt finding. Davis, 409 S.C. at 280-81, 762 S.E.2d at 543 (citing Ex parte Whetstone, 289 S.C. at 580-81, 347 S.E.2d at 881-82). Instead, the appellants attempted to divert the implementation of the orders by providing incomplete responses. Davis, 409 S.C. at 281, 762 S.E.2d at 543.⁸ The Court held that by responding to discovery as ordered by the circuit court, even though those responses were incomplete, the appellants accepted the circuit court's formulation of discovery. Davis, 409 S.C. at 281, 762 S.E.2d at 543. As stated by the Court "[r]ight or wrong, these decisions form the law of the case, and Appellants are bound by them now." Davis,

⁸ The appellants in Davis also appealed one of the orders which the Court of Appeals dismissed as interlocutory. Davis, 409 S.C. at 281, 762 S.E.2d at 543.

409 S.C. at 281, 762 S.E.2d at 543 (citing ML-Lee Acquisition Fund, L.P. v. Deloitte & Touche, 327 S.C. 238, 241, 489 S.E.2d 470, 472 (1997)).

Similarly here, the circuit court's Order directed the appellant file a more definite and certain statement in an amended complaint by February 5, 2016, and for the parties to verify all pleadings by the highest ranking corporate officer of each entity, the individual parties, and their respective attorneys. (Exhibit 10). Although the appellant did not agree with the Order, it did not follow the proper procedure to challenge the Order by refusing to comply, suffering contempt, and appeal from that contempt finding. See Davis, 409 S.C. at 280-81, 762 S.E.2d at 543. Instead, it attempted to divert the implementation of the Order by filing a Second Amended Complaint "pursuant to [the] Court's order entered on January 26, 2016," without identifying its predecessor entities as was required by the Order. See Davis, 409 S.C. at 280-81, 762 S.E.2d at 543; (Exhibit 14, p. 1). The appellant also submitted an attorney verification "[t]o the extent the Court's January 26, 2016 order requires counsel as attorney for the plaintiff to make a sworn verification . . ." and a verification from the appellant's highest ranking officer. (Exhibit 14, verifications). By filing a Second Amended Complaint as ordered by the circuit court, even though the appellant's more definite and certain statement is incomplete, the appellant has accepted the terms of the Order. See Davis, 409 S.C. at 281, 762 S.E.2d at 543. It has similarly done so with respect to the verifications. See Davis, 409 S.C. at 281, 762 S.E.2d at 543. Right or wrong, the Order forms the law of the case, and the appellant is bound by it. See Davis, 409 S.C. at 281, 762 S.E.2d at 543 (citing ML-Lee Acquisition Fund, L.P. v. Deloitte & Touche, 327 S.C. 238, 241, 489 S.E.2d 470, 472

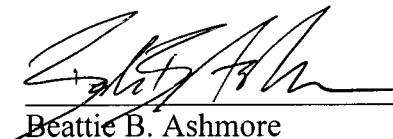
(1997)). The appellant has waived any right to change the merits of the Order, therefore this appeal must be dismissed.

VI. CONCLUSION

This Court should dismiss the appeal because (1) the January 26, 2016 Order is not immediately appealable; (2) the appellant did not timely serve its Notice of Appeal; and (3) the appellant waived any right to challenge the merits of the Order.

This 14 day of April, 2016

Respectfully submitted,



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RECEIVED
APR 18 2016
SC Court of Appeals

EXHIBIT 1

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO, EASTERN DIVISION**

RETAIL SERVICE SYSTEMS, INC.
6059 Frantz Road, Suite 204
Dublin, Ohio 43017

Plaintiff,

v.

CAROLINA BEDDING DIRECT, LLC
c/o Statutory Agent Nicholas Lyle
5275 Cleves Warsaw Pike
Cincinnati, Ohio 45238,

and

MATTRESS BY APPOINTMENT, LLC
c/o Statutory Agent Darren B. Conrad
320 1st Street North, Apt. 904
Jacksonville Beach, Florida 32250,

and

Does 1 through 50,

Defendants.

Case No. 2:13-cv-00994

Judge _____

JURY TRIAL DEMANDED

COMPLAINT

NOW COMES plaintiff Retail Service Systems, Inc. ("RSS" or "Plaintiff"), and alleges as its complaint and demand for jury trial as follows:

I. INTRODUCTION

1. Plaintiff Retail Service Systems, Inc. brings this action to secure redress from defendants Carolina Bedding Direct, LLC ("Carolina Bedding") and Mattress By Appointment, LLC ("MBA") (collectively, "Defendants") for violations of Ohio's Uniform Trade Secrets Act, Ohio

Rev. Code §§1333.61, *et seq.*, and for civil conspiracy. Upon information and belief both Carolina Bedding and MBA are owned and operated by Darren B. Conrad (“Conrad”) and may be referred to herein as “the Conrad Entities.”

2. Specifically, Conrad was formerly a bedding and furniture dealer as a licensee of Power Marketing Direct, Inc. (“PMD”). PMD is an Ohio corporation with its principal place of business in Franklin County, Ohio, and based upon the Ohio Secretary of State’s records is still active. PMD was in the business of selling furniture and bedding through licensed dealers located in defined territories throughout the United States. PMD, on June 12, 2013, sold the majority of its assets, including all licenses, accounts receivables, judgments, and intellectual property (including trade secrets) to plaintiff RSS, pursuant to an Asset Purchase Agreement by and among Retail Service Systems, Incorporated, Power Marketing Direct, Inc., PMD Furniture Direct, Inc. and Jeffrey S. Hosking. (the “Asset Purchase Agreement”).

3. Pursuant to the Asset Purchase Agreement, plaintiff RSS now owns the majority of the Assets of PMD and PMD Furniture Direct, Inc. (“PMDF”), including all intellectual property, such as trademarks, patents, trade dress, copyrights and trade secrets.

4. As set forth below, upon information and belief, defendants Carolina Bedding and MBA—the Conrad Entities—operated by and through Darren Conrad are using the trade secrets and materials derived from proprietary information first obtained from PMD and now owned by RSS. RSS seeks to enjoin these ongoing violations and seeks damages resulting from Defendants’ violations.

II. PARTIES

5. Plaintiff RSS is an Ohio Corporation with its principal place of business at 6059 Frantz Road, Suite 204, Dublin, Ohio 43017, in the Southern District of Ohio, and is otherwise *sui juris*.

6. Defendant Carolina Bedding Direct, LLC (“Carolina Bedding”) represents in its filings with the Ohio Secretary of State that it is a foreign limited liability company located in North Carolina, however, Carolina Bedding’s filings with the North Carolina Secretary of State reflect that the company has dissolved as of October 18, 2011. Upon information and belief, as well as the records of the Florida Secretary of State, Carolina Bedding has filed as a Florida limited liability company with its principal address at 377 8th Street, Atlantic Beach, Florida (as of July 5, 2013) and its mailing address at 320 1st Street North, Suite 904, Jacksonville Beach, Florida, with a registered agent of “Darren B. Conrad” at that same location. Under all scenarios, Carolina Bedding is a foreign corporation doing business in the State of Ohio.

7. Defendant Mattress By Appointment, LLC (“MBA”) is a Florida limited liability company with its principal place of business at 320 1st Street North, Suite 904, Jacksonville Beach, Florida, with a registered agent of “Darren B. Conrad” at that same location. According to MBA’s website, it is “a unique Mattress shopping experience that began in Columbus, OH more than 15 years ago.” Upon information and belief, Defendant MBA continues to conduct business in the State of Ohio, in this district, and throughout certain portions of the United States.

III. JURISDICTION AND VENUE

8. This Court has diversity jurisdiction over this action pursuant to 28 U.S.C. § 1332(a)(1) as the amount in controversy exceeds the sum or value of \$75,000, exclusive of interests and costs, and is between citizens of different States.

9. Venue in this judicial district is proper under 28 U.S.C. §1391(b) and (c) in that this is the judicial district in which a substantial part of the acts and omissions giving rise to the claims occurred.

IV. FACTUAL ALLEGATIONS

10. Pursuant to the Asset Purchase Agreement, plaintiff RSS now owns the majority of the assets of PMD and PMD Furniture Direct, Inc. ("PMDF"; collectively, the "PMD Entities").

The PMD Entities were originally founded by Jeffrey S. Hosking ("Hosking").

11. Over the course of several years Mr. Hosking developed a unique and comprehensive marketing program that PMD applied to the furniture and mattress industry. PMD licensed "dealers" such as Conrad, to purchase bedding and furniture exclusively through PMD. Further, PMD trained dealers, such as Conrad, to market and sell the products through small warehouses using classified advertising, detailed phone and sales scripts, and specific marketing techniques and sales approaches developed by PMD over time, utilizing PMD's extensive marketing and sales experience.

12. Because PMD's marketing approach was unique and highly successful (and continues to be under RSS's ownership), but capable of duplication, all PMD dealers were required to sign license agreements before attending PMD's two-day basic training seminar where the unique selling procedures and processes were divulged.

13. From early 2000 to April 2003, Darren Conrad was affiliated with PMD in a variety of ways. Conrad began by assisting PMD's founder and President, Hosking, and eventually became a PMD dealer, manager, and trainer of other PMD dealers.

14. In March 2003, Conrad announced that he had decided to leave PMD to "pursue other interests." Conrad left PMD in April 2003.

15. Contemporaneous with his departure at PMD, Conrad executed a Separation Agreement, with included a provision that stated:

[Conrad] agrees that he will not for a period of three (3) years following the execution of this Agreement engage in any of the following activities:

- (a) Undertake planning for or organization of any business activity competitive with [PMD's] business or combine or conspire with others for the purposes of organizing any such competitive business activity;
- (b) Directly or indirectly or by any action in concert with others induce or influence any person or entity who is engaged as an employee, agent, independent contractor o[f PMD] to terminate or in any way compromise his or her business relationship with [PMD];
- (c) Call upon an business contacts of [PMD] for the purposes of soliciting or selling competitive products or services;
- (d) divert to, solicit or in any other way attempt to take away business contacts, clientele or customers of [PMD] and place said business with any other business that may compete with the business of [PMD];
- (e) Directly or indirectly compete with the business of [PMD].

16. Unknown to PMD, Conrad had in early 2003 secretly begun plotting with PMD's then controller, Paul Kuproski, to establish, through the theft and improper use of PMD's trade secrets, a competing mattress and furniture wholesaling business in South Carolina.

17. In furtherance of their plot to steal trade secrets and compete with PMD in violation of Conrad's License Agreement and Separation Agreement and Kuproski's employment, Kuproski forwarded to Conrad PMD's highly confidential training materials for Conrad to use in the competing business.

18. In early February 2004, Hosking learned of Conrad's plot and competing business from Conrad's disgruntled former partner in the South Carolina competing business, Mr. Mark Chastain. By the time PMD learned of Conrad and Kuproski's deception, Conrad had created an imitation company with approximately 17 dealers located in several southeastern states. That imitation company was incorporated as "Carolina Direct, Inc." in early 2003. After Conrad relocated his family from Ohio to Greenville, South Carolina, Conrad handled selling new dealerships—utilizing the PMD license agreement taken without approval or permission from

PMD—and Kuproski, still an employee of PMD at the time, placed Conrad and Carolina Direct's orders with various manufacturers, leveraging the relationships PMD had developed with those manufacturers for the benefit of "Carolina Direct" and Conrad.

19. In addition to the PMD license agreement pilfered from PMD for Conrad and "Carolina Bedding's" use, Conrad and Kuproski also improperly obtained PMD's confidential materials used to train its dealers, and simply used them and held them out as their own.

20. After Conrad and Kuproski had a falling out, Conrad created a new company—Carolina Bedding & Furniture, Inc.—with his neighbor, turned informant, Mark Chastain.

21. Upon information and belief, these various iterations of the original imitation company set up by Conrad, became defendant Carolina Bedding Direct, LLC and its offspring, defendant Mattress By Appointment, LLC.

22. Because of Conrad's conduct, a lawsuit had previously been filed by PMD against Conrad in February 2004, in the Franklin County Common Pleas Court, Ohio, based upon Conrad's breach of the License Agreement and Separation Agreement with PMD and the noncompetition covenants contained therein (the "State Court Litigation").

23. After filing its complaint, PMD requested an order enjoining Conrad from violating the License Agreement and the Separation Agreement. After a five (5) day hearing during which approximately two dozen witnesses testified, the Magistrate issued detailed findings and granted PMD's motion for preliminary injunction. The Court later sustained the Magistrate's decision, including the injunctive relief, in an Entry dated November 9, 2004.

24. In the State Court Litigation Conrad conceded that Carolina Bedding's structure, strategy, training, and advertising, as well as all aspects of Carolina Bedding were "very or extremely similar" to PMD, and that Carolina Direct was "modeled after PMD." Magistrate's Decision

Sustaining Plaintiff's Motion for a Preliminary Injunction, Filed February 9, 2004 ("Magistrate's October 4, 2004 Decision") at 23 (¶61) (attached hereto as Exhibit A).

25. The Court in the State Court Litigation noted, "[n]ot without irony, the license/dealer agreement utilized by Carolina Direct, as well as its successor, contains a noncompetition provision more or less identical to that of PMD's." Magistrate's October 4, 2004 Decision at 23 (¶62). According to the Court, Conrad testified that noncompetition and confidentiality agreements were necessary because he "didn't want his business imitated" and he needed to "protect his income and opportunity." *Id.* at 23-24.

26. The Court found in the State Court Litigation that Carolina Bedding's documents that it distributed to licensees to be nearly identical to PMD's documents and Conrad's representation that he was "unaware that they came from PMD" to be "incredible." *Id.* at 27 (¶70).

27. Conrad ignored the Court's preliminary injunction and continued to operate in violation of the Court's Order.

28. Subsequent, as the matter progressed toward trial and the permanent injunction sought, the Court held that PMD "has a legitimate business interest in protecting itself against competition from [Conrad]. [PMD] spent significant resources in training [Conrad], from the use of its training manuals to attendance at various seminars and conferences, to formal training." (Decision and Entry Granting Plaintiff's Request for Permanent Injunction and Damages Against Defendant Darren Conrad dated January 26, 2009 (The "2009 Injunction Entry") at 7; attached hereto as Exhibit B).

29. The Court further held that, "[PMD] also disclosed its proprietary information to [Conrad], including information to which [Conrad] was exposed as a District Manager." (*Id.*).

30. The Court found that “the evidence suggests that [Conrad] made significant efforts to conceal his intention of establishing a competing business from [PMD]. Therefore, the Court finds [PMD’s] non-competition agreements are a legitimate way to protect its business interests.” (*Id.*).

31. Both the magistrate and the judge “found that [Conrad] essentially conceded that he had established a competing business (or businesses) which mirrored the program established at PMD.” (*Id.*). The Franklin County Common Pleas Judge further held that Conrad “had or has established competing dealers within a 100 mile radius in Charleston, South Carolina; Charlotte, North Carolina; Wilmington, North Carolina; Myrtle Beach, SC; Ft. Lauderdale, Florida; Fayetteville, North Carolina; Jacksonville, Florida; and Knoxville, Tennessee and possibly other locations where PMD dealerships either existed at the time of [Conrad’s] separation or were in the planning stages at the time the Separation Agreement was executed.” (*Id.* at 8).

32. The Court found that “[a]fter reviewing the evidence presented at the trial on the merits, as well as the history of this case as a whole . . . [Conrad] did engage in business activity that either indirectly or directly competed with [PMD’s] business in violation of the non-compete provisions in both agreements. [Conrad] also established competing dealers within a 100-mile radius of several of [PMD’s] dealerships. These actions violated [PMD’s] non-compete agreements with [PMD], and thus, the Court finds [Conrad] breached its contracts with [PMD].” (*Id.* at 8).

33. The Court found that PMD’s business materials and methodologies are trade secrets and Defendant [Conrad] has therefore violated the Uniform Trade Secrets Act.” (*Id.* at 11).

34. The Court noted that “[a]t the preliminary injunction stage, the following injunctive relief was granted: for a period of three years from the date of the Court’s determination, Defendant

Darren Conrad was preliminarily enjoined from the following (1) engaging in or being associated, in any way, in any business or other activity related to the sale of retail furniture or bedding, that either directly or indirectly competes with the business of PMD and its dealers, within a radius of one hundred (100) miles from any territory serviced by PMD as of the date of the execution of the Separation Agreement, or any territory in which PMD had planned or taken steps to service through a License and/or Dealer Agreement as of the time of the execution of the Separation Agreement, (2) calling upon any business contact of PMD for the purposes of soliciting or selling competitive products or services, (3) disclosing, using or training others to use the PMD program, (4) disclosing, using, reproducing or disseminating any or all of PMD's training materials, and (5) disclosing PMD's business plans, including but not limited to information indicating the geographic areas PMD has targeted for expansion." (*Id.* at 15).

35. Although the three year injunction was entered as of May 2003 (through May 2006), in the Court's 2009 Injunction Entry, it found: "it is clear to the Court that [Conrad] did not abide by the restrictions imposed by the preliminary injunction. Instead, [Conrad's] own testimony establishes that he continues to operate dealerships and/or indirectly compete with PMD by servicing dealerships in territories such as Charlotte, North Carolina" (*Id.*). "Because Defendant has continued to violate the restrictions imposed by the covenant and the preliminary injunction, the Court finds it is appropriate to award a permanent injunction and to extend the period for the injunction an additional 15 months from the date of this Decision." (*Id.* at 16).

36. Upon information and belief, defendants Carolina Bedding Direct, LLC and Mattress By Appointment, LLC are successors-in-interest and pass-through, wholly-owned entities of Darren Conrad that continue in operation to this day in violation of the Franklin County Common Pleas

Court's permanent injunction and they existed and operated in violation of the Court's fifteen month injunction from August 26, 2009 to November 26, 2010.

37. Upon information and belief, through the actions of Darren Conrad, defendants Carolina Bedding Direct, LLC and Mattress By Appointment, LLC, have obtained and continue to use PMD's trade secrets, including PMD's business materials and methodologies, in violation of Ohio Uniform Trade Secrets Act, Ohio Rev. Code §§1333.61, *et seq.*

38. Upon information and belief, through the actions of Darren Conrad, defendants Carolina Bedding Direct, LLC and Mattress By Appointment, LLC, have disseminated to CBD or MBA dealers or licensees, the trade secrets and methodologies of PMD, causing harm that will be difficult to quantify but runs into the tens of millions of dollars.

V. CAUSES OF ACTION

COUNT I

Violation of Ohio's Uniform Trade Secrets Act; Ohio Rev. Code §§1333.61, *et seq.*

39. Plaintiff hereby adopts and incorporates by reference paragraphs 1 through 38.

40. Plaintiff brings this claim pursuant to Ohio's Uniform Trade Secrets Act, Ohio Rev. Code §§1333.61, *et seq.*

41. As described above, defendants Carolina Bedding Direct, LLC and Mattress By Appointment, LLC, by and through Darren Conrad, have willfully and maliciously misappropriated the trade secrets of PMD (now RSS) and have continuously and consistently since 2003 violated Ohio's Uniform Trade Secrets Act, Ohio Rev. Code §§1333.61, *et seq.*

42. Further, Darren Conrad, the owner and operator of both defendants Carolina Bedding Direct, LLC and Mattress By Appointment, LLC, has willfully ignored the Ohio Common Pleas Court by blatantly and continuously violating the Court's multiple injunctions.

43. Defendants Carolina Bedding Direct, LLC and Mattress By Appointment, LLC, by and through Darren Conrad, did willfully and maliciously acquire PMD's (now RSS's) trade secrets, knowingly, or with reason to know, that the trade secrets were acquired by improper means.

44. Defendants Carolina Bedding Direct, LLC and Mattress By Appointment, LLC, by and through Darren Conrad, did willfully and maliciously use PMD's (now RSS's) trade secrets without the express or implied consent of either PMD or RSS.

45. At the time defendants Carolina Bedding Direct, LLC and Mattress By Appointment, LLC used PMD's (now RSS's) trade secrets, Defendants knew or had reason to know that the knowledge of the trade secret they acquired was through Darren Conrad who had utilized improper means to acquire the trade secrets, as held by the Franklin County Common Pleas Court.

46. Plaintiff has been damaged by defendants Carolina Bedding Direct, LLC and Mattress By Appointment, LLC's willful and malicious conduct in an amount to be determined at trial that exceeds \$75,000.00 exclusive of interest and costs.

47. Pursuant to Ohio Rev. Code §§1333.62 through 1333.64, Plaintiff is entitled to (1) permanent injunctive relief precluding Defendants from using Plaintiff's trade secrets; or in the alternative, (2) exceptional injunctive relief that conditions future use of the trade secrets by Defendants or any subsequent related entities, upon payment of a reasonable royalty; (3) actual damages caused by the misappropriation; (4) unjust enrichment damages caused by the misappropriation that is not taken into account in computing actual loss; or in the alternative (5) past and future reasonable royalty payments; (6) punitive damages of up to three times the amount awarded in actual and unjust enrichment damages (or past royalties); and (7) attorneys' fees.

COUNT II
Civil Conspiracy

48. Plaintiff hereby adopts and incorporates by reference paragraphs 1 through 47.
49. Upon information and belief, Defendants have conspired with others, including former PMD distributors and vendors to violate PMD's statutory and contractual rights and conceal their acts from PMD. In doing so, Defendants and their co-conspirators have acted intentionally and for the ulterior motive and purpose of competing with PMD through the use of the trade secrets stolen from PMD.
50. The actions of the Conspiracy were committed wrongfully, without reasonable or lawful excuse, to the injury of PMD and RSS, and with knowledge of the wrongfulness of the actions.
51. Plaintiff has been damaged by the conspiracy's actions in an amount to be determined at trial that exceeds \$75,000.00 exclusive of interest and costs.

WHEREFORE, Plaintiff Retail Service Systems, Inc. respectfully demands a trial by jury and prays for judgment as follows:

- A. Injunctive Relief: a preliminary and permanent injunction enjoining Defendants from use of RSS's trade secrets and proprietary materials;
- B. Damages: Actual damages and unjust enrichment damages;
- C. Royalties: Past and future royalties;
- D. Punitive Damages: Punitive or exemplary damages in an amount to be determined by the Court under statute or a jury;
- E. Interest: Pre-judgment and post-judgment interest to Plaintiff, as allowed by law;

- F. Attorneys' Fees, Costs and Expenses: Attorneys' fees, costs and expenses to Plaintiff; and
- G. Such other and further relief as this Court deems just and proper.

Date: October 4, 2013

Respectfully submitted,

/s/ Shawn J. Organ

Shawn J. Organ (OH 0042052)

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Trial Attorney

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JURY TRIAL DEMAND

Plaintiffs hereby demand a trial by jury on all Counts so triable.

/s/ Shawn J. Organ

EXHIBIT 2

**U.S. District Court
Southern District of Ohio (Columbus)
CIVIL DOCKET FOR CASE #: 2:13-cv-00994-EAS-EPD**

Retail Service Systems, Inc. v. Carolina Bedding Direct, LLC
et al

Assigned to: Chief Judge Edmund A. Sargus
Referred to: Magistrate Judge Elizabeth Preston Deavers
Demand: \$9,999,000

related Case: 2:15-cv-02769-EAS-EPD

Cause: 28:1332 Diversity-Tort/Non-Motor Vehicle

Date Filed: 10/04/2013

Jury Demand: Plaintiff

Nature of Suit: 380 Personal Property:
Other

Jurisdiction: Diversity

Interested Party

Organ Cole LLP

Plaintiff

Retail Service Systems, Inc.
6059 Frantz Road, Suite 204
Dublin, OH 43017

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TERMINATED: 10/13/2015

V.

Defendant

Carolina Bedding Direct, LLC

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Columbus, OH 43216-1008
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Email: wasieck@vorys.com
TERMINATED: 10/27/2014

Defendant

Mattress By Appointment, LLC

represented by **Mattress By Appointment, LLC**
c/o Statutory Agent Darren B. Conrad
320 1st Street North, Apt. 904
Jacksonville Beach, FL 32250
PRO SE

Daniel J Clark
(See above for address)
TERMINATED: 10/27/2014
LEAD ATTORNEY

Angelyne E. Lisinski
(See above for address)
TERMINATED: 10/27/2014

William Andrew Sieck
(See above for address)
TERMINATED: 10/27/2014

Defendant

John/Jane Does 1 through 50

V.

Respondent

Mattress by Appointment, LLC
EIN 45-3622490

represented by **Mattress by Appointment, LLC**
PRO SE

William Andrew Sieck
(See above for address)
TERMINATED: 10/27/2014

Date Filed	#	Docket Text
10/04/2013	<u>1</u>	COMPLAINT with JURY DEMAND against All Defendants (Filing fee \$ 400 paid - receipt number: 0648-4289052), filed by Retail Service Systems, Inc.. (Attachments: # <u>1</u> Exhibit Complaint Exhibit A, # <u>2</u> Exhibit Complaint Exhibit B, # <u>3</u> Civil Cover Sheet, # <u>4</u> Summons Form, # <u>5</u> Summons Form) (Organ, Shawn) (Entered: 10/04/2013)
10/07/2013	<u>2</u>	Summons Issued as to Carolina Bedding Direct, LLC and Mattress By

		Appointment, LLC. (er1) (Entered: 10/07/2013)
10/09/2013	<u>3</u>	CERTIFICATE of Mailing by Clerk's Office. (sr1) (Entered: 10/09/2013)
10/15/2013	<u>4</u>	SUMMONS Returned Executed as to Defendant Carolina Bedding Direct, LLC. Carolina Bedding Direct, LLC served on 10/12/2013, answer due 11/4/2013. (pes1) (Entered: 10/15/2013)
11/06/2013	<u>5</u>	MOTION for Default Judgment against Defendant Carolina Bedding Direct, LLC by Plaintiff Retail Service Systems, Inc.. Responses due by 12/2/2013 (Attachments: # <u>1</u> Affidavit Shawn J. Organ, # <u>2</u> Text of Proposed Order) (Organ, Shawn) (Entered: 11/06/2013)
11/20/2013	<u>6</u>	MOTION to Withdraw <i>Plaintiff's Motion for Default Judgment, with Memorandum in Support</i> by Plaintiff Retail Service Systems, Inc.. (Attachments: # <u>1</u> Text of Proposed Order) (Organ, Shawn) (Entered: 11/20/2013)
11/20/2013	<u>7</u>	Application to Clerk for entry of default against Carolina Bedding Direct, LLC , <i>with Memorandum in Support</i> . (Attachments: # <u>1</u> Affidavit of Shawn J. Organ, # <u>2</u> Text of Proposed Order) (Organ, Shawn) (Entered: 11/20/2013)
11/21/2013	<u>8</u>	Clerk's ENTRY OF DEFAULT as to Defendant Carolina Bedding Direct, LLC. (er1) (Entered: 11/21/2013)
11/21/2013	<u>9</u>	ORDER granting <u>6</u> Motion to Withdraw. Signed by Judge George C Smith on 11-21-13. (ga) (Entered: 11/21/2013)
11/21/2013	<u>10</u>	MOTION for Default Judgment against Carolina Bedding Direct, LLC by Plaintiff Retail Service Systems, Inc.. Responses due by 12/16/2013 (Attachments: # <u>1</u> Affidavit of Shawn J. Organ, # <u>2</u> Text of Proposed Order) (Organ, Shawn) (Entered: 11/21/2013)
12/05/2013	<u>11</u>	Summons Returned Unexecuted filed by Retail Service Systems, Inc. as to Mattress By Appointment, LLC. Summons and complaint was incorrectly sent to Organ Cole & Stock, LLP by Post Office. (sr1) (Entered: 12/06/2013)
12/06/2013	<u>12</u>	CERTIFICATE of Mailing By Clerk's Office. (sr1) (Entered: 12/06/2013)
12/12/2013	<u>13</u>	ORDER. Signed by Judge George C Smith on 12-12-13. (ga) (Entered: 12/12/2013)
12/12/2013		Set/Reset Hearings: Evidentiary Hearing set for 2/20/2014 @ 01:30 PM in Courtroom 220 - Columbus before Magistrate Judge Mark R. Abel. (er1) (Entered: 12/12/2013)
12/31/2013	<u>14</u>	MOTION to Compel <i>and for Sanctions</i> by Plaintiff Retail Service Systems, Inc.. (Attachments: # <u>1</u> Exhibit Exhibits to Motion to Compel, # <u>2</u> Text of Proposed Order Proposed Order for Motion to Compel) (Organ, Shawn) (Entered: 12/31/2013)
01/24/2014	<u>15</u>	Application to Clerk for entry of default against Mattress By Appointment, LLC . (Attachments: # <u>1</u> Affidavit Affidavit of Shawn Organ, # <u>2</u> Text of Proposed Order Proposed Entry of Default) (Organ, Shawn) (Entered: 01/24/2014)
01/27/2014	<u>16</u>	Clerk's ENTRY OF DEFAULT as to Defendant Mattress By Appointment, LLC.

		(er1) (Entered: 01/27/2014)
01/27/2014	<u>17</u>	MOTION for Default Judgment against Mattress By Appointment, LLC by Plaintiff Retail Service Systems, Inc.. Responses due by 2/21/2014 (Attachments: # <u>1</u> Affidavit Affidavit of Shawn Organ, # <u>2</u> Text of Proposed Order Proposed Order Granting Motion For Default Judgment) (Organ, Shawn) (Entered: 01/27/2014)
01/30/2014	<u>18</u>	MOTION to Set Aside Default by Defendants Carolina Bedding Direct, LLC, Mattress By Appointment, LLC. (Attachments: # <u>1</u> Exhibit 1: Motion to Dismiss, # <u>2</u> Exhibit 2: Affidavit of Darren Conrad, # <u>3</u> Exhibit 3: Affidavit of Reid Penuel, # <u>4</u> Exhibit 4: Letter to Shawn Organ) (Sieck, William) (Entered: 01/30/2014)
01/31/2014	<u>19</u>	ORDER denying <u>14</u> Motion to Compel. Signed by Magistrate Judge Mark R. Abel on 01/31/2014. (sr1) (Entered: 01/31/2014)
02/07/2014	<u>20</u>	ORDER permitting discovery to begin before a Rule 26(f) conference of the parties. Signed by Magistrate Judge Mark R. Abel on 2/7/2014. (Abel, Mark) (Entered: 02/07/2014)
02/07/2014		Minute Entry for proceedings held before Magistrate Judge Mark R. Abel: Telephone Conference held on 2/7/2014. (Rubey, Rachel) (Entered: 02/10/2014)
02/10/2014	<u>21</u>	MOTION to Continue <i>February 20, 2014 Evidentiary Hearing and MOTION for Expedited Briefing Schedule</i> by Defendants Carolina Bedding Direct, LLC, Mattress By Appointment, LLC. (Attachments: # <u>1</u> Exhibit A, # <u>2</u> Exhibit B) (Lisinski, Angelyne) (Entered: 02/10/2014)
02/13/2014	<u>22</u>	NOTICE of Appearance by Gerrod Louis Bede for Plaintiff Retail Service Systems, Inc. (Bede, Gerrod) (Entered: 02/13/2014)
02/13/2014	<u>23</u>	RESPONSE in Opposition re <u>21</u> MOTION to Continue <i>February 20, 2014 Evidentiary Hearing and MOTION for Expedited Briefing Schedule</i> filed by Plaintiff Retail Service Systems, Inc.. (Attachments: # <u>1</u> Exhibit A - Email Organ to Sieck) (Organ, Shawn) (Entered: 02/13/2014)
02/13/2014	<u>24</u>	Second MOTION to Compel <i>Regarding Nicholas Lyle</i> by Plaintiff Retail Service Systems, Inc.. (Attachments: # <u>1</u> Exhibit Exhibits 1-9, # <u>2</u> Text of Proposed Order) (Organ, Shawn) (Entered: 02/13/2014)
02/13/2014	<u>25</u>	ORDER denying <u>21</u> Motion to Continue. The hearing will go forward unless Judge Smith issues an order vacating or setting aside his 12/12/2013 Order. Plaintiffs are ORDERED to produce the documents that they intend to offer at the 02/20/2014 hearing by 1:00 p.m. on 02/19/2014. Signed by Magistrate Judge Mark R. Abel on 02/13/2014. (sr1) (Entered: 02/13/2014)
02/13/2014		Minute Entry for proceedings held before Magistrate Judge Mark R. Abel: Telephone Conference held on 2/13/2014. (Rubey, Rachel) (Entered: 02/19/2014)
02/16/2014	<u>26</u>	MOTION to Expedite <i>Discovery</i> by Plaintiff Retail Service Systems, Inc.. (Attachments: # <u>1</u> Exhibit A, # <u>2</u> Exhibit B, # <u>3</u> Exhibit C, # <u>4</u> Exhibit D, # <u>5</u> Exhibit E, # <u>6</u> Exhibit F) (Organ, Shawn) (Entered: 02/16/2014)
02/17/2014	<u>27</u>	MOTION to Set Aside Default , <i>Vacate Hearing Date, Deny Motion for Default Judgment and For Leave to Move or Plead</i> by Defendant Carolina Bedding

		Direct, LLC. (Attachments: # <u>1</u> Exhibit Affidavit of Darren Conrad, # <u>2</u> Exhibit 2014-01-24 Letter Clark to Organ, # <u>3</u> Exhibit 2014-01-29 Letter Organ to Clark, # <u>4</u> Exhibit 2014-01-31 Letter Organ to Clark, # <u>5</u> Exhibit 2014-01-31 Letter Clark to Organ, # <u>6</u> Exhibit 2014-02-03 & 04 Emails, # <u>7</u> Exhibit 2014-02-07 Email Bede to Clark, # <u>8</u> Exhibit 2014-02-11 Emails, # <u>9</u> Exhibit 2014-02-14 Letter Clark to Organ) (Sieck, William) (Entered: 02/17/2014)
02/17/2014	<u>28</u>	MOTION to Continue <i>February 20, 2014 Evidentiary Hearing and MOTION for Expedited Briefing Schedule</i> by Defendant Carolina Bedding Direct, LLC. (Attachments: # <u>1</u> Exhibit 2014-02-07 Email, # <u>2</u> Exhibit 2014-02-14 Email, # <u>3</u> Exhibit 2014-02-14 Letter) (Sieck, William) (Entered: 02/17/2014)
02/19/2014		Minute Entry for proceedings held before Magistrate Judge Mark R. Abel: Status Conference held on 2/19/2014. (Rubey, Rachel) (Entered: 02/21/2014)
02/20/2014	<u>29</u>	SCHEDULING CONFERENCE ORDER granting <u>18</u> Motion to Set Aside Default. Defendant Carolina BeddingDirect, LLC [NC]'s 02/17/2014 motions to vacate the 02/20/2014 hearing onplaintiffs 11/21/2013 motion for default judgment is GRANTED to the following. Plaintiffs counsel asked that the hearing on the 01/27/2014 motion for default judgment against defendant Mattress By Appointment, LLC (doc. 17) be combined with that as to the motion for default judgment against Carolina Bedding Direct, LLC [NC]. Accordingly, the hearing noticed for 02/20/2014 is CONTINUED. Signed by Magistrate Judge Mark R. Abel on 02/20/2014. (sr1) (Entered: 02/20/2014)
02/20/2014	<u>30</u>	RESPONSE in Opposition re <u>17</u> MOTION for Default Judgment against Mattress By Appointment, LLC filed by Defendant Mattress By Appointment, LLC. (Clark, Daniel) (Entered: 02/20/2014)
02/24/2014	<u>31</u>	RESPONSE in Opposition re <u>18</u> MOTION to Set Aside Default filed by Plaintiff Retail Service Systems, Inc.. (Attachments: # <u>1</u> Exhibit A - Letter objecting to subpoena on Carolina Bedding (NC)'s behalf) (Organ, Shawn) (Entered: 02/24/2014)
02/26/2014	<u>32</u>	REPLY to <u>30</u> Response to <u>17</u> MOTION for Default Judgment against Mattress By Appointment, LLC filed by Plaintiff Retail Service Systems, Inc.. (Organ, Shawn) Modified text and added link on 2/27/2014 (er1). (Entered: 02/26/2014)
02/27/2014	<u>33</u>	ORDER REFERRING MOTION: <u>17</u> MOTION for Default Judgment against Mattress By Appointment, LLC filed by Retail Service Systems, Inc., <u>27</u> MOTION to Set Aside Default , <i>Vacate Hearing Date, Deny Motion for Default Judgment and For Leave to Move or Plead</i> filed by Carolina Bedding Direct, LLC. Signed by Judge George C Smith on 2/27/14. (lww1) (Entered: 02/27/2014)
03/01/2014	<u>34</u>	SCHEDULING ORDER establishing deadlines for discovery and briefing related to plaintiff's motions for default judgment and defendant's motions to set aside entry of default and finding as moot <u>24</u> Motion to Compel; granting <u>26</u> Motion to Expedite; granting <u>28</u> Motion to Continue. Signed by Magistrate Judge Mark R. Abel on 3/1/2014. (Abel, Mark) (Entered: 03/01/2014)
03/03/2014	<u>35</u>	ORDER: A telephone conference is tentatively scheduled for 03/18/2014 at 1:30 p.m. to discuss any discovery disputes that the parties have not successfully resolved pursuant to the 03/01/2014 Order (doc. 34). Signed by Magistrate Judge Mark R. Abel on 03/03/2014. (sr1) (Entered: 03/03/2014)

03/10/2014	<u>36</u>	NOTICE of Appearance by Joshua M Feasel for Plaintiff Retail Service Systems, Inc. (Feasel, Joshua) (Entered: 03/10/2014)
03/11/2014	<u>37</u>	PROTECTIVE ORDER. Signed by Magistrate Judge Mark R. Abel on 03/11/2014. (sr1) (Entered: 03/11/2014)
03/13/2014	<u>38</u>	REPLY to Response to Motion re <u>18</u> MOTION to Set Aside Default filed by Defendants Carolina Bedding Direct, LLC, Mattress By Appointment, LLC. (Attachments: # <u>1</u> Exhibit A, # <u>2</u> Exhibit B, # <u>3</u> Exhibit C, # <u>4</u> Exhibit D) (Sieck, William) (Entered: 03/13/2014)
03/13/2014	<u>39</u>	RESPONSE in Opposition re <u>27</u> MOTION to Set Aside Default , <i>Vacate Hearing Date, Deny Motion for Default Judgment and For Leave to Move or Plead</i> filed by Plaintiff Retail Service Systems, Inc.. (Attachments: # <u>1</u> Exhibit A - Carolina Bedding (NC)'s Interrogatory Responses, # <u>2</u> Exhibit B - Designation of statutory agent, # <u>3</u> Exhibit C - Letter objecting to subpoena, # <u>4</u> Exhibit D - Carolina Bedding (NC)'s initial document production, # <u>5</u> Exhibit E - Letter re Carolina Bedding (NC)'s supplemental document production, # <u>6</u> Exhibit F - Letter re MBA (EIN 46), # <u>7</u> Exhibit G - Letter re MBA (EIN 45), # <u>8</u> Exhibit H - Letter re Carolina Bedding (FL), # <u>9</u> Exhibit I - Excerpts from Deposition of Nicholas Lyle, # <u>10</u> Exhibit J - Declaration of G. Bede, # <u>11</u> Exhibit J.1 - Notes produced by Carolina Bedding (Hagerstown), # <u>12</u> Exhibit J.2. - Email from Carolina Bedding (Hagerstown)) (Organ, Shawn) (Entered: 03/13/2014)
03/17/2014	<u>40</u>	NOTICE by Plaintiff Retail Service Systems, Inc. <i>of service of subpoenas</i> (Attachments: # <u>1</u> Exhibit A - Declaration of G. Bede, # <u>2</u> Exhibit B - Email attaching copies of subpoenas) (Organ, Shawn) (Entered: 03/17/2014)
03/17/2014	<u>41</u>	MOTION to Compel <i>directed at Defendants Carolina Bedding (NC), Carolina Bedding (FL), Mattress By Appointment (EIN 46-xxx), and Mattress By Appointment (EIN 45-xxx)</i> by Plaintiff Retail Service Systems, Inc.. (Attachments: # <u>1</u> Exhibit A, # <u>2</u> Exhibit B, # <u>3</u> Exhibit C, # <u>4</u> Exhibit D, # <u>5</u> Exhibit E, # <u>6</u> Exhibit F, # <u>7</u> Exhibit G, # <u>8</u> Exhibit H, # <u>9</u> Exhibit I, # <u>10</u> Exhibit J, # <u>11</u> Exhibit K, # <u>12</u> Exhibit L, # <u>13</u> Exhibit M, # <u>14</u> Exhibit N, # <u>15</u> Exhibit O, # <u>16</u> Exhibit P, # <u>17</u> Exhibit Q) (Organ, Shawn) (Entered: 03/17/2014)
03/18/2014		Minute Entry for proceedings held before Magistrate Judge Mark R. Abel: Telephone Conference held on 3/18/2014. (Rubey, Rachel) (Entered: 03/19/2014)
03/19/2014	<u>42</u>	DISCOVERY CONFERENCE ORDER re <u>41</u> Defendants must respond to plaintiff's MOTION to Compel on or before 3/28/2014. Carolina Bedding (NC)'s Rule 30(b)(6) deposition should be rescheduled as ordered. Additional observations and rulings. Signed by Magistrate Judge Mark R. Abel on 3/19/2014. (Abel, Mark) (Entered: 03/19/2014)
03/27/2014	<u>43</u>	First MOTION to Compel <i>Full and Complete Discovery Responses</i> , First MOTION to Expedite <i>Briefing</i> by Defendant Carolina Bedding Direct, LLC. (Attachments: # <u>1</u> Exhibit A, # <u>2</u> Exhibit B, # <u>3</u> Exhibit C, # <u>4</u> Exhibit D, # <u>5</u> Exhibit E, # <u>6</u> Exhibit F) (Lisinski, Angelyne) (Entered: 03/27/2014)
03/28/2014	<u>44</u>	RESPONSE to Motion re <u>41</u> MOTION to Compel <i>directed at Defendants Carolina Bedding (NC), Carolina Bedding (FL), Mattress By Appointment (EIN 46-xxx), and Mattress By Appointment (EIN 45-xxx)</i> filed by Defendant Carolina

		Bedding Direct, LLC. (Attachments: # <u>1</u> Exhibit A, # <u>2</u> Exhibit B, # <u>3</u> Exhibit C) (Sieck, William) (Entered: 03/28/2014)
03/28/2014	<u>45</u>	RESPONSE to Motion re <u>41</u> MOTION to Compel <i>directed at Defendants Carolina Bedding (NC), Carolina Bedding (FL), Mattress By Appointment (EIN 46-xxx), and Mattress By Appointment (EIN 45-xxx)</i> filed by Defendant Mattress By Appointment, LLC, Respondent Mattress by Appointment, LLC. (Attachments: # <u>1</u> Exhibit A, # <u>2</u> Exhibit B, # <u>3</u> Exhibit C, # <u>4</u> Exhibit D, # <u>5</u> Exhibit E, # <u>6</u> Exhibit F, # <u>7</u> Exhibit G, # <u>8</u> Exhibit H, # <u>9</u> Exhibit I, # <u>10</u> Exhibit J, # <u>11</u> Exhibit K) (Sieck, William) (Entered: 03/28/2014)
03/31/2014	<u>46</u>	MOTION to Seal Document <u>43</u> First MOTION to Compel <i>Full and Complete Discovery Responses</i> First MOTION to Expedite <i>Briefing</i> , MOTION to Strike <u>43</u> First MOTION to Compel <i>Full and Complete Discovery Responses</i> First MOTION to Expedite <i>Briefing</i> , MOTION for Sanctions by Plaintiff Retail Service Systems, Inc.. (Attachments: # <u>1</u> Exhibit A - Letter from S. Organ to B. Sieck, # <u>2</u> Exhibit B - Email from J. Feasel re document production) (Organ, Shawn) (Entered: 03/31/2014)
03/31/2014	<u>47</u>	ORDER granting <u>46</u> Motion to Seal Document confidential exhibits; denying <u>46</u> Motion to Strike ; denying <u>46</u> Motion for Sanctions. Signed by Magistrate Judge Mark R. Abel on 03/31/2014. (sr1) (Entered: 03/31/2014)
03/31/2014	<u>48</u>	REPLY to <u>39</u> Response to <u>27</u> MOTION to Set Aside Default , <i>Vacate Hearing Date, Deny Motion for Default Judgment and For Leave to Move or Plead</i> filed by Defendant Carolina Bedding Direct, LLC. (Attachments: # <u>1</u> Exhibit A, # <u>2</u> Exhibit B) (Sieck, William) Modified text and added link on 4/1/2014 (er1). (Entered: 03/31/2014)
04/04/2014	<u>49</u>	MOTION to Seal by Plaintiff Retail Service Systems, Inc.. (Attachments: # <u>1</u> Text of Proposed Order Proposed Order Granting Plaintiff's Motion To Seal Confidential Exhibits) (Organ, Shawn) (Entered: 04/04/2014)
04/04/2014	<u>50</u>	NOTICE by Plaintiff Retail Service Systems, Inc. of <i>Law Firm's Name Change</i> (Organ, Shawn) (Entered: 04/04/2014)
04/04/2014	<u>51</u>	REPLY to Response to Motion re <u>41</u> MOTION to Compel <i>directed at Defendants Carolina Bedding (NC), Carolina Bedding (FL), Mattress By Appointment (EIN 46-xxx), and Mattress By Appointment (EIN 45-xxx)</i> , <i>Partially Withdrawing Its Motion to Compel with Regard to Carolina Bedding (NC)</i> filed by Plaintiff Retail Service Systems, Inc.. (Organ, Shawn) (Entered: 04/04/2014)
04/07/2014	<u>52</u>	First MOTION for Protective Order to <i>Limit the Scope of the Deposition of its 30(b)(6) Witness</i> , First MOTION to Expedite <i>Briefing</i> by Defendant Carolina Bedding Direct, LLC. (Attachments: # <u>1</u> Exhibit A, # <u>2</u> Exhibit B, # <u>3</u> Exhibit C, # <u>4</u> Exhibit D, # <u>5</u> Exhibit E, # <u>6</u> Exhibit F, # <u>7</u> Exhibit G, # <u>8</u> Exhibit H, # <u>9</u> Exhibit I) (Lisinski, Angelyne) (Entered: 04/07/2014)
04/14/2014	<u>53</u>	REPLY to <u>45</u> Response to <u>41</u> MOTION to Compel <i>directed at Defendants Carolina Bedding (NC), Carolina Bedding (FL), Mattress By Appointment (EIN 46-xxx), and Mattress By Appointment (EIN 45-xxx)</i> filed by Plaintiff Retail Service Systems, Inc.. (Attachments: # <u>1</u> Exhibit A - Carolina Bedding (FL)'s articles of amendment) (Organ, Shawn) Modified text and added link on 4/15/2014 (er1). (Entered: 04/14/2014)

04/15/2014	<u>54</u>	MOTION to Seal Document by Plaintiff Retail Service Systems, Inc.. (Organ, Shawn) (Entered: 04/15/2014)
04/15/2014	<u>55</u>	ORDER granting <u>54</u> Motion to Seal Document. Signed by Magistrate Judge Mark R. Abel on 4/15/2014. (Abel, Mark) (Entered: 04/15/2014)
04/15/2014	<u>56</u>	**SEALED** Exhibits B and C to RSS's Reply In Support of Its Motion <u>53</u> . (Attachments: # <u>1</u> Exhibit B, # <u>2</u> Exhibit C) (sr1) (Entered: 04/15/2014)
04/18/2014	<u>57</u>	MOTION to Amend/Correct <i>Scheduling Order</i> by Plaintiff Retail Service Systems, Inc.. (Organ, Shawn) (Entered: 04/18/2014)
04/18/2014	<u>58</u>	MOTION to Compel <i>Compliance with Subpoenas to Power Marketing Direct, Inc. and PMD Furniture Direct, Inc.</i> by Defendant Carolina Bedding Direct, LLC. (Attachments: # <u>1</u> Exhibit A-1, # <u>2</u> Exhibit A-2, # <u>3</u> Exhibit B, # <u>4</u> Exhibit C, # <u>5</u> Exhibit D) (Sieck, William) (Entered: 04/18/2014)
04/18/2014	<u>59</u>	MOTION to Compel <i>Compliance with Subpoena to Associated Licensees of PMD, LLC</i> by Defendant Carolina Bedding Direct, LLC. (Attachments: # <u>1</u> Exhibit A, # <u>2</u> Exhibit B, # <u>3</u> Exhibit C, # <u>4</u> Exhibit D) (Sieck, William) (Entered: 04/18/2014)
04/18/2014	<u>60</u>	MOTION for Discovery <i>on an Expedited Basis Regarding Ownership of Plaintiff RSS, Inc.</i> by Defendant Carolina Bedding Direct, LLC. (Attachments: # <u>1</u> Exhibit A- Andrew Second Amended Complaint, # <u>2</u> Exhibit B-1 - Judgment Entry, # <u>3</u> Exhibit B-2 Satisfaction of Judgment, # <u>4</u> Exhibit C- Articles of Organization, # <u>5</u> Exhibit D- Declaration of Darren Conrad, # <u>6</u> Exhibit E- 3/11/2014 Letter, # <u>7</u> Exhibit F- 3/14/2014 Letter, # <u>8</u> Exhibit G- Second Set of Requests for Admission, # <u>9</u> Exhibit H- 4/1/14 Letter) (Clark, Daniel) (Entered: 04/18/2014)
04/21/2014	<u>61</u>	RESPONSE in Opposition re <u>43</u> First MOTION to Compel <i>Full and Complete Discovery Responses</i> First MOTION to Expedite <i>Briefing</i> filed by Plaintiff Retail Service Systems, Inc.. (Attachments: # <u>1</u> Exhibit A - Carolina Bedding (NC)'s First Discovery Requests) (Organ, Shawn) (Entered: 04/21/2014)
04/28/2014	<u>62</u>	NOTICE by Defendants Carolina Bedding Direct, LLC, Mattress By Appointment, LLC, Respondent Mattress by Appointment, LLC re <u>27</u> MOTION to Set Aside Default , <i>Vacate Hearing Date, Deny Motion for Default Judgment and For Leave to Move or Plead Notice of New Evidence</i> (Sieck, William) (Entered: 04/28/2014)
04/28/2014	<u>63</u>	NOTICE by Plaintiff Retail Service Systems, Inc. re <u>62</u> Notice (Other), <i>in response to Defendants' Notice of New Evidence</i> (Attachments: # <u>1</u> Exhibit A - LC Amendment and Name Change) (Organ, Shawn) (Entered: 04/28/2014)
04/28/2014	<u>64</u>	ORDER re <u>60</u> MOTION for Discovery <i>on an Expedited Basis Regarding Ownership of Plaintiff RSS, Inc.</i> filed by Carolina Bedding Direct, LLC. Plaintiff RSS's memo contra must be filed by Rule. Plaintiff may depose declarant Conrad about the facts asserted in his April 7, 2014 declaration. Signed by Magistrate Judge Mark R. Abel on 4/28/2014. (Abel, Mark) (Entered: 04/28/2014)
04/28/2014	<u>65</u>	RESPONSE to Motion re <u>49</u> MOTION to Seal filed by Defendant Carolina Bedding Direct, LLC. (Attachments: # <u>1</u> Exhibit 1, # <u>2</u> Exhibit 2, # <u>3</u> Exhibit 3, # <u>4</u> Exhibit 4, # <u>5</u> Exhibit 5) (Sieck, William) (Entered: 04/28/2014)

04/28/2014		Minute Entry for proceedings held before Magistrate Judge Mark R. Abel: Telephone Conference held on 4/28/2014. (Rubey, Rachel) (Entered: 04/30/2014)
05/01/2014	<u>66</u>	RESPONSE in Opposition re <u>52</u> First MOTION for Protective Order <i>to Limit the Scope of the Deposition of its 30(b)(6) Witness</i> First MOTION to Expedite Briefing filed by Plaintiff Retail Service Systems, Inc.. (Attachments: # <u>1</u> Exhibit A - 2014-04-08 Ltr Clark to Organ canceling 30(b)(6) deposition) (Organ, Shawn) (Entered: 05/01/2014)
05/08/2014	<u>67</u>	REPLY to Response to Motion re <u>43</u> First MOTION to Compel <i>Full and Complete Discovery Responses</i> First MOTION to Expedite Briefing filed by Defendant Carolina Bedding Direct, LLC. (Lisinski, Angelyne) (Entered: 05/08/2014)
05/12/2014	<u>68</u>	MOTION for Leave to File <i>Document Under Seal</i> by Defendants Carolina Bedding Direct, LLC, Mattress By Appointment, LLC. (Lisinski, Angelyne) (Entered: 05/12/2014)
05/12/2014	<u>69</u>	ORDER granting <u>68</u> Motion for Leave to File Document under Seal. Signed by Magistrate Judge Mark R. Abel on 5/12/2014. (Rubey, Rachel) (Entered: 05/12/2014)
05/12/2014	<u>70</u>	RESPONSE in Opposition re <u>60</u> MOTION for Discovery <i>on an Expedited Basis Regarding Ownership of Plaintiff RSS, Inc.</i> filed by Plaintiff Retail Service Systems, Inc.. (Attachments: # <u>1</u> Exhibit A - Declaration of S. Andrew, # <u>2</u> Exhibit B - 2014-03-11 Letter Clark to Organ, # <u>3</u> Exhibit C - 2014-03-14 Letter Clark to Organ, # <u>4</u> Exhibit D - CB(NC)'s Second Set of RFAs, # <u>5</u> Exhibit E - 2014-04-04 Letter Organ to Clark, # <u>6</u> Exhibit F - 2014-04-04 Letter Clark to Organ re doc production, # <u>7</u> Exhibit G - 2014-04-08 Letter Clark to Organ withdrawing RFAs) (Organ, Shawn) (Entered: 05/12/2014)
05/12/2014	<u>71</u>	Sealed Document. Asset Purchase Agreement in Support of <u>43</u> First MOTION to Compel. (pes1) (Entered: 05/13/2014)
05/14/2014	<u>72</u>	REPLY to <u>65</u> Response to <u>49</u> MOTION to Seal filed by Plaintiff Retail Service Systems, Inc. (Attachments: # <u>1</u> Exhibit A - 2014-03-31 Email B. Sieck to Court, # <u>2</u> Exhibit B - Carolina Bedding v. Darren Downen, Motion to Seal) (Organ, Shawn) Modified text and added link on 5/15/2014 (er1). (Entered: 05/14/2014)
05/16/2014	<u>73</u>	MOTION to Seal Document by Plaintiff Retail Service Systems, Inc.. (Attachments: # <u>1</u> Text of Proposed Order Proposed Order Granting Motion To File Confidential Exhibit Under Seal) (Organ, Shawn) (Entered: 05/16/2014)
05/19/2014	<u>74</u>	ORDER granting <u>73</u> Motion to Seal Document. Signed by Magistrate Judge Mark R. Abel on 05/19/2014. (sr) (Entered: 05/19/2014)
05/19/2014	<u>75</u>	MOTION to Compel by Plaintiff Retail Service Systems, Inc.. (Attachments: # <u>1</u> Exhibit Exhibit B, # <u>2</u> Exhibit Exhibit C, # <u>3</u> Exhibit Exhibit D, # <u>4</u> Exhibit Exhibit E, # <u>5</u> Exhibit Exhibit F, # <u>6</u> Affidavit Certification of Counsel) (Organ, Shawn) (Entered: 05/19/2014)
05/19/2014	<u>76</u>	REPLY to Response to Motion re <u>52</u> First MOTION for Protective Order <i>to Limit the Scope of the Deposition of its 30(b)(6) Witness</i> First MOTION to Expedite Briefing filed by Defendant Carolina Bedding Direct, LLC. (Lisinski, Angelyne) (Entered: 05/19/2014)

05/19/2014	<u>77</u>	**SEALED** Exhibit A to RSS's Motion To Compel (Doc. 75) filed by Plaintiff. (Attachments: # <u>1</u> Exhibit A) (sr1) (Entered: 05/20/2014)
05/23/2014	<u>78</u>	ORDER granting in part <u>41</u> Motion to Compel. Signed by Magistrate Judge Mark R. Abel on 05/23/2014. (sr1) (Entered: 05/23/2014)
05/23/2014	<u>79</u>	ORDER: Defendant Carolina Bedding Direct. LLCs 03/27/2014 motion to compel Retail Service Systems, Inc. to provide complete responses to discovery requests (doc. 43) is GRANTED in part. RSS is DIRECTED to supplement its responses and provide a privilege log within fourteen (14) days of the date of this Order. Signed by Magistrate Judge Mark R. Abel on 05/23/2014. (sr1) (Entered: 05/23/2014)
05/29/2014	<u>80</u>	REPLY to Response to Motion re <u>60</u> MOTION for Discovery <i>on an Expedited Basis Regarding Ownership of Plaintiff RSS, Inc.</i> filed by Defendant Carolina Bedding Direct, LLC. (Lisinski, Angelyne) (Entered: 05/29/2014)
06/03/2014	<u>81</u>	MOTION for Protective Order <i>Quashing Subpoena</i> by Defendant Carolina Bedding Direct, LLC. (Attachments: # <u>1</u> Exhibit A, # <u>2</u> Exhibit B, # <u>3</u> Exhibit C, # <u>4</u> Exhibit D, # <u>5</u> Exhibit E) (Sieck, William) (Entered: 06/03/2014)
06/04/2014	<u>82</u>	ORDER denying <u>81</u> Motion for Protective Order. Signed by Magistrate Judge Mark R. Abel on 6/4/2014. (Abel, Mark) (Entered: 06/04/2014)
07/23/2014	<u>83</u>	ORDER granting in part <u>60</u> Motion for Discovery. RSS is DIRECTED to respond to CBD Dissolveds second set of requests for admission previously served on plaintiff within fourteen (14) days of the date of this Order. Once CBD Dissolved reviews RSSs responses, it may renew its request for additional discovery if it believes it is warranted. Signed by Magistrate Judge Mark R. Abel on 07/23/2014. (sr1) (Entered: 07/23/2014)
07/23/2014	<u>84</u>	ORDER granting <u>58</u> Motion to Compel. PMD and PMD Furniture Direct are ORDERED to produce the documents or electronically stored information listed in Exhibit A of the subpoenas and permit their inspection or copying within fourteen (14) days of the date of this Order. Failure to comply with this Order will place PMD and PMD Furniture Direct in contempt of court. See Fed. R. Civ. P. 45(g). Signed by Magistrate Judge Mark R. Abel on 07/23/2014. (sr1) (Entered: 07/23/2014)
07/23/2014	<u>85</u>	ORDER granting <u>59</u> Motion to Compel. Associated Licensees is ORDERED to produce the documents or electronically stored information listed in Exhibit A of the subpoenas and permit their inspection or copying within fourteen (14) days of the date of this Order. Failure to comply with this Order will place Associated Licensees in contempt of court. See Fed. R. Civ. P. 45(g). Signed by Magistrate Judge Mark R. Abel on 07/23/2014. (sr1) (Entered: 07/23/2014)
07/24/2014	<u>86</u>	ORDER finding as moot <u>57</u> Motion to Amend/Correct; denying <u>75</u> Motion to Compel. A hearing on the motions for default judgment <u>17</u> and to set aside entry of default <u>27</u> will be held before Magistrate Judge Abel at 10:00 a.m. on 08/15/2014 in Courtroom 220. Signed by Magistrate Judge Mark R. Abel on 07/24/2014. (sr1) (Entered: 07/24/2014)
07/24/2014		Set/Reset Hearings: Motions Hearing set for 8/15/2014 10:00 AM in Courtroom

		220 - Columbus before Magistrate Judge Mark R. Abel. (sr1) (Entered: 07/24/2014)
07/25/2014	<u>87</u>	ORDER granting <u>49</u> Motion to Seal. Retail Service Systems (RSS) 04/04/2014 motion to seal documents 26-2 and 41-5 (doc. 49) is GRANTED. The Clerk of Court is DIRECTED to place documents 26-2 and 41-5 under seal. RSS is DIRECTED to file redacted exhibits within fourteen (14) days of the date of this Order. Signed by Magistrate Judge Mark R. Abel on 07/25/2014. (sr1) (Entered: 07/25/2014)
07/25/2014	<u>88</u>	ORDER denying <u>52</u> Defendant CBD Dissolved Motion for Protective Order. Signed by Magistrate Judge Mark R. Abel on 7/25/2014. (er1) (Entered: 07/25/2014)
07/25/2014	<u>89</u>	REPORT AND RECOMMENDATION: The Magistrate Judge RECOMMENDS that CBD Dissolved's February 17, 2014 <u>27</u> Motion to set aside entry of default, to deny motion for default judgment and for leave to move or plead in response to the complaint be GRANTED and Plaintiff RSS's November 21, 2013 <u>10</u> Motion for Default Judgment against Carolina Bedding Direct, LLC be DENIED. The Magistrate Judge further RECOMMENDS that Defendant MBA's January 30, 2014 <u>18</u> Motion to set aside entry of default be DENIED. Objections to R&R due within fourteen (14) days of the date of this Report. Signed by Magistrate Judge Mark R. Abel on 7/25/2014. (Attachments: # <u>1</u> USPS tracking) (er1) (Entered: 07/25/2014)
07/31/2014		Minute Entry for proceedings held before Magistrate Judge Mark R. Abel: Telephone Conference held on 7/31/2014. (Rubey, Rachel) (Entered: 08/14/2014)
08/01/2014	<u>90</u>	BRIEF by Plaintiff Retail Service Systems, Inc.. (Attachments: # <u>1</u> Exhibit 1 - Preliminary Injunction, # <u>2</u> Exhibit 2 - Decision Sustaining PI, # <u>3</u> Exhibit 3 - Permanent Injunction, # <u>4</u> Exhibit 4 - Decision re Attorney's Fees, # <u>5</u> Exhibit 5 - CB(NC)'s Articles of Organization, # <u>6</u> Exhibit 7 - CB(FL)'s Articles of Organization, # <u>7</u> Exhibit 8 - Checks Written by CB(NC), # <u>8</u> Exhibit 9 - CB(NC) Press Release, # <u>9</u> Exhibit 10 - MBA's Articles of Organization, # <u>10</u> Exhibit 12 - History of MBA) (Organ, Shawn) (Entered: 08/01/2014)
08/01/2014	<u>91</u>	MOTION to Seal <i>Confidential Exhibits</i> by Plaintiff Retail Service Systems, Inc.. (Attachments: # <u>1</u> Text of Proposed Order) (Organ, Shawn) (Entered: 08/01/2014)
08/04/2014	<u>92</u>	NOTICE by Plaintiff Retail Service Systems, Inc. of <i>Serving Plaintiff's Responses to Defendant Carolina Bedding Direct LLC's Second Set of Requests For Admission</i> (Attachments: # <u>1</u> Exhibit Plaintiff's Responses to CB(NC)'s Second Set of Requests for Admission) (Organ, Shawn) (Entered: 08/04/2014)
08/08/2014	<u>93</u>	REDACTION of <i>Document Number 26-2</i> by Plaintiff Retail Service Systems, Inc.. (Organ, Shawn) (Entered: 08/08/2014)
08/08/2014	<u>94</u>	REDACTION of <i>Document No. 41-5</i> by Plaintiff Retail Service Systems, Inc.. (Organ, Shawn) (Entered: 08/08/2014)
08/08/2014	<u>95</u>	OBJECTION to <u>89</u> Report and Recommendations by Defendant Mattress By Appointment, LLC. (Sieck, William) (Entered: 08/08/2014)
08/11/2014	<u>96</u>	STATUS CONFERENCE ORDER. Defendants requested a stay of the 8/15/2014

		hearing on plaintiff's motion for default judgment <u>17</u> . Decision deferred. Signed by Magistrate Judge Mark R. Abel on 8/11/2014. (Abel, Mark) (Entered: 08/11/2014)
08/11/2014		Minute Entry for proceedings held before Magistrate Judge Mark R. Abel: Telephone Conference held on 8/11/2014. (Rubey, Rachel) (Entered: 08/14/2014)
08/15/2014	<u>97</u>	NOTICE by Plaintiff Retail Service Systems, Inc. <i>regarding potential motion for stay</i> (Organ, Shawn) (Entered: 08/15/2014)
08/16/2014	<u>98</u>	ORDER granting Defendants unopposed request to continue the default judgment hearing against Defendant Mattress By Appointment, LLC until further order of the Court. Signed by Magistrate Judge Mark R. Abel on 8/16/2014. (Abel, Mark) (Entered: 08/16/2014)
08/22/2014	<u>99</u>	Response re <u>95</u> Objection to Report and Recommendations by Plaintiff Retail Service Systems, Inc.. (Attachments: # <u>1</u> Exhibit A - Correspondence Regarding Discovery) (Organ, Shawn) (Entered: 08/22/2014)
08/27/2014	<u>100</u>	NOTICE by Plaintiff Retail Service Systems, Inc. <i>of Counsel's Address Change</i> (Organ, Shawn) (Entered: 08/27/2014)
08/27/2014	<u>101</u>	MOTION to Stay by Plaintiff Retail Service Systems, Inc.. (Attachments: # <u>1</u> Exhibit A - Joint Motion and Agreement, # <u>2</u> Text of Proposed Order) (Organ, Shawn) (Entered: 08/27/2014)
08/27/2014	<u>102</u>	ORDER adopting Report and Recommendations re <u>89</u> Report and Recommendations.. Signed by Judge George C Smith on 8/27/14. (lww1) (Entered: 08/27/2014)
09/08/2014	<u>103</u>	ORDER: It is hereby ORDERED that this matter is STAYED. This stay will expire on 10/06/2014. By no later than 09/22/2014, RSS must file with this Court a notice reporting on the status of the proposed sale to Mr. Shoffner and whether that status requires that this stay be extended. Signed by Magistrate Judge Mark R. Abel on 09/08/2014. (sr1) (Entered: 09/08/2014)
09/18/2014	<u>104</u>	NOTICE by Plaintiff Retail Service Systems, Inc. <i>Regarding Stay</i> (Organ, Shawn) (Entered: 09/18/2014)
09/19/2014	<u>105</u>	ORDER: Accordingly, the STAY is hereby LIFTED subject to the right of any party to object to any discovery request on the basis that this case should remain stayed. If there is such an objection, counsel are DIRECTED to promptly call my office (614.719.3370) to schedule a conference with me to discuss the matter. Signed by Magistrate Judge Mark R. Abel on 09/19/2014. (sr1) (Entered: 09/19/2014)
10/24/2014	<u>106</u>	MOTION to Withdraw as Attorney by Defendants Carolina Bedding Direct, LLC, Mattress By Appointment, LLC. (Attachments: # <u>1</u> Affidavit Affidavit of Danile J. Clark (Redacted)) (Clark, Daniel) (Entered: 10/24/2014)
10/27/2014	<u>107</u>	ORDER granting <u>106</u> Motion to Withdraw as Attorney as to Attorneys William Andrew Sieck; Daniel J Clark and Angelyne E. Lisinski. Signed by Magistrate Judge Mark R. Abel on 10/27/14. (sem1) (Entered: 10/27/2014)

11/13/2014	<u>108</u>	ORDER granting <u>91</u> Motion to Seal. Plaintiff shall be permitted to file Exhibits 6 and 11 to Dkt. No. 90 under seal. Signed by Magistrate Judge Mark R. Abel on 11/13/2014. (sr1) (Entered: 11/13/2014)
11/14/2014	<u>109</u>	Exhibits 6 and 11 to <u>90</u> Brief regarding jurisdiction and damages filed under seal per the Court's 11/13/14 Order. (sem1) (Entered: 11/14/2014)
11/20/2014	<u>110</u>	Mail Returned <u>108</u> as Undeliverable Forward time Expired to Sender. Mail sent to Mattress By Appointment, LLC on 11/13/2014. (sr1) (Entered: 11/20/2014)
12/04/2014	<u>111</u>	Application to Clerk for entry of default against Carolina Bedding Direct, LLC . (Attachments: # <u>1</u> Affidavit of Joshua Feasel, # <u>2</u> Text of Proposed Order) (Organ, Shawn) (Entered: 12/04/2014)
12/05/2014	<u>112</u>	Clerk's ENTRY OF DEFAULT as to Carolina Bedding Direct, LLC. (sr1) (Entered: 12/05/2014)
01/16/2015	<u>113</u>	ORDER TO SHOW CAUSE: Plaintiff is ORDERED to SHOW CAUSE within eleven (11) days of the date of this Order why this case should not be DISMISSED for want of prosecution. Signed by Magistrate Judge Mark R. Abel on 01/16/2015. (sr1)(This document has been sent by regular mail to the party(ies) listed in the NEF that did not receive electronic notification.) (Entered: 01/16/2015)
01/20/2015	<u>114</u>	MOTION for Default Judgment against Carolina Bedding Direct, LLC by Plaintiff Retail Service Systems, Inc.. Responses due by 2/13/2015 (Attachments: # <u>1</u> Affidavit of S. Organ, # <u>2</u> Text of Proposed Order) (Organ, Shawn) (Entered: 01/20/2015)
01/20/2015	<u>115</u>	RESPONSE TO ORDER TO SHOW CAUSE by Plaintiff Retail Service Systems, Inc.. (Attachments: # <u>1</u> Exhibit A - Verified Complaint, # <u>2</u> Exhibit B - Response to Motion for TRO, # <u>3</u> Exhibit C - Motion to Compel, # <u>4</u> Exhibit D - Responses to Requests for Production, # <u>5</u> Exhibit E - Order Denying Protective Order) (Organ, Shawn) (Entered: 01/20/2015)
01/21/2015	<u>116</u>	Mail Returned <u>113</u> as Undeliverable - Return To Sender Unable To Forward. Mail sent to Mattress By Appointment, LLC on 01/16/2015. (sr1) (Entered: 01/21/2015)
02/24/2015	<u>117</u>	ORDER OF DEFAULT AND PERMANENT INJUNCTION. Signed by Judge George C Smith on 2/24/15. (lvw1)(This document has been sent by regular mail to the party(ies) listed in the NEF that did not receive electronic notification.) (Entered: 02/24/2015)
02/24/2015	<u>118</u>	DOCUMENT DELETED FILED IN ERROR - CASE REOPENED DEFAULT JUDGMENT in favor of Retail Service Systems, Inc. against Carolina Bedding Direct, LLC. Signed by Judge George C Smith on 2/24/15. (lvw1)(This document has been sent by regular mail to the party(ies) listed in the NEF that did not receive electronic notification.) Modified on 2/24/2015 (lvw1). (Entered: 02/24/2015)
02/24/2015		Notice of Correction re: 118 Default Judgment DELETED FILED IN ERROR CASE REOPENED (lvw1) (Entered: 02/24/2015)

03/02/2015	<u>119</u>	ORDER REASSIGNING CASE. Case reassigned to Magistrate Judge Elizabeth Preston Deavers for all further proceedings. Magistrate Judge Mark R. Abel no longer assigned to case. Signed by Chief Judge Edmund A Sargus on 3/2/15. (sem1)(This document has been sent by regular mail to the party(ies) listed in the NEF that did not receive electronic notification.) (Entered: 03/02/2015)
03/05/2015	<u>120</u>	STATUS REPORT ORDER: Plaintiff is DIRECTED to file a written REPORT detailing the status of this case WITHIN FOURTEEN (14) DAYS. Signed by Magistrate Judge Elizabeth Preston Deavers on 3/5/2015. (mas1)(This document has been sent by regular mail to the party(ies) listed in the NEF that did not receive electronic notification.) (Entered: 03/05/2015)
03/06/2015	<u>121</u>	Mail Returned <u>119</u> as Undeliverable Return To Sender Unable To Forward. Mail sent to Mattress By Appointment, LLC on 03/02/2015. (sr1) (Entered: 03/06/2015)
03/13/2015	<u>122</u>	Mail Returned as Undeliverable - Return to Sender - No Such Number - Unable to Forward. Mail (Doc <u>117</u>) sent to Mattress By Appointment, LLC on 2/25/2015. (agm1) (Entered: 03/13/2015)
03/13/2015	<u>123</u>	Mail Returned as Undeliverable - Return to Sender - Not Deliverable as Addressed - Unable to Forward. Mail (Doc <u>120</u>) sent to Mattress by Appointment, LLC on 3/5/2015. (agm1) (Entered: 03/13/2015)
03/17/2015	<u>124</u>	STATUS REPORT by Plaintiff Retail Service Systems, Inc.. (Organ, Shawn) (Entered: 03/17/2015)
03/18/2015	<u>125</u>	NOTICE of Hearing: Status Conference set for 4/8/2015 03:30 PM in - Teleconference before Magistrate Judge Elizabeth Preston Deavers. (sln1)(This document sent by regular mail to the party(ies) listed in the NEF that did not receive electronic notification.) (Entered: 03/18/2015)
03/23/2015	<u>126</u>	Mail Returned as Undeliverable - Return to Sender - Not Deliverable as Addressed - Unable to Forward. Mail (Two copies of Doc <u>125</u>) sent to Mattress By Appointment, LLC c/o Statutory Agent Darren B. Conrad. (agm1) (Entered: 03/24/2015)
04/21/2015	<u>127</u>	NOTICE by Plaintiff Retail Service Systems, Inc. of <i>Withdrawal of Co-Counsel Gerrod L. Bede</i> (Organ, Shawn) (Entered: 04/21/2015)
09/02/2015	<u>128</u>	RELATED CASE MEMORANDUM ORDER: The Judges agree that this case and case number 2:15-cv-2769 ARE related. Case reassigned to Chief Judge Edmund A. Sargus for all further proceedings. Signed by Judge George C. Smith on 9/2/15. (lvw)(This document has been sent by regular mail to the party(ies) listed in the NEF that did not receive electronic notification.) (Entered: 09/02/2015)
09/29/2015	<u>129</u>	Mail Returned as Undeliverable - Return to Sender - Not Deliverable as Addressed - Unable to Forward. Mail (Doc <u>128</u>) sent to Mattress By Appointment, LLC on 9/4/2015. (agm) (Entered: 09/29/2015)
10/09/2015	<u>130</u>	NOTICE of Substitution of Counsel - James Edward Arnold substituting for Shawn J. Organ as to Plaintiff Retail Service Systems, Inc.. (Arnold, James) (Entered: 10/09/2015)

10/13/2015	<u>131</u>	NOTICE of Hearing: Status Conference set for 10/27/2015 04:00 PM in Teleconference before Magistrate Judge Elizabeth Preston Deavers. (sln)(This document sent by regular mail to the party(ies) listed in the NEF that did not receive electronic notification.) (Entered: 10/13/2015)
10/27/2015		Minute Entry for proceedings held before Magistrate Judge Elizabeth Preston Deavers: Status Conference held on 10/27/2015. (sln) (Entered: 10/28/2015)
10/28/2015	<u>132</u>	NOTICE of Hearing:Hearing on Plaintiff's Motion for Default Judgment set for 12/16/2015 10:00 AM in Courtroom 220 - Columbus before Magistrate Judge Elizabeth Preston Deavers. (sln)(This document sent by regular mail to the party(ies) listed in the NEF that did not receive electronic notification.) (Entered: 10/28/2015)
10/29/2015	<u>133</u>	Mail Returned as Undeliverable - Return to Sender - Not Deliverable as Addressed - Unable to Forward. Mail (Doc. <u>131</u>) sent to Mattress By Appointment, LLC on 10/13/2015. (agm) (Entered: 10/29/2015)
11/10/2015	<u>134</u>	Mail Returned as Undeliverable - Return to Sender - Not Deliverable as Addressed - Unable to Forward. Mail (Doc. <u>132</u>) sent to Mattress By Appointment, LLC on 10/29/2015. (agm) (Entered: 11/10/2015)
12/09/2015	<u>135</u>	NOTICE by Interested Party Organ Cole LLP <i>of filing of affidavit of fees and expenses</i> (Attachments: # <u>1</u> Affidavit of Shawn Organ regarding attorneys' fees) (Organ, Shawn) (Entered: 12/09/2015)
12/16/2015	<u>136</u>	Minute Entry for proceedings held before Magistrate Judge Elizabeth Preston Deavers: Hearing held on 12/16/2015 re <u>114</u> Plaintiff's Motion for Default Judgment. (Court Reporter Gina Wells.) (sln) (Entered: 12/16/2015)
01/08/2016	<u>137</u>	Post-Hearing BRIEF by Plaintiff Retail Service Systems, Inc.. (Arnold, James) Modified text on 1/8/2016 (agm). (Entered: 01/08/2016)

PACER Service Center			
Transaction Receipt			
04/13/2016 11:07:05			
PACER Login:	ay0012:2509478:0	Client Code:	RSS
Description:	Docket Report	Search Criteria:	2:13-cv-00994-EAS-EPD
Billable Pages:	13	Cost:	1.30

EXHIBIT 3

**U.S. District Court
Southern District of Ohio (Columbus)
CIVIL DOCKET FOR CASE #: 2:15-cv-02769-EAS-EPD**

Retail Service Systems, Inc. v. Mattress by Appointment, LLC
et al

Assigned to: Chief Judge Edmund A. Sargus
Referred to: Magistrate Judge Elizabeth Preston Deavers
Magistrate Judge Norah McCann King
(Settlement)

related Case: 2:13-cv-00994-EAS-EPD

Cause: 28:1332 Diversity-Tort/Non-Motor Vehicle

Date Filed: 08/31/2015

Jury Demand: Plaintiff

Nature of Suit: 380 Personal Property:
Other

Jurisdiction: Diversity

Plaintiff

Retail Service Systems, Inc.

represented by **James Edward Arnold**

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LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Gerrod Louis Bede

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ATTORNEY TO BE NOTICED

V.

Defendant

Mattress by Appointment, LLC

formerly known as

Carolina Bedding Direct, LLC

represented by **Jessica A. Reese**

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*PRO HAC VICE
ATTORNEY TO BE NOTICED*

Defendant

Mattress by Appointment, LLC
c/o Registered Agent C. Edwin Shoffner

represented by **Jessica A. Reese**
(See above for address)
*LEAD ATTORNEY
ATTORNEY TO BE NOTICED*

Douglas M Grimsley
(See above for address)
PRO HAC VICE
ATTORNEY TO BE NOTICED

Joseph Jude Golian
(See above for address)
ATTORNEY TO BE NOTICED

Michael P. Flynn
(See above for address)
PRO HAC VICE
ATTORNEY TO BE NOTICED

Steven W. Zoffer
(See above for address)
PRO HAC VICE
ATTORNEY TO BE NOTICED

Defendant

C. Edwin Shoffner

represented by **Jessica A. Reese**
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LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Douglas M Grimsley
(See above for address)
PRO HAC VICE
ATTORNEY TO BE NOTICED

Joseph Jude Golian
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ATTORNEY TO BE NOTICED

Michael P. Flynn
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PRO HAC VICE
ATTORNEY TO BE NOTICED

Steven W. Zoffer
(See above for address)
PRO HAC VICE
ATTORNEY TO BE NOTICED

Date Filed	#	Docket Text
08/31/2015	<u>1</u>	COMPLAINT with JURY DEMAND against Mattress by Appointment, LLC, Mattress by Appointment, LLC, C. Edwin Shoffner (Filing fee \$ 400 paid - receipt number: 0648-5187805), filed by Retail Service Systems, Inc.. (Attachments: # <u>1</u> Exhibit 1, # <u>2</u> Exhibit 2, # <u>3</u> Exhibit 3, # <u>4</u> Exhibit 4, # <u>5</u> Exhibit 5, # <u>6</u> Civil Cover

		Sheet, # <u>7</u> Summons Form, # <u>8</u> Summons Form, # <u>9</u> Summons Form) (Arnold, James) (Entered: 08/31/2015)
09/01/2015	<u>2</u>	Summons Issued as to Mattress by Appointment, LLC, Mattress by Appointment, LLC, C. Edwin Shoffner. (agm) (Entered: 09/01/2015)
09/14/2015	<u>3</u>	AFFIDAVIT of Service for Complaint and Summons served on Registered Agent of Mattress By Appointment, LLC on 9/3/2015, filed by Plaintiff Retail Service Systems, Inc.. (Attachments: # <u>1</u> Exhibit A) (Arnold, James) (Entered: 09/14/2015)
09/14/2015		Set Deadlines/Hearings: Mattress by Appointment, LLC fka Carolina Bedding Direct, LLC answer due 9/24/2015. (agm) (Entered: 09/14/2015)
09/24/2015	<u>4</u>	MOTION to Dismiss for Lack of Jurisdiction by Defendants Mattress by Appointment, LLC, Mattress by Appointment, LLC, C. Edwin Shoffner. Responses due by 10/19/2015 (Attachments: # <u>1</u> Exhibit 1, # <u>2</u> Exhibit 2, # <u>3</u> Exhibit 3) (Walter, Jessica) (Entered: 09/24/2015)
09/28/2015	<u>5</u>	NOTICE of Hearing: Preliminary Pretrial Conference set for 11/10/2015 11:00 AM in Chambers before Magistrate Judge Elizabeth Preston Deavers. (sln) (Entered: 09/28/2015)
09/29/2015	<u>6</u>	NOTICE by Plaintiff Retail Service Systems, Inc. of Service (Attachments: # <u>1</u> Exhibit A, # <u>2</u> Exhibit B) (Arnold, James) (Entered: 09/29/2015)
09/30/2015		Set Deadlines: Mattress by Appointment, LLC answer due 10/13/2015; C. Edwin Shoffner answer due 10/13/2015. (agm) (Entered: 09/30/2015)
10/19/2015	<u>7</u>	Unopposed MOTION for Leave to File Document Under Seal by Plaintiff Retail Service Systems, Inc.. Responses due by 11/12/2015 (Attachments: # <u>1</u> Text of Proposed Order) (Arnold, James) Modified text and event type on 10/20/2015 (agm). (Entered: 10/19/2015)
10/19/2015	<u>8</u>	RESPONSE in Opposition re <u>4</u> MOTION to Dismiss for Lack of Jurisdiction filed by Plaintiff Retail Service Systems, Inc.. (Attachments: # <u>1</u> Exhibit, # <u>2</u> Exhibit, # <u>3</u> Exhibit, # <u>4</u> Exhibit, # <u>5</u> Exhibit, # <u>6</u> Exhibit, # <u>7</u> Exhibit, # <u>8</u> Exhibit, # <u>9</u> Exhibit, # <u>10</u> Exhibit, # <u>11</u> Exhibit, # <u>12</u> Exhibit, # <u>13</u> Exhibit, # <u>14</u> Exhibit) (Arnold, James) (Entered: 10/19/2015)
10/20/2015	<u>9</u>	ORDER granting <u>7</u> Motion for Leave to File Confidential Exhibit Under Seal. Signed by Magistrate Judge Elizabeth Preston Deavers on 10/20/2015. (mas) (Entered: 10/20/2015)
11/02/2015	<u>11</u>	REPLY to Response to Motion re <u>4</u> MOTION to Dismiss for Lack of Jurisdiction filed by Defendants Mattress by Appointment, LLC, Mattress by Appointment, LLC, C. Edwin Shoffner. (Attachments: # <u>1</u> Exhibit A - F) (Walter, Jessica) (Entered: 11/02/2015)
11/03/2015	<u>12</u>	RULE 26(f) REPORT by Plaintiff Retail Service Systems, Inc.. (Arnold, James) (Entered: 11/03/2015)
11/05/2015	<u>13</u>	MOTION to Amend/Correct <u>11</u> Reply to Response to Motion, by Defendants Mattress by Appointment, LLC, Mattress by Appointment, LLC, C. Edwin Shoffner. Responses due by 11/30/2015 (Attachments: # <u>1</u> Exhibit, # <u>2</u> Text of

		Proposed Order) (Walter, Jessica) (Entered: 11/05/2015)
11/06/2015	<u>14</u>	ORDER Granting <u>13</u> Dfts' Motion for Leave to file Revised Reply Instanter. Signed by Magistrate Judge Elizabeth Preston Deavers on 11/6/2015. (sln) (Entered: 11/06/2015)
11/06/2015	<u>15</u>	Defendants' REVISED REPLY in Support of their <u>4</u> MOTION to Dismiss for Lack of Jurisdiction. (sln) (Entered: 11/06/2015)
11/10/2015	<u>16</u>	PRELIMINARY PRETRIAL ORDER: Joinder of Parties and Motions to Amend due by 2/29/2016. Rule 26(a)(1) Disclosures due by 11/20/2015. Primary Expert due by 4/15/2016. Rebuttal Expert due by 5/20/2016. Discovery due by 7/29/2016. Dispositive motions due by 8/31/2016. Signed by Magistrate Judge Elizabeth Preston Deavers on 11/10/2015. (mas) (Entered: 11/10/2015)
11/19/2015	<u>17</u>	NOTICE of Hearing: Settlement Conference set for 3/24/2016 10:00 AM before Magistrate Judge Norah McCann King. (jr) (Entered: 11/19/2015)
12/01/2015	<u>18</u>	*** WITHDRAWN per Doc. 19 *** MOTION for Leave to File <i>Motion to Strike Affidavits of Darren Brett Conrad and Carlton Scott Andrew</i> by Defendants Mattress by Appointment, LLC, Mattress by Appointment, LLC, C. Edwin Shoffner. Responses due by 12/28/2015 (Attachments: # <u>1</u> Exhibit Motion to Strike, # <u>2</u> Text of Proposed Order) (Walter, Jessica) Modified text and terminated motion on 12/17/2015 (agm). (Entered: 12/01/2015)
12/16/2015	<u>19</u>	NOTICE OF WITHDRAWAL OF DOCUMENT by Defendants Mattress by Appointment, LLC, Mattress by Appointment, LLC, C. Edwin Shoffner re <u>18</u> MOTION for Leave to File <i>Motion to Strike Affidavits of Darren Brett Conrad and Carlton Scott Andrew</i> (Walter, Jessica) (Entered: 12/16/2015)
02/09/2016	<u>20</u>	NOTICE of Change of Address by Jessica A. Reese (Reese, Jessica) (Entered: 02/09/2016)
03/08/2016	<u>21</u>	First MOTION Expedited Discovery Dispute Conference by Plaintiff Retail Service Systems, Inc.. Responses due by 4/1/2016 (Attachments: # <u>1</u> Exhibit Correspondence, # <u>2</u> Exhibit Declaration of Extra Judicial Efforts) (Arnold, James) (Entered: 03/08/2016)
03/09/2016	<u>22</u>	MOTION for Leave to Appear Pro Hac Vice of Steven W. Zoffer, Douglas M. Grimsley, Michael P. Flynn (Filing fee \$ 600, receipt number 25QD8T44) by Defendants Mattress by Appointment, LLC, Mattress by Appointment, LLC, C. Edwin Shoffner. Responses due by 4/4/2016 (Attachments: # <u>1</u> Supplement Certificates of Good Standing) (Reese, Jessica) (Entered: 03/09/2016)
03/10/2016	<u>23</u>	NOTICE of Hearing: Discovery Hearing set for 3/11/2016 11:00 AM in Teleconference before Magistrate Judge Elizabeth Preston Deavers. The parties are directed to call 614-719-3460. (sln) (Entered: 03/10/2016)
03/10/2016	<u>24</u>	ORDER Granting <u>22</u> Dfts' Motion for Leave to Appear Pro Hac Vice of Steven W. Zoffer, Douglas M. Grimsley, and Michael P. Flynn. Signed by Magistrate Judge Elizabeth Preston Deavers on 3/10/2016. (sln) (Entered: 03/10/2016)
03/11/2016		Minute Entry for proceedings held before Magistrate Judge Elizabeth Preston Deavers: Discovery Conference held on 3/11/2016. Plaintiff's counsel will provide list of attorneys to whom confidential trade secret information will be shared.

		Parties reached agreement as to other matters related to the Protective Order. Defendants will produce documents promptly after the Protective Order is executed. (sln) (Entered: 03/11/2016)
03/16/2016	<u>25</u>	STIPULATED PROTECTIVE ORDER. Signed by Magistrate Judge Elizabeth Preston Deavers on 3/16/2016. (sln) (Entered: 03/16/2016)
03/24/2016		Minute Entry for proceedings held before Magistrate Judge Norah McCann King: Settlement Conference held on 3/24/2016. (NMK) (Entered: 03/24/2016)

PACER Service Center			
Transaction Receipt			
04/13/2016 11:11:28			
PACER Login:	ay0012:2509478:0	Client Code:	RSS
Description:	Docket Report	Search Criteria:	2:15-cv-02769-EAS-EPD
Billable Pages:	5	Cost:	0.50

EXHIBIT 4

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION**

RETAIL SERVICE SYSTEMS, INC.,)
6059 Frantz Road, Suite 204)
Dublin, Ohio 43017,)

Plaintiff,)

v.)

MATTRESS BY APPOINTMENT, LLC,)
(formerly known as Carolina)
Bedding Direct, LLC))
c/o Registered Agent Eraclides Gelman,)
4811 Atlantic Boulevard)
Jacksonville, Florida 32207,)

and)

MATTRESS BY APPOINTMENT, LLC,)
c/o Registered Agent C. Edwin Shoffner,)
10 Longview Terrace)
Greenville, South Carolina 29605,)

and)

C. EDWIN SHOFFNER,)
10 Longview Terrace)
Greenville, South Carolina 29605,)

Defendants.)
_____)

Case No. _____

Judge _____

JURY TRIAL DEMANDED

COMPLAINT

NOW COMES plaintiff Retail Service Systems, Inc. ("Plaintiff" or "RSS"), and alleges as its complaint and demand for jury trial as follows:

I. INTRODUCTION

1. RSS brings this action against Defendants Mattress By Appointment, LLC (hereinafter “MBA (FL) I”),¹ formerly known as Carolina Bedding Direct, LLC (“Carolina Bedding (FL)”);² Mattress By Appointment, LLC (hereinafter “MBA (SC)”); and C. Edwin Shoffner (“Shoffner”) (collectively, “Defendants”), for violations of Ohio’s Uniform Trade Secrets Act and for their liability as successors to several prior entities that are similarly liable for misappropriating RSS’s trade secrets. RSS owns a unique and proprietary system for establishing and operating retail mattress and furniture businesses. RSS’s system, which differs substantially from any methodologies used by traditional mattress and furniture retailers, yields higher *rates* of success at significantly lower operating costs than those found in the traditional mattress or mattress and furniture retail industry. RSS licenses and franchises the system through a network of dealers across the United States.

2. RSS’s system involves an intense training and management program through which dealers learn RSS’s proprietary methodologies for establishing and operating their businesses. The training program includes step-by-step instructions so that a dealer’s progress can be measured and improved through specific, duplicable actions. By investing significant resources,

¹ The history of this action involves three entities named “Mattress By Appointment, LLC,” two existing under Florida law and one under South Carolina law. For clarity, this Complaint will refer to the Florida entity originally named “Mattress By Appointment, LLC” (which has since dissolved) as “MBA (FL) I,” will refer to the still-existing Florida entity that is party to this suit as “MBA (FL) II,” and will refer to the newly formed South Carolina entity, which is also a party to this lawsuit, as “MBA (SC).”

² Confusingly, the history of this suit also involves two entities named “Carolina Bedding Direct, LLC” that are predecessors to MBA. Because the first of these companies was formed in North Carolina and the second (the one that is a party to this suit as MBA (FL) II) was later formed in Florida, this Complaint will use “(NC)” and “(FL)” designations to distinguish the two entities.

RSS and its predecessor created and perfected its methodologies, and have tracked results under the system for more than a decade.

3. Through statistical tracking of its advertising, merchandising, and selling programs, RSS can quickly identify a dealer's areas for improvement. This management process enables RSS's dealers to achieve faster and more cost-effective results than those typically found in traditional retail start-ups.

4. RSS's trade secrets were misappropriated by Carolina Bedding (NC) and MBA (FL) I. RSS filed a lawsuit against those entities on October 4, 2013, and ultimately obtained a default judgment against those entities, as well as a permanent injunction prohibiting Carolina Bedding (NC) from using RSS's trade secrets. *Retail Service Systems, Inc. v. Carolina Bedding Direct, LLC, et al.*, Case No. 2:13-cv-00994, Doc. 117 (S.D. Ohio, Feb. 24, 2015) (Ex.1). A damages hearing against Carolina Bedding (NC) and MBA (FL) I (as well as a request for an injunction and damages against MBA (FL) I) is pending before Judge Smith.

5. MBA (FL) II and MBA (SC) are continuations of, and successors to, Carolina Bedding (NC) and MBA I, and have continued improperly using RSS's trade secrets. Upon information and belief, MBA (FL) II and MBA (SC) are wholly owned and operated by C. Edwin Shoffner ("Shoffner"). Upon information and belief, Shoffner has improperly disseminated RSS's trade secrets and management methodologies. Accordingly, RSS seeks to enjoin Defendants' ongoing violations and recover damages caused by Defendants' improper use of RSS's trade secrets and management methodologies.

II. PARTIES

6. Plaintiff RSS is an Ohio Corporation with its principal place of business at 6059 Frantz Road, Suite 204, Dublin, Ohio 43017, Franklin County, Ohio.

7. Defendant Mattress By Appointment, LLC (MBA (FL) II) is a Florida limited liability company with its principal place of business at 2817 Alaskan Way, Jacksonville, Florida 32226. Upon information and belief, Defendant MBA (FL) II continues to conduct business in the State of Ohio in this district and throughout certain portions of the United States.

8. Defendant Mattress By Appointment, LLC (MBA (SC)) is a South Carolina limited liability company. Upon information and belief, Defendant MBA (SC) continues to conduct business in the State of Ohio in this district and throughout certain portions of the United States.

9. Upon information and belief, Defendant C. Edwin Shoffner is a citizen of South Carolina residing at 10 Longview Terrace, Greenville, South Carolina, 29605, and is the sole owner/member and operator of MBA (FL) II and MBA (SC).

III. JURISDICTION AND VENUE

10. This Court has diversity jurisdiction over this action pursuant to 28 U.S.C. §1332(a)(1) as the amount in controversy exceeds the sum or value of \$75,000, exclusive of interests and costs, and is between citizens of different States.

11. Venue in this judicial district is proper under 28 U.S.C. §1391(b) and (c) in that this is the judicial district in which a substantial part of the acts and omissions giving rise to the claims occurred.

IV. FACTUAL ALLEGATIONS

PMD is Formed

12. In 1997, Jeffrey S. Hosking ("Hosking") founded a business that was subsequently incorporated as Power Marketing Direct, Inc. ("PMD") in 2001. In 2008, Hosking formed a related company called PMD Furniture Direct, Inc. ("PMDF"; collectively, the "PMD Entities"). Over the course of several years, the PMD Entities developed a unique and comprehensive

marketing program that they applied to the mattress and furniture industry. PMD licensed and/or franchised “dealers” to purchase mattresses and furniture exclusively through PMD, where over 55% of PMD’s sales were in mattresses. Further, PMD trained these dealers to market and sell those products through unique, non-traditional, retail-type stores using the PMD proprietary marketing, merchandising, and selling program that had been developed by PMD over time, utilizing PMD’s extensive marketing and sales experience.

13. Pursuant to an Asset Purchase Agreement between RSS, PMD, PMDF and Jeffrey S. Hosking dated June 12, 2013 (hereinafter the “Asset Purchase Agreement”), Plaintiff RSS now owns the majority of the assets of the PMD Entities, including the intellectual-property rights to this marketing, selling, and management system for establishing and operating these specialized retail businesses—which includes all trademarks, trade names, patents, trade dress, copyrights, methodologies, and trade secrets.

14. RSS’s proprietary program involves a unique by-appointment-only business with a much higher success rate than a typical retail start-up business. It combines scripted, low-cost advertising techniques; scripted and planned telephone conversations; and in-person merchandising and selling methodologies for selling mattresses and furniture by appointment. RSS’s program also includes a step-by-step trackable management process for measuring and developing licensed and/or franchised dealers.

15. Because PMD’s marketing approach was unique and highly successful (and continues to be under RSS’s ownership), but capable of duplication, PMD took great steps to protect its secrets. All PMD dealers were required to sign non-disclosure agreements in the interview process and license or franchise agreements before receiving PMD’s initial training, receiving training manuals, opening a location, and attending PMD’s extensive two-day basic training

seminar where the proprietary methodologies were further expounded. The PMD entities and RSS have invested tremendous capital into the enforcement and protection of the trade secrets via numerous successful state and federal actions dating back to the early 2000's.

Darren Conrad Becomes a PMD Dealer

16. From early 2000 to April 2003, Darren Conrad ("Conrad") was affiliated with PMD in a variety of ways. Conrad began by assisting PMD's founder and President, Hosking, and eventually became a PMD dealer, manager, and trainer of other PMD dealers.

17. At the end of March, 2003, Conrad left PMD. Contemporaneous with his departure from PMD, Conrad executed a Separation Agreement, which included a provision that stated:

[Conrad] agrees that he will not for a period of three (3) years following the execution of this Agreement engage in any of the following activities:

(a) Undertake planning for or organization of any business activity competitive with [PMD's] business or combine or conspire with others for the purposes of organizing any such competitive business activity;

(b) Directly or indirectly or by any action in concert with others, induce or influence any person or entity who is engaged as an employee, agent, independent contractor of [PMD] to terminate or in any way compromise his or her business relationship with [PMD];

(c) Call upon any business contacts of [PMD] for the purposes of soliciting or selling competitive products or services;

(d) Divert to, solicit, or in any other way attempt to take away business contacts, clientele or customers of [PMD] and place said business with any other business that may compete with the business of [PMD];

(e) Directly or indirectly compete with the business of [PMD].

(Ex. 2 at 19).

18. Unknown to PMD, in early 2003 Conrad secretly began planning to start a separate business, extremely similar to PMD, in South Carolina. After he left PMD, Conrad in fact started that business, then named Carolina Bedding and Furniture, Inc.

19. Carolina Bedding and Furniture, Inc. operated using the exact same methodologies as PMD. The company recruited dealers who purchased mattresses and furniture exclusively through the company, and it trained those dealers to market and sell their product using PMD's marketing and sales system. Specifically, Carolina Bedding and Furniture, Inc. trained dealers using a "Guide to Success" manual also referred to as the "playbook" describing its marketing and sales system, which Conrad had largely copied from PMD's own "Basics Training Manual."

PMD Wins a Lawsuit Against Darren Conrad for Misappropriation of Its Trade Secrets

20. In early February 2004, PMD learned of Conrad's competing business. By that time, Conrad had built Carolina Bedding and Furniture, Inc. into an imitation company with approximately 17 dealers located in several southeastern states.

21. On February 9, 2004, PMD sued Conrad in the Franklin County Court of Common Pleas for breach of the PMD License Agreement and Separation Agreement and misappropriation of PMD's trade secrets, among other things, and sought both damages and an injunction against Conrad. *See Power Marketing Direct, Inc. v. Darren Conrad*, Case No. 04-CV-1519 (Franklin C.P.).

22. After a five-day preliminary injunction hearing, during which approximately two dozen witnesses testified, the Magistrate granted PMD's motion for preliminary injunction, finding (among other things) that "PMD has demonstrated by clear and convincing evidence a substantial likelihood that it will prevail on its cause of action against [Conrad] for violation of the Uniform Trade Secret Act." (*See* Ex. 2, Magistrate's Decision Sustaining Plaintiff's Motion for a Preliminary Injunction, Filed February 9, 2004 ("Magistrate's October 4, 2004 Decision") at 47). The Magistrate further found that "the systematic approach and business philosophy

engineered by Jeffrey Hosking and PMD is truly unique and proprietary in the industry” and that Conrad’s attempt to argue otherwise was unpersuasive. *Id.*

23. The trial court sustained the Magistrate’s decision and preliminary injunction, and then awarded damages and a permanent injunction following trial. (*See* Ex. 3; Decision and Entry Granting Plaintiff’s Request for Permanent Injunction and Damages Against Defendant Darren Conrad dated January 26, 2009 (the “2009 Injunction Entry”) at 9). The trial court agreed that “PMD’s business materials and methodologies are trade secrets” and that Conrad wrongfully used those trade secrets, “therefore violat[ing] the Uniform Trade Secrets Act.” (*Id.* at 11). Accordingly, the trial court permanently enjoined Conrad and found him liable for \$140,000 in compensatory damages, \$40,000 in punitive damages, and PMD’s attorneys’ fees. (*Id.* at 18-19).

24. Sometime between March and June of 2004, after the state court’s preliminary injunction entry but before trial, Conrad moved to Florida, where he ignored the state court rulings and continued to sell mattresses and recruit and train dealers.

25. According to the Ohio state court, these actions violated its preliminary injunction: “[I]t is clear to the Court that [Conrad] did not abide by the restrictions imposed by the preliminary injunction. Instead, [Conrad’s] own testimony establishes that he continues to operate dealerships and/or indirectly compete with PMD by servicing dealerships in territories such as Charlotte, North Carolina.” (Ex. 3 at 15-16). “Because [Conrad] has continued to violate the restrictions imposed by the covenant and the preliminary injunction,” the court extended the injunction (based on the terms of Conrad’s contracts with PMD) for an additional 15 months. (*Id.* at 16).

26. The state court’s permanent injunction issued on January 26, 2009. On April 1 of that year, Conrad received a copy of that order. (Ex. 4, letter to Conrad from Cooper & Elliott).

27. Soon thereafter, Conrad conspired with defendant Shoffner to subvert the Ohio state court's order and injunction by creating a payment scheme in which Shoffner insured that Conrad would be paid on all mattresses sold to dealers trained in PMD's methodologies during the injunction period. In this scheme, Conrad "gave away" his Carolina Bedding and Furniture, Inc. dealers, splitting them among three different dealers, who received 20-30 dealers each. In return, Shoffner ensured that Conrad received a monetary portion of all mattress sales by those dealers.

28. Conrad and Shoffner jointly and knowingly continued using PMD's trade secrets to develop dealers in secret from PMD. On the surface, Conrad gave away his dealers to other individuals for no consideration, but in fact, Conrad continued to be paid a percentage of mattress sales by those dealers. Using this scheme, Conrad received payments—based on mattresses sold by these dealers—separately and directly by companies for whom Shoffner worked as a sales executive. As soon as the injunction period lapsed in April 2010, Conrad more aggressively engaged in using PMD's methodologies with his former dealers, as well as new ones, first in Greenville, South Carolina, and later in Charlotte, North Carolina. In both locations, Conrad continued his business relationships with Shoffner and the dealers, until a falling out with one of the dealers in October 2011.

Darren Conrad Forms Carolina Bedding (NC) and Carolina Bedding (FL)

29. On October 18, 2011, Conrad formed Carolina Bedding Direct, LLC ("Carolina Bedding (NC)") in North Carolina. Conrad was the sole owner of Carolina Bedding (NC), and he operated the company in the same manner he operated Carolina Bedding and Furniture, Inc. Specifically, Conrad continued selling to, recruiting, and training dealers using versions of the "playbook" he obtained during his time at PMD and created while operating Carolina Bedding

and Furniture, Inc. Using PMD's marketing, merchandising, sales, and management systems in this way, as well as continuing his supply relationship with defendant Shoffner, Conrad quickly grew his network to over 100 dealers.

30. In 2012, Conrad moved to Florida. At first he continued to operate Carolina Bedding (NC) from Florida, but on April 11, 2012, Conrad registered Carolina Bedding Direct, LLC, under Florida law ("Carolina Bedding (FL)"), intending for that company to take over the business of Carolina Bedding (NC).

31. As the sole owner of both entities, Conrad simply transferred to Carolina Bedding (FL) full and exclusive use of Carolina Bedding (NC)'s dealers, employees, playbook, and online ordering system. Carolina Bedding (FL) also used the same merchant account, bank accounts, federal Employer Identification Number, mattress vendor relationship through defendant Shoffner, which included the same "private" trade name labels for mattresses that were used by its North Carolina predecessor. This transfer was "informal"—Carolina Bedding (FL) did not enter into a contract for these assets or give any consideration for them.

32. Void of assets, Carolina Bedding (NC) was dissolved on April 26, 2012.

33. As Conrad and Shoffner had intended, Carolina Bedding (FL) continued the business of Carolina Bedding (NC), recruiting, training, and advising dealers across the country, including in Ohio, using RSS's proprietary marketing, merchandising, sales, and management systems. These dealers continued to use this system to market and sell mattresses, which they would purchase from mattress manufacturers, and Carolina Bedding (FL) continued to receive a percentage of its dealers' purchases, just as Carolina Bedding (NC) had.

Conrad Forms MBA (FL) I and Shoffner Becomes a 45% Owner

34. On November 19, 2012, Conrad started yet another company, Mattress By Appointment, LLC (“MBA (FL) I”), in Florida. This company was originally intended to continue the operations of Carolina Bedding (FL), but in fact it never did so.

35. In March 2013, Shoffner purchased a 45% ownership interest in Carolina Bedding (FL). Shoffner knew about Carolina Bedding (FL)’s business model and PMD’s lawsuit against Conrad prior to becoming a part-owner of Carolina Bedding (FL).

RSS Sues Carolina Bedding (NC) and MBA I

36. On October 4, 2013, RSS (which by this time owned PMD’s intellectual property and trade secrets) filed suit against Carolina Bedding (NC) and MBA (FL) I in the Southern District of Ohio, claiming misappropriation of trade secrets and civil conspiracy. *See Retail Service Systems, Inc. v. Carolina Bedding Direct, LLC*, Case No. 2:13-cv-994 (S.D. Ohio).

37. On February 4, 2014, in response to this lawsuit, Conrad and Shoffner renamed Carolina Bedding (FL) to “Mattress By Appointment, LLC” (“MBA (FL) II”), despite the fact that a company with that name already existed—and was already being sued by RSS.

38. Two days later, Conrad and Shoffner dissolved MBA (FL) I on February 6, 2014.

39. MBA (FL) II continued the business that Carolina Bedding (FL) had been operating. Like Carolina Bedding (FL), Carolina Bedding (NC), and Conrad’s prior companies, MBA (FL) II recruited, trained, and advised dealers using the same marketing, merchandising, sales, and management system it had originally taken from PMD. In fact, MBA (FL) II, under the exclusive control and ownership of Conrad and Shoffner, continued to use the same dealers, employees, playbook, online ordering system, EIN number, vendors, merchants, and bank accounts as Carolina Bedding (NC) and Carolina Bedding (FL).

40. Moreover, MBA (FL) II's own website—www.mattressbyappointment.com—explains precisely why it is a successor entity to Carolina Bedding (NC), Carolina Bedding (FL), and MBA I. Under the “Our History” section of its website, MBA (FL) II describes its origin in 2003 as Carolina Bedding and Furniture, Inc., which then developed into Carolina Bedding Direct, which became Carolina Bedding (NC), which became Carolina Bedding (FL), which became MBA (FL) I and MBA (FL) II. (*See* Ex. 5). Some of these are the very entities that the Franklin County Common Pleas Court found to violate that court's injunction. (*See* Ex. 3, 2009 Injunction Entry at 7-8).

41. Like with the business's shift from Carolina Bedding (NC) to Carolina Bedding (FL), MBA (FL) II did not give any consideration for the assets that it used to operate; rather, it just assumed Carolina Bedding (FL)'s assets under its new name and continued recruiting, training, and advising new dealers with the methodologies acquired by Conrad while at PMD.

Shoffner is Fired and Conrad Files for Bankruptcy

42. In March 2014, MBA (FL) II's Board of Trustees fired Shoffner as President. In May 2014, Shoffner instituted a provision in his contract that required either Shoffner or Conrad to buy out the other partner's interest in MBA (FL) II. Due in part to this provision, as well as RSS's continued efforts to collect on PMD's prior judgment against him, Conrad filed for personal bankruptcy on July 3, 2014.

43. As part of Conrad's bankruptcy proceedings, Shoffner purchased Conrad's remaining 55% interest in MBA (FL) II.

44. Upon information and belief, defendant MBA (FL) II, formerly known as Carolina Bedding (FL), transferred some or all of its assets to MBA (SC). Upon further information and

belief, both companies continue to operate to this day as successors-in-interest to Carolina Bedding and Furniture, Inc. and Carolina Bedding (NC).

45. Upon information and belief, through the actions of defendant C. Edwin Shoffner, Defendants MBA (FL) II and MBA (SC) have obtained and continue to use RSS's trade secrets in violation of the Ohio Uniform Trade Secrets Act, Ohio Rev. Code §§1333.61, *et seq.*

46. Upon information and belief, through the actions of defendant C. Edwin Shoffner, Defendant MBA (FL) II and MBA (SC) have disseminated to MBA (FL) II and MBA (SC) dealers or licensees the trade secrets and methodologies of RSS, causing harm that will be difficult to quantify but runs into the millions of dollars.

V. CAUSES OF ACTION

COUNT I **Successor Liability**

47. Plaintiff hereby adopts and incorporates by reference paragraphs 1 through 46.

48. As described above, Defendants MBA (FL) II and MBA (SC), by and through C. Edwin Shoffner and Darren Conrad, have undergone a succession of identity changes since the formation of their initial predecessor-in-interest, Carolina Bedding and Furniture, Inc. in 2003.

49. Conrad never fully complied with the Ohio court's injunction, instead knowingly and intentionally resuming business practices substantially similar to those which the Franklin County Court of Common Pleas found to be a misappropriation of RSS's trade secrets when he acted as the sole owner and operator of Carolina Bedding (NC) from October 18, 2011, to April 11, 2012.

50. Conrad knowingly and intentionally continued business practices substantially similar to those which the Franklin County Court of Common Pleas found to be a misappropriation of

RSS's trade secrets, and those utilized by Carolina Bedding (NC), when he acted as the sole owner and operator of Carolina Bedding (FL) from April 11, 2012, to March 2013.

51. Conrad and Shoffner knowingly and intentionally continued business practices substantially similar to those which the Franklin County Court of Common Pleas found to be a misappropriation of RSS's trade secrets, and those utilized by Carolina Bedding (NC), when they acted as co-owners and operators of Carolina Bedding (FL) from March 2013 to February 4, 2014.

52. Conrad and Shoffner knowingly and intentionally continued business practices substantially similar to those which this Court found to be a misappropriation of RSS's trade secrets, and those utilized by Carolina Bedding (NC) and Carolina Bedding (FL), when they acted as co-owners and operators of MBA (FL) II from February 4, 2014 until September 4, 2014—when Shoffner purchased all remaining shares of MBA (FL) II in Conrad's personal bankruptcy.

53. On August 29, 2014, just days before Shoffner finalized the purchase of Conrad's shares in MBA (FL) II, Shoffner formed MBA (SC).

54. Shoffner knowingly and intentionally continues to misappropriate RSS's trade secrets—including those utilized by Carolina Bedding (NC) and Carolina Bedding (FL)—through his sole ownership and operation of MBA (SC) and MBA (FL) II from September 4, 2014 to the present.

55. Each successive iteration of Carolina Bedding and Furniture, Inc.—first Carolina Bedding (NC), MBA (FL) I, and then Carolina Bedding (FL) (now MBA (FL) II)—is a successor-in-interest to the prior entities. Among other things, as described above: (1) each business merely continued the prior business activities of its predecessor and personnel remained consistent throughout each successive name change; (2) ownership interests did not change as a

result of each successive name change; (3) each predecessor transferred all of its assets in the absence of consideration and immediately ceased operations at the time of each name change; and (4) each iteration assumed the ongoing obligations of its predecessor.

56. MBA (FL) II and MBA (SC), by and through Shoffner, continue to use RSS's trade secrets. These companies are the present successors-in-interest, and are liable to Plaintiff RSS for damages caused by their predecessors' misappropriation of RSS's trade secrets.

57. MBA (FL) II and MBA (SC), as successors-in-interest to Carolina Bedding (NC), are also subject to the permanent injunction entered against Carolina Bedding (NC) by the Federal District Court of the Southern District of Ohio.

COUNT II

Violation of Ohio's Uniform Trade Secrets Act; Ohio Rev. Code §§ 1333.61, et seq.

58. Plaintiff hereby adopts and incorporates by reference paragraphs 1 through 57.

59. Plaintiff brings this claim pursuant to Ohio's Uniform Trade Secrets Act, Ohio Rev. Code §§ 1333.61, *et seq.*

60. As described above, Defendants MBA (FL) II and MBA (SC), by and through Defendant Shoffner, have willfully and maliciously misappropriated the trade secrets of RSS in violation of Ohio's Uniform Trade Secrets Act, Ohio Rev. Code §§ 1333.61, *et seq.*

61. Defendants MBA (FL) II and MBA (SC), by and through Defendant Shoffner, did willfully and maliciously acquire RSS's trade secrets, knowingly, or with reason to know, that the trade secrets were acquired by improper means.

62. Defendants MBA (FL) II and MBA (SC), by and through Defendant Shoffner, did willfully and maliciously use RSS's trade secrets without the express or implied consent of RSS.

63. At the time Defendants MBA (FL) II and MBA (SC) used RSS's trade secrets, Defendants knew or had reason to know that they had acquired knowledge of those trade secrets

through Darren Conrad, who had utilized improper means to acquire the trade secrets, as held by the Franklin County Common Pleas Court.

64. Plaintiff has been damaged by Defendants MBA (FL) II, MBA (SC), and Shoffner's willful and malicious conduct in an amount to be determined at trial that exceeds \$75,000.00 exclusive of interest and costs.

65. Pursuant to Ohio Rev. Code §§ 1333.62 through 1333.64, Plaintiff is entitled to (1) permanent injunctive relief precluding Defendants from using Plaintiff's trade secrets; or in the alternative, (2) exceptional injunctive relief that conditions future use of the trade secrets by Defendants, or any subsequent related entities, upon payment of a reasonable royalty; (3) actual damages caused by the misappropriation; (4) unjust enrichment damages caused by the misappropriation that is not taken into account in computing actual loss; or in the alternative (5) past and future reasonable royalty payments; (6) punitive damages of up to three times the amount awarded in actual and unjust enrichment damages (or past royalties); and (7) attorneys' fees.

WHEREFORE, Plaintiff Retail Service Systems, Inc. respectfully demands a trial by jury and prays for judgment as follows:

- A. Injunctive Relief: a permanent injunction enjoining Defendants from using RSS's trade secrets and proprietary materials;
- B. Damages: Actual damages and unjust enrichment damages;
- C. Royalties: Past and future royalties;
- D. Punitive Damages: Punitive or exemplary damages in an amount to be determined by the Court under statute or a jury;
- E. Interest: Pre-judgment and post-judgment interest to Plaintiff, as allowed by law;

- F. Attorneys' Fees, Costs and Expenses: Attorneys' fees, costs and expenses to Plaintiff; and
- G. Such other and further relief as this Court deems just and proper.

Respectfully submitted,

/s/ James E. Arnold

James E. Arnold (OH 0037712)

Trial Attorney

JAMES E. ARNOLD & ASSOCIATES, LPA

115 W. Main St., Fourth Floor

Columbus, Ohio 43215

Telephone: (614) 460-1600

Email: jarnold@arnlaw.com

OF COUNSEL:

Gerrod L. Bede (OH 0088075)

JAMES E. ARNOLD & ASSOCIATES, LPA

115 W. Main St., Fourth Floor

Columbus, Ohio 43215

Telephone: (614) 460-1600

Email: gbede@arnlaw.com

Counsel for Plaintiff Retail Service Systems, Inc.

JURY TRIAL DEMAND

Plaintiff RSS hereby demands a trial by jury as to all issues so triable.

/s/ James E. Arnold

James E. Arnold

EXHIBIT 5

IN THE COURT OF COMMON PLEAS
C.A. NO. 2015-CP-04- 02161

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SEP 15 2015

Public Defender
CLINTON COUNTY COURT

JURISDICTION AND VENUE

2. Defendant Retail Service Systems, Inc. is an Ohio corporation doing business across numerous states, including South Carolina and, upon information and belief, is part or whole owner of Boxdrop Furniture, Inc. Defendant Boxdrop Furniture, Inc. is a South Carolina Corporation operating throughout the state of South Carolina, and upon information and belief, is a subsidiary of Defendant Retail Service Systems,

Inc. (Retail Service Systems, Inc. and Boxdrop Furniture, Inc. are collectively referred to as "RSS", hereinafter.).

3. Carlton Scott Andrew ("Andrew") is an individual and resident of Anderson County, South Carolina, and, upon information and belief, is an owner and officer of RSS.

4. Defendant Darren Brett Conrad ("Conrad") is an individual and previously was a resident of Duval County, Florida and, upon information and belief, is an employee or agent working on behalf of RSS.

5. Venue and jurisdiction are proper in this Court.

GENERAL ALLEGATIONS

6. Prior to 2003, Darren Conrad was an employee of Power Marketing Direct ("PMD").

7. In 2003, Conrad left PMD and began doing business as Carolina Bedding and Furniture, Inc.

8. In October 2011, Conrad began doing business as Carolina Bedding Direct, LLC, of North Carolina. In April 2012, Conrad dissolved the North Carolina entity and started Carolina Bedding Direct, LLC of Florida ("CBD"). In November 2012, Mattress By Appointment, LLC I was formed in Florida. This entity never conducted business, is not a part of MBA as described in paragraph 1 and was dissolved on February 6, 2014.

9. On January 27, 2014, Conrad filed articles of amendment with the Florida Secretary of State changing CBD's name to Mattress by Appointment, LLC. The articles

were approved on February 4, 2014, and Carolina Bedding Direct began doing business as Mattress by Appointment, LLC.

10. Conrad was the majority owner of Carolina Bedding Direct, LLC and MBA until September 4, 2014 and was the CEO of these entities until on or about September 20, 2014.

11. MBA utilizes a network of independent mattress dealers to sell mattresses and other bedding products. In his role as CEO of MBA, Conrad authorized and implemented a business model requiring agreements between MBA and dealers to protect MBA's relationships with dealers and its confidential business information (the "Territory Agreement.").

12. The Territory Agreement contains a non-competition clause that prevents dealers or key employees from direct competition with MBA, competition through ownership of another business, or interference with any MBA's business relationships (the "Non-Compete") for a period of one year following termination.

13. All of MBA's dealers and key personnel enter into a Territory Agreement, which governs each dealer or key personnel's relationship with MBA.

14. On December 3, 2013 and again on December 5, 2013, Conrad agreed and entered into the Territory Agreement with MBA.

15. On March 19, 2013, Edwin Shoffner became a minority shareholder of CBD.

16. On July 3, 2014, Conrad declared bankruptcy.

17. As a result of that bankruptcy, the bankruptcy trustee sold Conrad's interest in CBD/MBA (55%) to the minority shareholder, Edwin Shoffner on September 4, 2014.

18. On September 8, 2014, Conrad formed Mattress Direct, LLC for the purpose of competing with MBA despite still being its CEO and in violation of the Territory Agreement.

19. On October 13, 2014, MBA filed a summons, complaint and motion for an emergency injunction in Duval County, Florida seeking to enjoin Conrad from continued violations of his Territory Agreement. Following evidentiary hearings held on January 9, 2015, January 20, 2015, January 23, 2015, January 27, 2015 and January 29, 2015, the Florida Court found that Conrad was in breach of his Territory Agreement and Non-Compete and granted MBA's motion for a preliminary injunction. Pursuant to the Florida Court's order (the "Florida Order"), Conrad was enjoined from:

- a. Engaging in Business¹ within the Territory²;
- b. Owning an interest in a Business engaged in the Business in the Territory;
- c. Providing services within the Territory that are competitive with MBA;
- d. Soliciting, inducing, influencing, or attempting to solicit, induce or influence any Customer³ (i) to cease doing business in whole or in part

¹ Business is defined in the Territory Agreement as "the business of selling and marketing mattresses...through a network of independent dealers soliciting and scheduling one-on-one appointments with customers."

² Territory is defined in the Territory Agreement as "a straight-line radius of ten miles around the physical location of any showroom maintained by [Conrad], and authorized by MBA, during the two-year period preceding the termination."

³ Customer is defined in the Territory Agreement as "a person or entity to whom or to which [Conrad] sold any Products within the one-year period preceding the termination of the [Territory Agreement] for any reason."

with MBA, or any Dealer for MBA; or (ii) to do business with any other person or entity engaged in the Business; or

- e. Soliciting, attempting to solicit, inducing, attempting to induce, encouraging or endeavoring to cause any Dealer for MBA as of the termination of the Territory Agreement for any reason to cease being a Dealer for MBA, reduce the amount of Products sold through MBA, or sell or market Products through any other person or entity engaged in the Business, or in any manner interfere with the business relationship between MBA and any of its Dealers as of the termination of the Territory Agreement for any reason.

20. The Florida Order further enjoined "all those acting in concert with Conrad...from tortiously interfering with MBA's contractual and advantageous business relationships, including through the sale of mattresses to individuals who have executed a Territory Agreement."

21. Upon information and belief, on or around June 2015 Conrad began acting as an agent of RSS.

22. As an agent of RSS, Conrad has engaged in competition with MBA, in violation of the Non-Compete and the Florida Order.

23. As an agent of RSS, Conrad has interfered in MBA's business relationships with dealers, customers, and key personnel in violation of his Non-Compete and the Florida Order by engaging in the following conduct:

- a. Directly soliciting MBA dealers and key personnel to violate their respective Territory Agreements.

- b. Copying sales information and names to facilitate dealer transitions to his new company.
- c. Utilizing his insider knowledge of MBA pricing to out-price MBA and entice dealers to violate their Territory Agreements.
- d. Directly selling mattresses and competing products with MBA.
- e. Each year, MBA holds an "incentive trip" where dealers that sell a certain number of mattresses are taken, at MBA's expense, to a resort in Mexico. Conrad knew of the trip and the attendees. He took a concurrent trip to an adjacent resort with reciprocity to the resort hosting MBA's incentive trip. While MBA held its incentive trip, Conrad met with and solicited MBA dealers to leave MBA.

24. At all times relevant, RSS and Andrew knew or should have known of the existence of the Non-Compete and the Florida Order. In fact, RSS and Andrew were specifically made aware of proceedings in Duval County, Florida and the Florida Order.

25. Despite RSS and Andrew's knowledge of the Territory Agreement, Non-Compete, and Florida Order, these defendants solicited and engaged Conrad's services to take advantage of his efforts to make relationships with and solicit MBA's dealers and his knowledge of MBA's clients and business practices in an effort to harm MBA all in violation of the Non-Compete and Florida Order.

26. As a direct and proximate result of RSS, Andrew and Conrad's actions, numerous dealers have breached their Territory Agreements with MBA.

FOR A FIRST CAUSE OF ACTION
(Tortious Interference with Contractual Relationship)

27. MBA adopts and re-alleges each and every allegation set forth above not inconsistent with this cause of action.

28. Contracts existed between MBA and Conrad and between MBA and numerous independent dealers.

29. RSS and Andrew knew of these contracts.

30. RSS and Andrew tortiously interfered with these contracts.

31. There was no justification for RSS and Andrew's interference.

32. RSS and Andrew's actions have directly and proximately caused MBA damages.

33. MBA prays for a judgment against RSS and Andrew's, jointly and severally, in the amount of actual, compensatory, and punitive damages as may be determined by a jury.

FOR A SECOND CAUSE OF ACTION
(Aiding and Abetting Breach of Fiduciary Duty)

34. MBA adopts and re-alleges each and every allegation set forth above not inconsistent with this cause of action.

35. Conrad owes certain fiduciary duties to MBA as a former officer of MBA, an MBA dealer, and as a party to the Territory Agreement. By assisting Conrad in his competition with MBA and using confidential information concerning MBA's business disclosed by Conrad, RSS and Andrew have aided and abetted Conrad's breach of fiduciary duties owed to MBA.

36. As a direct and proximate result, MBA has suffered damages in an amount to be determined by a trier of fact.

**FOR A THIRD CAUSE OF ACTION
(Unfair and Deceptive Trade Acts and Practices)**

37. MBA adopts and re-alleges each and every allegation set forth above not inconsistent with this cause of action.

38. RSS, Andrew, and Conrad's actions outlined above occurred in the course of commerce and affected commerce.

39. RSS, Andrew, and Conrad's actions constitute unfair and deceptive trade practices pursuant to S.C. Code Ann. § 39-5-20.

40. RSS, Andrew, and Conrad knew or should have known that their conduct constituted a violation of S.C. Code Ann. § 39-5-20.

41. RSS, Andrew, and Conrad's conduct is capable of repetition and affecting the public at large.

42. RSS, Andrew, and Conrad's actions directly and proximately caused MBA damages.

43. MBA is entitled to a judgment against RSS, Andrew, and Conrad for actual damages, compensatory damages, treble damages, costs, and attorneys' fees.

**FOR A FOURTH CAUSE OF ACTION
(Civil Conspiracy)**

44. MBA adopts and re-alleges each and every allegation set forth above not inconsistent with this cause of action.

45. RSS, Andrew, and Conrad have combined in actions against MBA.

46. The purpose of their joint actions is to injure MBA.

47. RSS, Andrew, and Conrad's actions have caused MBA special damages including, but not limited to, the loss of good will in their Territory Agreements with dealers and loss of the time, assets, and resources committed to developing the business relationships that led to the various breached Territory Agreements.

48. MBA is entitled to a judgment against the defendants in the amount of special damages as may determined by the trier of fact.

**FOR A FIFTH CAUSE OF ACTION
(Preliminary and Permanent Injunction)**

49. MBA adopts and re-alleges each and every allegation set forth above not inconsistent with this cause of action.

50. RSS, Andrew, and Conrad have wrongfully procured valuable customers and dealers from MBA in violation of the dealers' Territory Agreements, solicited MBA dealers to breach their Territory Agreements, and assisted Conrad in competing with MBA in violation of the Territory Agreements, all of which is in violation of the Non-Compete and Florida Order.

51. Conrad has, unlawfully, copied or obtained lists of MBA dealers for the purpose of soliciting a breach of their Territory Agreements. Conrad has breached his duties to MBA and the Territory Agreement, and RSS and Andrew have solicited, procured and participated in Conrad's breaches, all in violation of the Non-Compete and Florida Order.

52. As a direct and proximate result of the defendants' actions, MBA has suffered and will continue to suffer irreparable harm.

53. MBA is, therefore, entitled to a preliminary and permanent injunction ordering Conrad, RSS, and Andrew to cease and desist from any further actions in

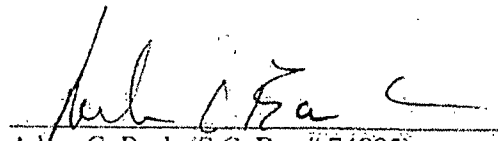
violation of the Territory Agreements, Non-Compete and Florida Order and tortious interference with MBA's business until such time as this Court determines the rights, liabilities, and responsibilities owed to MBA pursuant to Conrad's fiduciary duties, the Territory Agreement, Non-Compete, Florida Order and South Carolina law.

WHEREFORE, MBA respectfully requests the Court enter a judgment awarding it the following relief:

- a. For actual, consequential, compensatory, incidental, special and general damages against RSS, Andrew, and Conrad, jointly and severally, in amounts to be determined by the trier of fact;
- b. For treble damages against RSS, Andrew, and Conrad, jointly and severally, in amounts to be determined by the trier of fact;
- c. For punitive damages against RSS and Andrew in amounts to be determined by the trier of fact;
- d. For all material facts to be decided by a properly empanelled jury;
- e. For pre-judgment and post-judgment interest;
- f. For the cost of this action;
- g. For attorneys' fees; and
- h. For such other and further relief as this Court deems just and proper.

[Signature on following page.]

Respectfully submitted,



Adam C. Bach (S.C. Bar # 74885)

ELLER TONNSEN BACH, LLC

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Greenville, SC 29605

Telephone: (864) 236-5013

Facsimile: (864) 312-4191

abach@etblawfirm.com

September 15, 2015
Greenville, SC

Attorney for MBA

EXHIBIT 6

MOTION FEE PAID

STATE OF SOUTH CAROLINA

COUNTY OF ANDERSON

Mattress by Appointment, LLC

vs.

Retail Service Systems, Inc., Boxdrop
Furniture, Inc., Carlton Scott Andrew, and
Darren Conrad

Defendant.

IN THE COURT OF COMMON PLEAS
TENTH JUDICIAL CIRCUIT

CASE NO.: 2015-CP-04-02161

MOTION AND ORDER INFORMATION FORM AND COVERSHEET

Plaintiff's Attorney:

Adam C. Bach, Bar No. 74885

Address:

2201 Augusta St., Ste. 200, Greenville, SC
29605

Phone: 864-236-5013 Fax 864-312-4191

E-mail: abach@etblawfirm.com Other: _____

Defendant's Attorney:

Beattie Ashmore, Bar No. 10419

Address:

Beattie Ashmore, P.A.

650 E. Washington St.

Greenville, SC 29601

Phone: 864-467-1001 Fax 864-672-1406

E-mail: beattie@beattieashmore.com Other: _____

- ☒ MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)
☐ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)
☐ PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)

SECTION I: Hearing Information

Nature of Motion: Motion to Dismiss

Estimated Time Needed: 1 hour

Court Reporter Needed: ☒ YES / ☐ NO

SECTION II: Motion/Order Type

☐ Written motion attached

☐ Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.

Beattie B. Ashmore

Signature of Attorney for ☒ Plaintiff / ☒ Defendant

11/13/15
Date submitted

SECTION III: Motion Fee

☒ PAID - AMOUNT: \$ _____

☐ EXEMPT:

(check reason)

- ☐ Rule to Show Cause in Child or Spousal Support
☐ Domestic Abuse or Abuse and Neglect
☐ Indigent Status ☐ State Agency v. Indigent Party
☐ Sexually Violent Predator Act ☐ Post-Conviction Relief
☐ Motion for Stay in Bankruptcy
☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)
☐ Proposed order submitted at request of the court; or,
reduced to writing from motion made in open court per judge's instructions

Name of Court Reporter: _____

☐ Other: _____

JUDGE'S SECTION

☐ Motion Fee to be paid upon filing of the attached order.

☐ Other: _____

JUDGE CODE _____

Date: _____

A TRUE COPY

NOV 13 2015

Richard M. Hines
ANDERSON CLERK OF COURT

CLERK'S VERIFICATION

Collected by: TS6 Date Filed: 11-13-15
☒ MOTION FEE COLLECTED: \$ 25.00
☐ CONTESTED - AMOUNT DUE: \$

SCCA 233 (11/2003)

STATE OF SOUTH CAROLINA)

COUNTY OF ANDERSON)

Mattress by Appointment, LLC,)

Plaintiff,)

v.)

Retail Service Systems, Inc., Boxdrop
Furniture, Inc., Carlton Scott Andrew,
and Darren Conrad,)

Defendants.)

IN THE COURT OF COMMON PLEAS

Case No. 2015-CP-04-02161

**DEFENDANTS' NOTICE OF MOTION
AND MOTION TO DISMISS
THE COMPLAINT AND
MEMORANDUM IN SUPPORT**

A TRUE COPY

NOV 13 2015

Richard D. Kline
ANDERSON CLERK OF COURT

Please take notice that the defendants, Retail Service Systems, Inc. and Carlton Scott Andrew, by and through their attorney Beattie B. Ashmore, hereby move to dismiss the Complaint pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure. Such motion will be heard before the Honorable Judge presiding in the Court of Common Pleas, County of Anderson, State of South Carolina, at a time and date to be determined by the Court.

The plaintiff's entire Complaint revolves around a Territory Agreement that defendant Darren Conrad and other dealers allegedly entered into with Mattress by Appointment, LLC on December 3, 2013 and December 5, 2013. (See Complaint ¶¶ 12-14). A reading of the Complaint reveals that the plaintiff, Mattress by Appointment, LLC, is actually two separate entities Mattress by Appointment, LLC. According to the Complaint, the plaintiff Mattress by Appointment, LLC did not exist until January 27, 2014 and did not begin doing business as Mattress by Appointment, LLC until February 4, 2014. In fact, the Complaint specifically alleges that the Mattress by Appointment, LLC that was in existence in December 2013 is *not* the same entity as the plaintiff. (Complaint ¶ 8). The plaintiff has an extensive history of creating and renaming business entities

in order to improperly use RSS's trade secrets. The plaintiff fails to state facts sufficient to constitute a cause of action, and this case must be dismissed. The plaintiff is not a party to the Territory Agreement and therefore lacks standing to bring this lawsuit.

I. BACKGROUND AND ALLEGATIONS OF COMPLAINT

This lawsuit is one of many in the decade of litigation related to the theft of defendant Retail Service System, Inc.'s trade secrets. On one hand, the plaintiff asserts that it is the Mattress by Appointment, LLC, which existed and did business as Mattress by Appointment, LLC, a Florida Limited Liability Company, in December 2013. (See Complaint ¶ 14, alleging that Mattress by Appointment, LLC entered into the Territory Agreement in December 2013). On the other hand, it claims to be a completely distinct and separate entity. (See Complaint ¶ 9, alleging that it did not do business as Mattress by Appointment, LLC until February 4, 2014).

On October 4, 2013, defendant Retail Service Systems, Inc. ("RSS") filed a lawsuit against Carolina Bedding Direct, LLC, Mattress by Appointment, LLC, and Does 1-50 in the District Court for the Southern District of Ohio (Case No. 2:13-cv-00994, "Ohio Case No. 1"). (Exhibit 1, Complaint, Ohio Federal Case No. 1). RSS asserts that Carolina Bedding Direct, LLC and Mattress by Appointment, LLC obtained and continue to use the trade secrets that belong to RSS. (Exhibit 1, Complaint, Ohio Federal Case No. 1, ¶¶ 2, 37-38). The Ohio Complaint describes Mattress by Appointment, LLC as being a Florida Limited Liability Company. (Exhibit 1, Complaint, Ohio Federal Case No. 1, ¶ 7). It describes Carolina Bedding Direct, LLC as a company that represented itself in Ohio secretary of state filings as a North Carolina Limited Liability Company, however the North Carolina secretary of state filings reflected that the company was dissolved as of October 18, 2011, so RSS believed the entity was Carolina Bedding

Direct, LLC a Florida Limited Liability Company. (Exhibit 1, Complaint, Ohio Federal Case No. 1, ¶ 6).

Both defendants retained counsel in Ohio Federal Case No. 1, and almost a year of litigation ensued between the parties relating to which parties were properly before the Court, and whether service was proper on those parties. Ultimately, the Court found that both parties were properly served, and entered a default against CBD (NC) and Mattress by Appointment, LLC. (Exhibit 2, Ohio Federal Case No. 1 Docket). The damages hearing in Ohio Federal Case No. 1 against those entities is scheduled for December 16, 2015. (Exhibit 2, Ohio Federal Case No. 1 Docket, Docket Entry No. 132).

Notably, it was only *after* RSS filed Ohio Case No. 1 (October 4, 2013) and *after* RSS obtained a default against Mattress by Appointment, LLC (January 27, 2014) that the plaintiff in the present matter took the name Mattress by Appointment, LLC.

Allegations in the present Complaint state that the plaintiff became Mattress by Appointment, LLC, a Florida Limited Liability Company, on January 27, 2014, (Complaint ¶ 8), the same day that RSS obtained the Judgment against Mattress by Appointment, LLC, a Florida Limited Liability Company, in Ohio Federal Case No. 1. Thus, in order to avoid liability in Ohio Federal Case No. 1, the plaintiff here claimed that it merely changed its name from Carolina Bedding of Florida, LLC (an entity that had not been sued in Ohio Federal Case No. 1) to Mattress by Appointment, LLC.

The plaintiff here asserts that it did not do business as Mattress by Appointment, LLC, a Florida Limited Liability Company, until February 4, 2014. (Complaint ¶ 9). In other words, the plaintiff alleges there are two separate Mattress by Appointment, LLC, Florida Limited Liability Companies: (1) Mattress by Appointment, LLC, a Florida Limited Liability Company, which

existed prior to January 27, 2014 ("MBA (FL) I"), which was sued by RSS in Ohio Federal Case No. 1; and (2) Mattress by Appointment, LLC, a Florida Limited Liability Company, which began to exist on January 27, 2014 and began to do business as Mattress by Appointment, LLC on February 4, 2014 ("MBA (FL) II"), which was not sued by RSS in Ohio Federal Case No. 1.¹

RSS filed a lawsuit on August 31, 2015 against MBA (FL) II, Mattress by Appointment, LLC of South Carolina ("MBA (SC)"), and Edwin Shoffner (the owner of both MBA (FL) II and MBA (SC)) in the United States District Court for the Southern District of Ohio.² (Case No. 2:15-cv-02769, "Ohio Federal Case No. 2"). (Exhibit 4, Complaint, Ohio Federal Case No. 2). RSS has asserted there that MBA (FL) II, MBA (SC), and CBD (FL) are essentially the same companies or successors in interest to CBD (NC) and MBA (FL) I. (Exhibit 4, Complaint, Ohio Federal Case No. 2, ¶¶ 54-57). MBA (FL) II, MBA (SC), and CBD (FL) have filed a motion to dismiss Ohio Federal Case No. 2, claiming that the Ohio Courts do not have personal jurisdiction over them. This motion is currently pending. Ohio Federal Case No. 1 and Ohio Federal Case No. 2 have been designated by the Federal Courts as related. (Exhibit 2, Ohio Federal Case No. 1 Docket, p. 1).

The plaintiff has now filed the present case in South Carolina, specifically alleging that it is *not* MBA (FL) I. (Complaint ¶ 8). Rather, it claims to be MBA (FL) II that came into existence on January 27, 2014 and began doing business as Mattress by Appointment, LLC on February 4, 2014. (Complaint ¶¶ 8, 9). Thus, the *only* company doing business as "Mattress by Appointment, LLC" prior to January 2014 was MBA (FL) I.

¹ These designations are for ease of reference only for the purposes of this Motion. The defendants in no way concede that Mattress by Appointment, LLC is two (or more) distinct companies.

² South Carolina Secretary of State records indicate that Mattress by Appointment, LLC filed as a South Carolina Limited Liability Company on August 29, 2014. (Exhibit 3, South Carolina Secretary of State records).

The South Carolina Complaint alleges that on December 3, 2013 and again on December 5, 2013, Conrad and others entered a Territory Agreement with "MBA." (Complaint ¶ 14). It alleges that on October 13, 2014, "MBA" filed a summons, complaint, and motion for an emergency injunction in Duval County, Florida seeking to enjoin Conrad from continued violations of his Territory Agreement. (Complaint ¶ 19). It further alleges that the Florida court found that Conrad was in breach of the Territory Agreement and Non-Compete and granted "MBA's" motion for a preliminary injunction. (Complaint ¶ 19). The plaintiff alleges that the Florida Order enjoined all those acting in concert with Conrad from tortiously interfering with "MBA's" Territory Agreement with Conrad. (Complaint ¶ 20).

The plaintiff here -- who claims to only be MBA (FL) II -- brings various causes of actions based on duties allegedly owed to MBA (FL) I and damages allegedly suffered by MBA (FL) I. (Complaint ¶¶ 22-26, 28, 35, 38, 45, 50-51). The plaintiff apparently realizes that if it asserts that it was MBA (FL) I, or is a successor to MBA (FL) I, it would be admitting that it is subject to the default judgment awaiting a damages hearing in Ohio Federal Case No. 1.³

II. LEGAL STANDARD

"Under Rule 12(b)(6), SCRCP, a defendant may make a motion to dismiss based on a failure to state facts sufficient to constitute a cause of action." Baird v. Charleston County, 333 S.C. 519, 527, 511 S.E.2d 69, 73 (1999). "A trial judge in the civil setting may dismiss a claim when the defendant demonstrates the plaintiff has failed to state facts sufficient to constitute a cause of action in the pleadings filed with the court." Doe v. Marion, 361 S.C. 463, 469, 605 S.E.2d 556, 559 (Ct. App. 2004). "Generally, in considering a 12(b)(6) motion, the trial court

³ In fact, the "Confidential Information" and "Playbook" referenced in the Territory Agreement attached to the Florida Complaint utilize RSS's protected trade secrets.

must base its ruling solely upon allegations set forth on the face of the complaint.” Id. (citing Stiles v. Onorato, 318 S.C. 297, 475 S.E.2d 601 (1995)).

III. ARGUMENT

Despite the complex background of this case, the defendants’ argument is fairly simple. Assuming that the plaintiff’s allegations are true, the plaintiff here *could not be* the same entity that entered into the Territory Agreement with Conrad. Thus, the plaintiff could not have suffered any injury due to the defendants’ alleged actions, and the present plaintiff has no standing to bring this case.

The plaintiff bases its entire Complaint on a Territory Agreement that “Mattress by Appointment, LLC, a Florida Limited Liability Company” allegedly entered into in December 2013. However, the only “Mattress by Appointment, LLC” entity that existed at the time was MBA (FL) I, which is not a party to this case by plaintiff’s own admission.

The plaintiff alleges that Conrad entered into a Territory Agreement with “MBA” on December 3, 2013 and December 5, 2013, which is the subject of a Florida case and a Florida preliminary injunction. (Complaint ¶¶ 11-14, 19). The Complaint in the Florida case alleges that the Territory Agreement was executed electronically, and as such, no hard copy of the document was maintained upon execution. (Exhibit 5, Florida Complaint ¶¶ 12-14). Nevertheless, the Florida Complaint attached an asserted “true and correct redacted copy of the Territory Agreement that MBA entered with another Dealer on December 4, 2013, the substance of which is the same as the Territory Agreement executed by Defendant Conrad.” (Exhibit 5, Florida Complaint, p. 2 ¶ 14).

It is clear and unambiguous that MBA (FL) I was the entity that allegedly entered into the Territory Agreement. “Where contracts are clear and unambiguous, they should be construed as

written, and the court can give it no other meaning.” Institutional & Supermarket Equipment, Inc. v. C & S Refrigeration, Inc., 609 So.2d 66, 68 (Ct. App. Fla. 1992) (citing Hamilton Const. Co. v. Board of Public Instruction of Dade County, 65 So. 729 (Fla. 1953); *see also* Andersen Windows, Inc. v. Hochberg, 997 So.2d 1212, 1214 (Ct. App. Fl. 2008) (“Courts, without dispute, are not authorized to rewrite clear and unambiguous contracts ... And where a contract is clear and unambiguous, it must be enforced as written”); Lee v. University of South Carolina, 407 S.C. 512, 517-18, 757 S.E.2d 394, 397 (2014) (“Parties [to a contract] are governed by their outward expressions and the court is not at liberty to consider their secret intentions”).

Here, the Territory Agreement clearly and unambiguously identifies the entity as “MATTRESS BY APPOINTMENT LLC, a Florida Limited Liability Company.” (Exhibit 5, Florida Complaint, p. 15). The only entity doing business as “Mattress by Appointment, LLC” at that time was MBA (FL) I. The Territory Agreement does not identify some future entity that would allegedly come into existence months later, only after default was entered against the party to the Territory Agreement. Moreover, it does not identify some other entity that existed at the time. It only identifies Mattress by Appointment, LLC, a Florida Limited Liability Company, which existed at the time and which is subject to the Judgment in Ohio Federal Case No. 1.

It is also clear and unambiguous that MBA (FL) I was the only “Mattress by Appointment” entity doing business as “Mattress by Appointment, LLC, a Florida Limited Liability Company” at the time of the Territory Agreement. The Territory Agreement states that “MBA is engaged” in the business of selling and marketing mattresses, that part of the consideration is “MBA allowing Dealer to use its branded name ‘Mattress by Appointment’,” and that “MBA dealers order products exclusively through MBA.” (Exhibit 5, Florida Complaint, pp. 15, 21) (bold added). Again, it does not refer to some entity that may in the future begin doing business as Mattress by

Appointment, LLC. It is referring to the Mattress by Appointment, LLC, which was doing business as that entity at the time of the Territory Agreement -- MBA (FL) I.

"The parties selected the language of the contract. Finding it to be clear and unambiguous, [the Court] has no right ... to give it a meaning other than that expressed in it. To hold otherwise would be to do violence to the most fundamental principles of contracts." Institutional & Supermarket Equipment, Inc., 609 So.2d at 69 (quoting Hamilton Construction, 65 So.2d at 731; see also McGill v. Moore, 381 S.C. 179, 188, 672 S.E.2d 571, 576 (2009) ("Where a written instrument is unambiguous, parol evidence is inadmissible to ascertain the true intent and meaning of the parties").

It is clear and unambiguous that the entity who purportedly entered into the Territory Agreement was MBA (FL) I. The duties (if any) were owed to MBA (FL) I and the damages (if any) were suffered by MBA (FL) I. Because the plaintiff specifically denies being MBA (FL) I, the Complaint fails to state facts sufficient to constitute a cause of action, and the plaintiff has no standing to bring this action.

Dated this 13th day of November, 2015


Beattie B. Ashmore (SC Bar # 10419)
Beattie B. Ashmore, P.A.
650 E. Washington St.
Greenville, SC 29601
(864) 467-1001
*Attorney for Retail Service Systems,
Inc. and Carlton Scott Andrew*

EXHIBIT 7

STATE OF SOUTH CAROLINA

COUNTY OF ANDERSON

Mattress by Appointment, LLC

☐ Plaintiff

v.

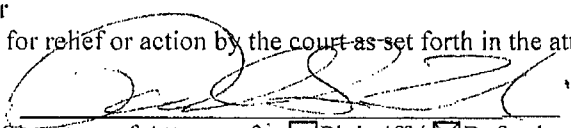
Retail Service Systems, Inc., Et Al.

☒ Defendant.

IN THE COURT OF COMMON PLEAS

CASE NO.
2015-CP-04-02161

MOTION AND ORDER INFORMATION
FORM AND COVER SHEET

Plaintiff's Attorney: _____, Bar No. Address: phone: _____ fax: _____ e-mail: _____ other: _____	Defendant's Attorney: Paul S. Landis, Bar No. 76120 Address: PO Box 10207, Greenville, SC 29603 phone: 864-233-0445 fax: 864-233-4781 e-mail: paul@fayssouxlaw.com other: _____
☒ MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III) ☐ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III) ☐ PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)	
SECTION I: Hearing Information Nature of Motion: Motion to Dismiss Estimated Time Needed: 30 min Court Reporter Needed: ☒ YES / ☐ NO	
SECTION II: Motion/Order Type ☒ Written motion attached ☐ Form Motion/Order I hereby move for relief or action by the court as set forth in the attached proposed order.  Signature of Attorney for ☐ Plaintiff / ☒ Defendant November 13, 2015 Date submitted	
SECTION III: Motion Fee ☒ PAID - AMOUNT: 25.00 ☐ EXEMPT: ☐ Rule to Show Cause in Child or Spousal Support (check reason) ☐ Domestic Abuse or Abuse and Neglect ☐ Indigent Status ☐ State Agency v. Indigent Party ☐ Sexually Violent Predator Act ☐ Post-Conviction Relief ☐ Motion for Stay in Bankruptcy ☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP) ☐ Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions Name of Court Reporter: _____ ☐ Other: _____	
JUDGE'S SECTION ☐ Motion Fee to be paid upon filing of the attached order. ☐ Other: _____	JUDGE: _____ CODE: _____ Date: _____
CLERK'S VERIFICATION Collected by: <u>TSG</u> Date Filed: <u>11-13-15</u> ☒ MOTION FEE COLLECTED: <u>25.00</u> ☐ CONTESTED - AMOUNT DUE: _____	

SCCA/233 (11-03)

A TRUE COPY

NOV 13 2015

Richard S. Kiley
ANDERSON CLERK OF COURT

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS

COUNTY OF ANDERSON)

Case No. 2015-CP-04-02161

Mattress by Appointment, LLC,)

Plaintiff,)

v.)

**DEFENDANT BOXDROP
FURNITURE, INC.'S NOTICE
OF MOTION AND MOTION
TO DISMISS AND MOTION
FOR MORE DEFINITE STATEMENT**

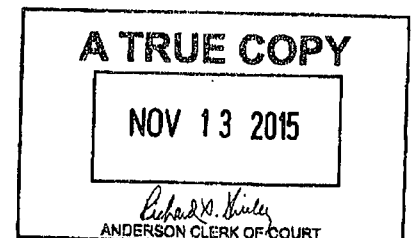
Retail Service Systems, Inc., Boxdrop)
Furniture, Inc., Carlton Scott Andrew,)
and Darren Conrad,)

Defendants.)

Please take notice that the Defendant Boxdrop Furniture, Inc. hereby moves to dismiss the Complaint pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure, or alternatively, moves for a more definite statement pursuant to Rule 12(e), SCRCPP. Such motion will be heard in the Court of Common Pleas, County of Anderson, State of South Carolina, at a time and date to be determined by the Court.

Plaintiff's Complaint fails to state facts sufficient to constitute a cause of action. More specifically, the grounds for Defendant's motion include, but may not be limited to, the following:

1. Boxdrop Furniture, Inc. is an independent entity owned one hundred percent by Daphene Andrew.
2. Boxdrop Furniture, Inc. was not formed until 2015 and neither existed nor did business at the time of the acts alleged in Plaintiff's Complaint.
3. Plaintiff has failed to allege a duty or other obligation owed by Boxdrop Furniture, Inc. to Plaintiff.
4. Plaintiff lacks standing to bring this action.

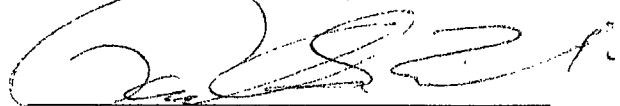


In support of its motion, Defendant Boxdrop Furniture, Inc. reserves the right to present affidavits, citations of authority, arguments, and other relevant materials. Furthermore, Defendant Boxdrop craves reference to and incorporates the arguments of co-defendants to the extent such arguments are applicable to Boxdrop.

In the alternative, Boxdrop Furniture, Inc. moves for a more definite statement. In its Complaint, Plaintiff refers to Retail Service Systems, Inc. and Boxdrop Furniture, Inc. collectively. However, Boxdrop Furniture, Inc. is not owned in whole or in part by Retail Service Systems, Inc. – or by any other entity. Accordingly, Boxdrop Furniture requests that Plaintiff allege facts applicable to Boxdrop Furniture, Inc. so that it may understand the allegations against it (if such allegations exist) and form an appropriate response.

WE SO MOVE.

FAYSSOUX LAW FIRM, P.A.



James W. Fayssoux, Jr. / SC Bar # 16659

Paul S. Landis/ SC Bar # 76120

P.O. Box 10207

Greenville, SC 29603

(864) 233-0445

(864) 233-4781 (Fax)

wally@fayssouxlaw.com

paul@fayssouxlaw.com

Attorneys for Boxdrop Furniture, Inc.

November 12, 2015

EXHIBIT 8

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS)

COUNTY OF ANDERSON)

TENTH JUDICIAL CIRCUIT)

CASE NO.: 2015-CP-04-02161)

Mattress by Appointment, LLC,)

MOTION AND ORDER INFORMATION

Plaintiff,)

FORM AND COVERSHEET

vs.)

Retail Service Systems, Inc., et al)

Defendant.)

Plaintiff's Attorney:

Adam C. Bach., Bar No. 00527

Address:

2201 Augusta Street, Ste 200, Greenville, SC

Phone: _____ Fax: _____

E-mail: _____ Other: _____

Defendant's Attorney:

L. Walter Tollison, III, Bar No. 5595

Address:

24 Vardry St., Ste. 203, Greenville, SC 29601

Phone: 864-451-7038 Fax 864-451-7591

E-mail: walt.tollison@thetollisonlawfirm.com

Other: _____

- ☒ MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)
☐ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)
☐ PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)

SECTION I: Hearing Information

Nature of Motion: Motion to Dismiss

Estimated Time Needed: 15 min

Court Reporter Needed: ☒ YES / ☐ NO

SECTION II: Motion/Order Type

☒ Written motion attached☐ Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.

Signature of Attorney for ☐ Plaintiff / ☒ Defendant

November 13, 2015

Date submitted

SECTION III: Motion Fee

☒ PAID - AMOUNT: \$ _____☐ EXEMPT:

(check reason)

☐ Rule to Show Cause in Child or Spousal Support☐ Domestic Abuse or Abuse and Neglect☐ Indigent Status ☐ State Agency v. Indigent Party☐ Sexually Violent Predator Act ☐ Post-Conviction Relief☐ Motion for Stay in Bankruptcy☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)☒ Proposed order submitted at request of the court; or,
reduced to writing from motion made in open court per judge's instructions

Name of Court Reporter: _____

☐ Other: _____

JUDGE'S SECTION

☐ Motion Fee to be paid upon filing of the attached order.☐ Other: _____

JUDGE CODE _____

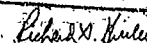
Date: _____

CLERK'S VERIFICATION

Collected by: TSGDate Filed: 11-13-15☒ MOTION FEE COLLECTED: \$ 25.00☐ CONTESTED - AMOUNT DUE: \$ _____

A TRUE COPY

NOV 13 2015


 ANDERSON CLERK OF COURT

STATE OF SOUTH CAROLINA)

COUNTY OF ANDERSON)

Mattress by Appointment, LLC,)

Plaintiff,)

v.)

Retail Service Systems, Inc., Boxdrop)
Furniture, Inc., Carlton Scott Andrew,)
and Darren Conrad,)

Defendants.)

IN THE COURT OF COMMON PLEAS

Case No. 2015-CP-04-02161

**DEFENDANT'S NOTICE OF MOTION
AND MOTION TO DISMISS**

A TRUE COPY

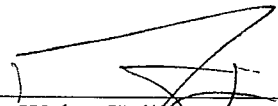
NOV 13 2015

Richard X. Kule
ANDERSON CLERK OF COURT

Please take notice that Defendant Darren Conrad, by and through his undersigned counsel, hereby moves to dismiss the Complaint pursuant to Rules 12(b)(5), 12(b)(6) and 12(b)(8) of the South Carolina Rules of Civil Procedure, and that such motion will be heard before the Honorable Judge presiding in the Court of Common Pleas, County of Anderson, State of South Carolina, at a time and date to be determined by the Court, but in any event, not less than 10 days after service of this Motion.

Specifically, Defendant Conrad contends that he has neither been properly served with, nor waived service of, the Summons and Complaint pursuant to Rule 4 of the South Carolina Rules of Civil Procedure, and for this reason the Complaint should be dismissed. Further, even if the Court finds that proper service has been affected, Plaintiff has failed to state a claim upon which relief can be granted because Plaintiff is not a party to the Territory Agreement upon which the above captioned suit is based, and the claims being asserted against Defendant Conrad in this action appear to be duplicative, in whole or part, of the claims pursued by Plaintiff in other jurisdictions.

Respectfully submitted,



L. Walter Tollison, III
The Tollison Law Firm, P.A.
24 Vardry St.
Suite 203
Greenville, SC 29601
(864) 451-7038
Attorney for Darren Conrad

November 13, 2015
Greenville, South Carolina

EXHIBIT 9

From: "McIntosh, Lawton" <lmcintoshj@sccourts.org>

Date: Tuesday, January 26, 2016 at 1:50 PM

To: Adam Bach <abach@etblawfirm.com>, "Beattie (beattie@beattieashmore.com)"

<beattie@beattieashmore.com>, "walt.tollison@thetollisonlawfirm.com"

<walt.tollison@thetollisonlawfirm.com>, "paul@fayssouxlaw.com" <paul@fayssouxlaw.com>

Cc: "McIntosh, Lawton Law Clerk (Elizabeth Nicholson)" <lmcintoshlc@sccourts.org>, "McIntosh, Lawton Secretary (Susan Stanfield)" <lmcintoshsc@sccourts.org>

Subject: mattress by appointment -v-retail service systems, inc. et al 2015-cp-04-2161

Gentlemen, I have read through the file in the above matter (with the exception of the amended complaint which is not in the file). Having reading through the file, I have concerns as to the pending motions and well as this litigation. Because of the procedural aspects of this/these multi-state cases and corporations, I intend to draft and order directing plaintiff and plaintiff's counsel to file a more definite and certain complaint. The order is based on the original complaint since the alleged amended complaint is not in the courts file (although reportedly filed last week). Plaintiff's CEO and legal counsel shall be required to each verify the ordered pleading prior to filing and serving. Thereafter I will rule on the various motions to dismiss. At this juncture, the plaintiff shall not file a more definite and certain complaint as to Boxdrop Furniture, Inc as ordered at the hearing but only as will be ordered by me shortly. Please advise your respective clients that all subsequent motions and pleadings shall be verified by their CEO's or their top mananging/corporate officer. The requirement for corporate verifications shall continue until further order of this court. Also, please advise your clients that I reserve the right to require the named individual defendants, as well as C. Edwin Shoffner and the top corporate officer of the respective corporations to attend any future hearings in this case.

Lawton McIntosh

~~~ CONFIDENTIALITY NOTICE ~~~ This message is intended only for the addressee and may contain information that is confidential. If you are not the intended recipient, do not read, copy, retain, or disseminate this message or any attachment. If you have received this message in error, please contact the sender immediately and delete all copies of the message and any attachments.

## **EXHIBIT 10**

STATE OF SOUTH CAROLINA  
COUNTY OF ANDERSON  
IN THE COURT OF COMMON PLEAS

## JUDGMENT IN A CIVIL CASE

CASE NO. 2015-CP-04-02161

Mattress by Appointment, LLC

Retail Service Systems, Inc., Boxdrop  
Furniture, Inc., Carlton Scott Andrew and  
Darren Conrad

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:

Attorney for: ☐ Plaintiff ☒ Defendant  
or  
☐ Self-Represented Litigant

## 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. ☐ See Page 2 for additional information.
- ☐ **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
- ☐ **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.

See Pages Two (2) and Three (3).

## ORDER INFORMATION

This order ☐ ends ☐ does not end the case.

Additional Information for the Clerk:

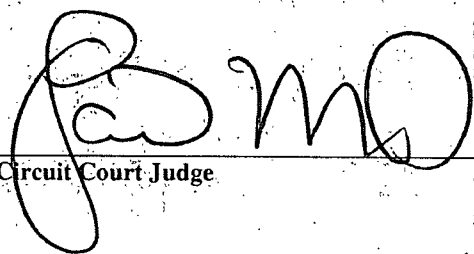
## INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

| Judgment in Favor of<br>(List name(s) below) | Judgment Against<br>(List name(s) below) | Judgment Amount To be Enrolled<br>(List amount(s) below) |
|----------------------------------------------|------------------------------------------|----------------------------------------------------------|
|                                              |                                          | \$                                                       |
|                                              |                                          | \$                                                       |
|                                              |                                          | \$                                                       |

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note:** Title abstractors and researchers should refer to the official court order for judgment details.

  
Circuit Court Judge

2155

Judge Code

1-26-16  
Date

**For Clerk of Court Office Use Only**

This judgment was entered on the \_\_\_\_\_ day of \_\_\_\_\_, 2015 and a copy mailed first class or placed in the appropriate attorney's box on this \_\_\_\_\_ day of \_\_\_\_\_, 2016 to attorneys of record or to parties (when appearing pro se) as follows:

\_\_\_\_\_  
\_\_\_\_\_  
**ATTORNEY(S) FOR THE PLAINTIFF(S)**

\_\_\_\_\_  
\_\_\_\_\_  
**ATTORNEY(S) FOR THE DEFENDANT(S)**

\_\_\_\_\_  
**CLERK OF COURT**

**Court Reporter:**  
\_\_\_\_\_

**ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.**

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

The Court is, sua sponte, requiring the Plaintiff to provide more definite and certain statements in the Complaint. The Amended Complaint shall be verified by Plaintiff's highest ranking corporate officer and Plaintiff's attorney. The amendment shall be as follows and shall be due no later than Friday, February 5, 2016 by 5:00 pm (unless otherwise ordered by the Court). The more definite and certain statement shall include:

A) Date and places of incorporation of Plaintiff, Mattress by Appointment, LLC; the names of any and all predecessor's entities, including dates and places of incorporation;

B) Date, places and names of incorporation of any and all successor entities of Mattress by Appointment, LLC (including but not limited to all successor entities of identical name) principle places of business(es);

C) A brief description of the nature and matter by which Mattress by Appointment, LLC of Fla and Mattress by Appointment, LLC of South Carolina <sup>(1)</sup> are legal successors in interest to Carolina Bedding Direct and how each legally became successors in interest to Carolina Bedding Direct (CBD), a Florida LLC;

D) Facts to support Plaintiff's underlying allegation(s) that Boxdrop Furniture, Inc. is wholly or partially owned by Defendant Retail Service Systems, Inc.;

E) Facts to support Plaintiff's contention in Paragraph 8 of its complaint that "Mattress by Appointment, LLC I" <sup>(1)</sup> never conduct business, <sup>(2)</sup> is not a part of the Plaintiff, Mattress by Appointment, LLC. <sup>(3)</sup> any and all facts to support Plaintiff's contention that "Mattress by Appointment, LLC I" was dissolved on February 6, 2014;

F) Facts to support Plaintiff's contention that Edwin Shoffner on September 4, 2014 purchased 55% interest in both "CBO/MBA" from the bankruptcy trustee;

G) Facts to support Plaintiff's contention in Paragraph 21 that on or around June, 2015 Conrad began acting as agent of RSS; H) Facts to support Plaintiff's contention that "contracts existed between MBA and Conrad..." (Paragraph 28 Complaint);

I) Facts to support Plaintiff's contention (Paragraph 30 Complaint) that RSS and Andrew tortiously interfered with these contracts;

J) Facts to support Plaintiff's contention in Paragraph 35 of the Complaint that RSS and Andrew assisted and/or abetted Conrad's breach of fiduciary duties.

Henceforth, all future pleadings, motions and filings and discovery responses shall be verified by the highest ranking corporate officer of each entity, the individual parties and their respective attorneys. No formal order is requested.

## **EXHIBIT 11**

**MOTION FEE PAID**

STATE OF SOUTH CAROLINA )

IN THE COURT OF COMMON PLEAS

COUNTY OF ANDERSON )

CASE NO.: 2015-CP-04-02161

Mattress by Appointment, LLC, )

**MOTION AND ORDER INFORMATION  
FORM AND COVERSHEET**

vs. )

Retail Service Systems, Inc., Boxdrop Furniture, )  
Inc., Carlton Scott Andrew, and Darren Conrad, )

Defendant. )

Plaintiff's Attorney:

Adam C. Bach, Bar No. 74885

Address:

2201 Augusta Street, Ste. 200, Greenville, SC 29605

Phone: (864) 236-5013 Fax (864) 312-4191

E-mail: abach@etblawfirm.com Other: \_\_\_\_\_

Defendant's Attorney:

, Bar No. \_\_\_\_\_

Address: \_\_\_\_\_

Phone: \_\_\_\_\_ Fax: \_\_\_\_\_

E-mail: \_\_\_\_\_ Other: \_\_\_\_\_

☒ **MOTION HEARING REQUESTED** (attach written motion and complete SECTIONS I and III)

☐ **FORM MOTION, NO HEARING REQUESTED** (complete SECTIONS II and III)

☐ **PROPOSED ORDER/CONSENT ORDER** (complete SECTIONS II and III)

**SECTION I: Hearing Information**

Nature of Motion: Motion to reconsider, amend or alter judgment

Estimated Time Needed: 30mins

Court Reporter Needed: ☒ YES / ☐ NO

**SECTION II: Motion/Order Type**

☒ Written motion attached

☐ Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.

Signature of Attorney for ☒ Plaintiff / ☐ Defendant

1/28/2016

Date submitted

**SECTION III: Motion Fee**

☒ **PAID - AMOUNT: \$25.00**

☐ **EXEMPT:**

(check reason)

☐ Rule to Show Cause in Child or Spousal Support

☐ Domestic Abuse or Abuse and Neglect

☐ Indigent Status ☐ State Agency v. Indigent Party

☐ Sexually Violent Predator Act ☐ Post-Conviction Relief

☐ Motion for Stay in Bankruptcy

☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)

☐ Proposed order submitted at request of the court; or,  
reduced to writing from motion made in open court per judge's instructions

Name of Court Reporter: \_\_\_\_\_

☐ Other: \_\_\_\_\_

**JUDGE'S SECTION**

☐ Motion Fee to be paid upon filing of the attached order.

☐ Other: \_\_\_\_\_

JUDGE CODE \_\_\_\_\_

Date: \_\_\_\_\_

**CLERK'S VERIFICATION**

Collected by: \_\_\_\_\_ Date Filed: \_\_\_\_\_

☐ **MOTION FEE COLLECTED: \$** \_\_\_\_\_

☐ **CONTESTED - AMOUNT DUE: \$** \_\_\_\_\_

**A TRUE COPY**

**JAN 29 2016**

*Robert M. Gault*  
ANDERSON CLERK OF COURT

MOTION FEE PAID

STATE OF SOUTH CAROLINA

COUNTY OF ANDERSON

Mattress by Appointment, LLC,

Plaintiff,

v.

Retail Service Systems, Inc., Boxdrop  
Furniture, Inc., Carlton Scott Andrew,  
and Darren Conrad,

Defendants.

) IN THE COURT OF COMMON PLEAS

) C.A. NO. 2015-CP-04-2161

**A TRUE COPY**

JAN 29 2016

*Robert L. King*  
ANDERSON CLERK OF COURT

) **VERIFIED NOTICE OF MOTION**  
) **MOTION AND MEMORANDUM IN**  
) **SUPPORT OF MOTION TO**  
) **RECONSIDER, AMEND OR ALTER**  
) **JUDGMENT**

YOU WILL PLEASE TAKE NOTICE THAT the plaintiff, Mattress by Appointment, LLC, by and through its undersigned attorneys, will move at date and time to be set by the Court, for an order reconsidering, altering or amending its order entered on January 26, 2016. The basis for this motion and relief sought are as follow:

**INTRODUCTION AND PROCEDURAL POSTURE**

This matter came before the Court for a hearing on the defendants' motion to dismiss the plaintiff's complaint. The defendants originally sought dismissal on two grounds: 1) the plaintiff was not a party to a contract underpinning the complaint; and 2) jurisdiction and venue were properly in Duval County, Florida. Prior to the hearing, the plaintiff filed an amended complaint to address the first basis for the defendants' motion to dismiss. It did not learn of the defendants' second basis until the night before the hearing.

Following the hearing, the Court *sua sponte* entered an order requiring the plaintiff to plead additional facts in support of its complaint. In an email to the parties, the Court expressed concern regarding the multistate litigation between these parties.

Prior to addressing the grounds for its motion to reconsider, the plaintiff would like to provide the Court with background on this litigation in an effort to address the Court's concerns as expressed in its email and order.

### **BACKGROUND**

Darren Conrad, a named defendant in this action, incorporated Carolina Bedding Direct, LLC in Florida ("CBD") on April 11, 2012. *See* Articles of Incorporation, attached as **Exhibit A**.

In November 2012, Conrad formed Mattress by Appointment, LLC 1 ("MBA 1") in Florida. *See* Entity Detail, attached as **Exhibit B**.

On March 19, 2013, Edwin Shoffner became a minority shareholder of CBD. Prior to acquiring his minority interest in CBD, Shoffner had no ownership in any company owned or ever owned by Conrad. Instead, Shoffner's relationship with Conrad was through his status as a sales representative of Serta and/or Park Place Corporation, two companies for which Shoffner worked prior to March 2013.

In November 2013, CBD began doing business as "Mattress by Appointment, LLC." *See* Affidavit of Conrad at ¶ 3, attached as **Exhibit C**. While at the time MBA 1 was still in existence, this entity was never used for any purpose and never conducted any business. *See* Letter from Conrad to Florida Secretary of State, attached as **Exhibit D**. Instead, as described by Conrad in his affidavit and subsequent testimony, while CEO and majority shareholder of CBD, Conrad created the Territory Agreement and entered into the Territory Agreement with CBD on December 3, 2013 and December 5, 2013. Conrad Affidavit at ¶¶ 3-7. Conrad filed articles of amendment officially changing CBD's name to Mattress by Appointment on February 4, 2014. *See* Articles of

Amendment, attached as **Exhibit E**. Conrad's affidavit affirms throughout that CBD was the operative entity in November and December 2013 and this was again confirmed by Conrad in a letter he provided to the Florida Secretary of State on January 27, 2014. *See* Letter of Conrad to Florida Secretary of State. MBA 1 was dissolved on February 6, 2014. *See* Entity Detail.

On February 4, 2014, Conrad filed articles of amendment changing CBD's name to Mattress by Appointment, LLC. *See* Articles of Amendment.

In March 2014, Shoffner was terminated as President by majority shareholder Conrad and the board of CBD. In total, Shoffner was a co-employee with Conrad for approximately one year. During that year, RSS filed suit against two entities previously created by Conrad, Carolina Bedding Direct, a dissolved North Carolina entity, and MBA 1, but failed to file suit against CBD of Florida, the current plaintiff. *See* Report and Recommendation of Mark Abel, Magistrate Judge, at page 7, attached as **Exhibit F** ("Carolina Bedding, LLC (FL), quite simply, is not a party to this action.") *affirmed*, Retail Service Systems, Inc. v. Carolina Bedding Direct, LLC, *et. al.*, 2:13-994-GCS, Docket Entry 102, August 27, 2014 (S. D. Ohio). RSS proceeded against CBD of North Carolina and MBA 1 and a default judgment was entered in Ohio against CBD of North Carolina and MBA 1 in February 2015.

In this litigation, RSS and Andrew allege in their motion to dismiss "the plaintiff has an extensive history of creating and renaming business" but neglect to mention that every single entity was created by their co-defendant and agent Conrad. The plaintiff in this litigation has existed in Florida since it was created by Conrad in 2012 and, except

for a name change in 2014, has always existed in the same corporate form, with the same Florida filing number and the same employer identification number. *See* Entity Detail.

On July 3, 2014, Conrad filed for bankruptcy in the United States Bankruptcy Court for the Middle District of Florida. *See In Re Darren Conrad*, 3:14-bk-3268-PMG (Bankr. M.D. Fla. 2014). On September 4, 2014, Shoffner purchased Conrad's majority interest in the plaintiff. *See* Order Approving Sale, attached as **Exhibit G**. RSS was a party to and consented in proceedings resulting in the transfer of Conrad's interest to Shoffner and received \$150,000.00 of the sale proceeds to facilitate the transaction. *See* Motion for Order to Approve Sale, excerpts attached as **Exhibit H**.

Following the sale of Conrad's interest to Shoffner in September 2014, Shoffner learned that Conrad had begun taking steps to begin forming a competing business. *See* Florida Order, attached as **Exhibit I**. Part of these steps was to begin contacting the plaintiff's dealers in an effort to convince them to begin doing business with Conrad's newly planned entity. *Id.* All of these actions were in violation of Conrad's Territory Agreement and the plaintiff's operating agreement to which Conrad was a party.

On October 13, 2014, the plaintiff in this litigation filed a verified complaint against Conrad in Duval County, Florida. In its Verified Complaint, the plaintiff alleged that on or about December 3, 2013, Conrad entered into a Territory Agreement, that Conrad violated multiple provisions of his Territory Agreement, breached his fiduciary duties to the plaintiff, and interfered with the plaintiff's business relationships. The plaintiff sought injunctive relief and damages. The plaintiff filed two subsequent verified amended complaints containing the same allegations and Conrad filed answers to these complaints as well. *See* First and Second Verified Amended Complaints and Conrad

Answers, these documents are not filed to avoid excessive material being submitted to the Court but are available upon request. During the course of discovery, Conrad denied that he was bound by the Territory Agreement but never denied that the plaintiff was a party to the agreement.

The Florida Court held five evidentiary hearings on the plaintiff's motion for a preliminary injunction – January 9, 2015, January 20, 2015, January 23, 2015, January 27, 2015, and January 29, 2015. *See* Florida Order. Darren Conrad, Edwin Shoffner, and other relevant witnesses provided sworn testimony at these hearings. During those hearings, the Florida Court reviewed testimony and evidence that Conrad began taking steps to compete against the plaintiff in August 2014 under a new entity named “Matress Direct, LLC” of Florida.

Following five evidentiary hearings, the presentation of live testimony, discovery conducted by the parties, and arguments of counsel, the Court entered an order granting the plaintiff's motion for a preliminary injunction on April 29, 2015. In its order, the Florida Court made findings of fact relevant to this action, some of which are included in the plaintiff's South Carolina complaint, including:

1. Conrad authorized and developed the plaintiff's Territory Agreement (Order ¶ 2);
2. Conrad agreed to the terms of the Territory Agreement with the plaintiff (Order ¶¶ 3, 33);
3. All of the plaintiff's dealers and key personnel entered into MBA Territory Agreements with Protective Covenants (Order ¶ 4);

4. Conrad solicited certain dealers in violation of both his Territory Agreement and the individual dealers' Territory Agreements, including:

- a. Leroy Adams
- b. James Amistadi
- c. Scott Anderson
- d. Randy Butson
- e. Gail Carlson
- f. Doreen Carson
- g. Clyde Faus
- h. Gary Gallo
- i. Thomas Gray
- j. Troy and Laurie Meath
- k. Mark Randall
- l. Kyle Sherratt
- m. John Swanson
- n. Rachel Taylor
- o. Chris Webb
- p. David Zaczynski<sup>1</sup>

(Order Second ¶ 4, page 15)

5. That the Conrad Territory Agreement was reasonable and enforceable under Florida law (Order ¶ 17 - 21);

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<sup>1</sup> The individuals listed in the Florida order were named by Conrad during his testimony in the Florida evidentiary proceedings. The plaintiff has since identified at least another ten dealers that Conrad has interfered with through subsequent depositions with fact witnesses.

6. That Conrad owed fiduciary duties to the plaintiff pursuant to the Operating Agreement and his status as an officer or former officer of the plaintiff (Order ¶ 22-23).

Conrad was held in contempt for his continued violation of the Florida Order on July 28, 2015, *see* Contempt Order, attached as **Exhibit J**, and his pleadings were stricken.

Despite entry of the preliminary injunction, Conrad continued competing against the plaintiff. Following entry of the preliminary injunction, Shoffner spoke with Defendant Andrew on multiple occasions. Following an industry trade show on or around August 2015, Andrew told Shoffner that he had “engaged” Conrad to recruit dealers for RSS, which Shoffner later learned to be Boxdrop. This conversation was confirmed by the discovery of Conrad’s creation of Boxdrop’s Facebook Page, which advertises itself as an affiliate of RSS. *See* Facebook Pages, attached as **Exhibit K** and Webpages, attached as **Exhibit L**. The plaintiff originally believed Boxdrop to be owned by RSS based on Andrew’s representations that he “engaged” Conrad as a recruiter, Conrad’s creation of Boxdrop’s Facebook page, and the fact that both entities are owned by Andrews. Boxdrop now represents that it is owned by Andrew’s wife, Daphene Andrew, and the plaintiff has amended to allege an affiliation between the companies but believes the evidence will ultimately show both entities are owned or controlled by Andrew or RSS.

Conrad continues to represent himself as an agent of Boxdrop on various website postings and other materials. *See* Exhibit N. In fact, Conrad is identified as a speaker at an upcoming conference hosted by Boxdrop. *Id.* Conrad’s agency with Andrew, RSS or

Boxdrop was also confirmed by third party witnesses and is known within the mattress industry. To the plaintiff's knowledge, Andrew, RSS, and Boxdrop have made no effort to conceal that Conrad is working on their behalf.

On June 21, 2015, Conrad created Boxdrop's Facebook page. Nine days later Conrad, without explanation, signed an affidavit admitting numerous allegations made by RSS and its predecessor PMD that Conrad had previously consistently denied over the course of 12 years of litigation. No explanation was provided for his reversal. On August 11, 2015, Shoffner received a call from Andrew threatening him with litigation if he did not agree to merge his business with RSS. During this call, Andrew repeatedly represented that Conrad was now working for him and that Conrad would now testify against the plaintiff unless the plaintiff agreed to merge with RSS.

Shoffner refused. On August 31, 2015, RSS filed suit in Ohio against the plaintiff. Despite knowing about the existence of the plaintiff for nearly three years, and despite knowing that it had failed to sue the proper entity in Ohio for more than a year, RSS did not file suit against the plaintiff until a) Conrad began working for RSS and b) Conrad signed his new affidavit contradicting his previous representations and allegations concerning the plaintiff.

The plaintiff filed this action on September 15, 2015 to stop RSS, Conrad and Boxdrop from continuing to interfere with its contractual relationships with its dealers, using information Conrad learned as an officer or director of the plaintiff to compete against it, continuing to engage in a conspiracy directed at the plaintiff, and for Unfair Trade Practices.

Just two weeks after this action was filed, the plaintiff obtained video surveillance and a video surveillance report indicating that persons matching the description of Conrad, Daphene Andrew, Scott Andrew and key dealers for the plaintiff, including Troy Meath, Mark Randall, Kyle Sherrat, Jimmy Amastadi, and Doreen Carson, were attending an RSS/Boxdrop/Mattress Direct event in North Carolina. Conrad, Mattress Direct, Meath, Sherrat, Randall, Amastadi, and Carson are all parties to the plaintiff's Territory Agreement and subjects of the Florida court's order.

### **DISCUSSION OF GROUNDS FOR MOTION TO RECONSIDER**

The previous background to this litigation is provided in an effort to address the Court's concerns. RSS has no legal right to facilitate Conrad's continued violation of his non-compete and fiduciary duties or to use Conrad as its "recruiter" to interfere with the plaintiff's contracts. If RSS/Boxdrop chooses to use Conrad as its agent/recruiter, it is liable for its actions and his. Nothing about RSS's belated and suspicious action in Ohio gives it, Boxdrop, or Conrad, the right to violate the law in South Carolina, or anywhere else for that matter. The plaintiff has the right to bring this action to stop their illegal activity.

I. The order should be altered or amended to find that based upon the representations of the defendants, jurisdiction and venue are proper in Duval County, Florida

The plaintiff first learned of the defendants' forum arguments at 5:39 p.m. on the night before the hearing when it received an email from Mr. Ashmore, counsel for RSS and Andrew. See Email to Bach, attached as Exhibit M. The email contained no details concerning the arguments other than they were based on a forum selection clause

contained in a Territory Agreement that the defendants a) were not a party to and b) claim is unenforceable.<sup>2</sup>

The first requirement for invoking a Florida forum selection clause is that the moving party is subject to jurisdiction in Florida. *See Loyd & Ring's Wholesale Nursery, Inc. v. Long & Woodley Landscaping & Garden Ctr., Inc.*, 315 S.C. 88, 94, 431 S.E.2d 632, 636 (Ct. App. 1993) (discussing the enforcement of forum selection clauses under Florida law). At the hearing, the defendants argued repeatedly that this litigation should proceed in Florida. *See e.g.*, Hearing Transcript, January 26, 2016 at 4:22-5:1 (Ashmore: But my first argument to the Court, Your Honor, is that this litigation needs to be in Florida...); 11:13-14 (Ashmore: This is all taking place in Florida.); 11:25-12:1 (Ashmore: Your honor, it's all about this territory agreement which has got to be litigated in Florida.); 18:21-19:1 (Tollison: If I'm a non-party and I'm violating...a court order...you think we're going to win on jurisdiction – they're going to win on a jurisdiction argument...He can sue them in Florida for whatever he just alleged that he would allege to the Florida court.); 19:15-16 (Tollison: But let the Florida court do that).

This case was brought in Anderson County, South Carolina because the plaintiff believed that one or more of the defendants would object to jurisdiction in Duval County and it believes that three of the defendants (RSS, Boxdrop, and Andrew) may be subject to general jurisdiction in South Carolina. *See* S.C. Code § 36-2-802. The plaintiff brought this action here precisely to avoid a fight over venue and jurisdiction and has no desire to litigate about where to litigate. Although the plaintiff believes jurisdiction and

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<sup>2</sup> The clause relied upon by the defendants is contained in the Territory Agreement, attached as Exhibit 5 to RSS and Andrew's original motion to dismiss, which was filed on November 13, 2015. No explanation was provided as to why forum was not raised in original filing.

venue are proper here, there are distinct advantages to placing venue in Florida, including its familiarity with these proceedings.

Following the hearing and learning about the defendants' position on jurisdiction, the plaintiff's counsel consulted with his client and his clients' Florida attorneys concerning whether a Florida court would find jurisdiction. The plaintiffs seek to make certain that the defendants do not object to jurisdiction in South Carolina only to arrive in Florida and object to jurisdiction there as well, which if successful would raise due process concerns. The defendants are subject to suit somewhere.

However, based on the defendants' arguments and their invocation of the Florida forum selection clause, the plaintiff agrees to transfer venue to Duval County, provided that this Court finds that the defendants are subject to jurisdiction in Duval County, Florida, have agreed not to contest jurisdiction in Duval County, Florida, and that venue is more appropriate in Duval County, Florida.

Alternatively, the plaintiff asks the Court to stay this action so that it may bring this action in Florida to obtain a determination on jurisdiction and venue in Florida. In the event the Florida court accepts jurisdiction and venue, counsel for the plaintiff will certify that the action is proceeding in Florida and enter a dismissal without prejudice. In the event the defendants raise objections to jurisdiction and venue in Florida and/or the Florida court does not accept jurisdiction and venue, the Court could lift the stay and proceed with this action.

II. The operative pleading is the plaintiff's amended complaint and the plaintiff asks the Court to amend its order to reflect the amended complaint

The Court's order is directed to the original complaint filed in this action. The plaintiff mailed an amended pleading to the defendants and the Anderson County Clerk of Court on January 19, 2016. See Amended Complaint with Certificate of Service, attached as Exhibit N. The pleading was filed by the Anderson County Clerk of Court on January 25, 2016, the day before the hearing on the defendants' motions to dismiss. *Id.* Once an amended pleading is filed, a party is no longer bound by the original pleading. *Duncan v. CRS Sirrine Engineers, Inc.*, 337 S.C. 537, 542, 524 S.E.2d 115, 117 (Ct. App. 1999).

The primary differences between the pleadings as it concerns the Court's order are as follows:

- a) The amended pleading removes the South Carolina Mattress by Appointment entity because plans to transition the plaintiff to South Carolina have been put on hold pending the resolution of the Florida litigation.
- b) The amended pleading revises the allegations concerning Boxdrop and RSS to allege that they are affiliates or subsidiaries of one another.
- c) The amended pleading makes it clear that Conrad entered the Territory Agreement with the plaintiff in this action.
- d) The amended complaint more closely conforms to Conrad's affidavit.

III. The plaintiff asks the Court to reconsider or amend its order requiring additional facts to be pled by the plaintiff

The plaintiff asks the Court to reconsider or amend its order requiring the plaintiff to plead additional facts in support of its allegations for two reasons: 1) The defendants have not submitted a responsive pleading and some or all of the allegations contained in the current complaint are unlikely to be disputed by the defendants; and 2) The plaintiff is only required to plead ultimate facts.

First, the order requires the plaintiff to make numerous additional allegations about facts that are unlikely to be disputed or that are within the knowledge of the defendants, including:

a) The Court requires the plaintiff to plead additional facts concerning the date, places and names of any all of its predecessor entities, including dates and places of incorporation. The plaintiff in this case was incorporated in Florida in 2012 by Darren Conrad and its name was changed to Mattress by Appointment, LLC in 2014, by Darren Conrad. We do not believe this is in dispute.

b) The plaintiff does not believe that any party will dispute that Carolina Bedding Direct, LLC became Mattress by Appointment, LLC by filing amended articles changing its name.

c) While Boxdrop has disputed that it is owned in whole or part by RSS, the plaintiff doubts that Boxdrop and RSS will dispute that they are at a minimum affiliated companies as represented on their websites.

d) RSS, Conrad, and Shoffner entered into a consent order regarding his purchase of Conrad's 55% interest in Mattress by Appointment, LLC f/k/a Carolina Bedding Direct and it is doubtful this allegation will be disputed.

e) Conrad has openly represented that he is an agent of Boxdrop, and Andrew has previously represented to Shoffner that Conrad is an agent. Given the openness of the relationship between Boxdrop and Conrad, the Court should determine if this allegation is disputed before requiring the plaintiff to plead additional facts.

Other allegation may be admitted by the defendants as well. Prior to requiring additional factual allegations to support the plaintiff's complaint, the defendants should be required to file a responsive pleading so the Court may determine what facts are in dispute.

Second, the plaintiff's complaint is only required to contain short and plain statements of the grounds and must be "simple, concise, and direct." See Rule 8(a) and (e). "The purpose of pleadings is to place the adversary on notice as to what the issues are." *Langston v. Niles*, 265 S.C. 445, 455, 219 S.E.2d 829, 833 (1975) see also *Shirley's Iron Works, Inc. v. City of Union*, 403 S.C. 560, 574, 743 S.E.2d 778, 785 (2013); *Watts v. Metro Sec. Agency*, 346 S.C. 235, 240, 550 S.E.2d 869, 871 (Ct. App. 2001) ("The purpose of a pleading is fair notice to the opponent and the court.").

Rule 8 "mandates that a pleading contain ultimate facts rather than evidentiary facts." *RoTec Servs., Inc. v. Encompass Servs., Inc.*, 359 S.C. 467, 473, 597 S.E.2d 881, 884 (Ct. App. 2004) (quoting *Watts v. Metro Sec. Agency*, 346 S.C. 235, 240, 550 S.E.2d 869, 871 (Ct. App. 2001)). "A litigant is not required to plead evidentiary matter and we have held that it is both unnecessary and improper to do so." *Stroud v. Riddle*, 260 S.C.

99, 102, 194 S.E.2d 235, 237 (1973). "The ultimate facts required to be stated in a pleading are those which the evidence upon the trial will prove, and not the evidence which will be required to prove those facts." *Id.*

The plaintiff believes it has complied with Rule 8 and asks the Court to alter or amend its judgment requiring the plaintiff to plead additional facts.

III. In the event the Court denies the plaintiff's motion to alter or amend its judgment requiring additional facts in support of plaintiff's allegations, the plaintiff asks the Court to clarify what is required by the Court when it requests additional "Facts to support Plaintiff's contention" or "Facts to support Plaintiff's underlying allegations"

The plaintiff desires to make sure it understands and fully complies with the Court's order without submitting too much.

For example, the Court instructs the plaintiff to provide facts to support its contention that a contract existed between the plaintiff and Conrad. The plaintiff relies on the order of the Florida court described in the Amended Complaint. The Florida court has already determined that Conrad entered into an enforceable contract with the plaintiff and its determination is entitled to Full Faith and Credit pursuant to Article IV of the United States Constitution. *See Microplanet Sys. USA Ltd. V. American Aire, Inc.*, 368 S.C. 146, 628 S.E.2d 43, 45 (2006) ("In accordance with [full faith and credit], the courts of one state must give such force and effect to a foreign judgment as the judgment would receive in the state where rendered."). Additionally, Conrad is barred by judicial estoppel and res judicata from re-litigating different or novel issues pertaining to the Territory Agreement. *See Cothran v. Brown*, 357 S.C. 210, 592 S.E.2d 629 (2004) ("judicial estoppel is an equitable concept that prevents a litigant from asserting a position

inconsistent with, or in conflict with, one the litigant has previously asserted in the same or related proceeding"); *Plum Creek Dev. Co. v. City of Conway*, 334 S.C. 30, 34, 512 S.E.2d 106, 109 (1999) ("[a] litigant is barred from raising any issues which were adjudicated in the former suit and any issues which might have been raised in the former suit."). Submission or recitation of the evidence supporting the Florida order would be voluminous.

As another example, the Court instructs the plaintiff to include facts to support the plaintiff's contention that Shoffner purchased a "55% interest in CBO/MBA." The plaintiff alleged that Shoffner purchased this interest from the bankruptcy trustee of Conrad's bankruptcy estate. The facts in the plaintiff's possession concerning this allegation would include portions of the record from the bankruptcy proceedings, Conrad's bankruptcy petition identifying the asset, motions to permit the sale of the asset, the bankruptcy court's order approving the sale, along with other materials from that proceeding.

As another example, the Court instructs the plaintiff to include facts to support the plaintiff's allegation that Boxdrop is owned partially or wholly by RSS. The facts in the plaintiff's possession include web pages, witness statements, and these entities' own representations. Similarly, the Court instructs the plaintiff to include facts to support its allegations that Conrad began acting as an agent for RSS (which collectively refers to Boxdrop in the complaint) and that RSS tortiously interfered with Conrad's contract. The evidence in the plaintiff's possession includes web pages, witness testimony, emails, and surveillance video.

The plaintiff desires to make sure it complies with Court's requirement without unnecessarily pleading or submitting evidence beyond what the Court is seeking. Therefore, the plaintiff asks the Court to alter or amend its order to provide clarification.

IV. The plaintiff asks the Court to alter, amend or clarify its requirement that pleadings, motions, filings, and discovery responses be verified by the highest ranking corporate officer of each entity, the individual parties and their respective attorneys

Verification as contemplated by the Rules of Civil Procedure is described in Rule 11(c). Rule 11(c) provides that verifications must be sworn before an officer who can administer oaths and provide that the affiant knows the facts stated to be "true of his own knowledge" or that he believes them to be true on information and belief.

Rule 11(a) provides that "except when otherwise specifically provided for by rule or statute, pleadings need not be verified or accompanied by an affidavit." Additionally, the verification of motions and some discovery responses are not provided for by the *Rules of Civil Procedure* and, in the case of motions, the client must often rely on facts or evidence discovered in litigation but outside of its knowledge. For example, many dispositive motions are based on testimony or evidence obtained from the opposing party, even where the moving party does not believe that testimony or evidence. Additionally, verification as contemplated by Rule 11(c) constitutes an individual's affidavit, which may not be proper where information or facts stated are not within the individual's firsthand knowledge. Therefore, the plaintiff asks the Court to reconsider its order requiring verification for pleadings, filings, motions and discovery responses. Alternatively, the plaintiff asks the Court to amend its order to require verification of pleadings and discovery responses only.

The plaintiff's counsel also seeks clarification regarding the Court's order requiring verification by the parties' attorneys for all pleadings, motions, filings, and discovery responses. The plaintiff asks the Court to clarify whether verification by an attorney refers to the certificate provided by the attorneys' signature on documents pursuant to Rule 11(a) or to a verification sworn under oath providing that the verifying party knows the facts to be true as provided for in Rule 11(c).

To the extent the Court is requiring attorney verification pursuant to Rule 11(c), the order is inconsistent with attorneys' obligations under the Rules of Professional Conduct. *See* 3.1, cmt. 2 (providing that the filing of an action, defense or taking an action for a client is not frivolous merely because facts have not first been fully substantiated or because the lawyer expects to develop evidence only by discovery); 3.3 cmt. 2 ("a lawyer in an adversary proceeding is not required to...vouch for the evidence submitted in a cause"), 3.3 cmt. 3 ("An advocate is responsible for pleadings and other documents...but is usually not required to have personal knowledge of matters asserted therein, for litigation documents ordinarily present assertions by the client, or by someone on the client's behalf."). To diligently and competently represent a party, an attorney must be able to act within the full scope of the Rules of Professional Conduct. While he is not permitted to make statements that he knows are false, he is permitted to file pleadings, motions, make other filings and serve discovery responses without personal knowledge of the matters asserted therein, which is inconsistent with the requirements for verification pursuant to Rule 11(c).

V. The plaintiff asks the Court to stay its January 26, 2016 ruling until this motion is decided.

The Court's ruling on one or more of the above issues will affect the plaintiff's compliance with the January 26, 2016 order. Therefore, the plaintiff asks the Court to stay its ruling until this motion may be heard and ruled upon.

### **CONCLUSION**

Based upon the foregoing, the Rules of Civil Procedure and the common and statutory law of the State of South Carolina, the plaintiff respectfully requests that the Court alter or amend its order to provide the following:

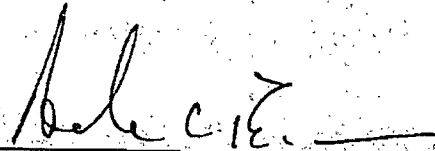
1. Finding that jurisdiction is proper in Duval County, Florida and the defendants are subject to jurisdiction in Duval County, Florida; that the parties agree to jurisdiction and venue in Duval County, Florida; and dismissing this case pursuant to Rule 12(b)(3) without prejudice to refile in South Carolina.
2. Alternatively, enter an order staying this case so that the plaintiff may file this action in Duval County, Florida to receive a determination on jurisdiction and venue from a Florida court.
3. Amend the order to reflect the allegations contained in the amended complaint; order the defendants to file a responsive pleading to determine which allegations addressed by the order, if any, are disputed and must be supported by additional facts; or amend the order to remove the requirement that the plaintiff plead additional facts in support of its previously stated allegations.
4. Alternatively, clarify what the plaintiff must plead in order to comply with the Court's requirement that it plead additional facts in support of various allegations;
5. Amend the order to remove the requirement that all pleadings, motions, filings, and discovery responses be verified by each party's highest ranking officer and

attorneys; or amend the order to provide that only pleadings and discovery responses must be verified by the parties.

6. Amend the order to make it clear that verification by attorneys refers to the signature requirement provided for in Rule 11(a), rather than the verification as provided for in Rule 11(c).

7. Stay its original order until this motion can be heard and decided.

Respectfully submitted,



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January 29, 2016  
Greenville, SC

Attorneys for the plaintiff

The attorneys for the plaintiff affirm that they have consulted with opposing counsel prior to filing this motion

  
Adam C. Bach

*Verification of attorney on following page*

## **EXHIBIT 12**

STATE OF SOUTH CAROLINA )

COUNTY OF ANDERSON )

Mattress by Appointment, LLC, )

Plaintiff, )

v. )

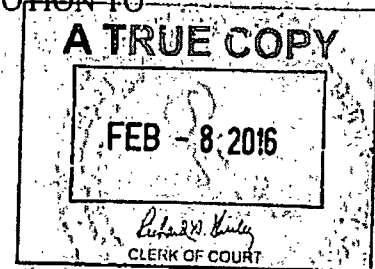
Retail Service Systems, Inc., Boxdrop  
Furniture, Inc., Carlton Scott Andrew,  
and Darren Conrad, )

Defendants. )

IN THE COURT OF COMMON PLEAS

Case No. 2015-CP-04-02161

RETAIL SERVICE SYSTEMS, INC. AND  
CARLSON SCOTT ANDREW'S  
RESPONSE IN OPPOSITION TO  
PLAINTIFF'S MOTION TO  
RECONSIDER



The Plaintiff filed its twenty-page motion for reconsideration with accompanying exhibits as the result of this Court's Order of January 26, 2016. The Plaintiff asks this South Carolina Court to find that jurisdiction is proper in a yet-to-be-filed lawsuit in Duval County, Florida. In the alternative, the Plaintiff asks for a stay of this action in case it is unsuccessful in their jurisdictional arguments in Florida. The Defendants, Retail Service Systems, Inc. (RSS) and Carlton Scott Andrew ("Scott Andrew") file this Response in Opposition to the Motion. These parties have been involved in extensive litigation for years and the Plaintiff has now added Scott Andrew's wife's company, Boxdrop Furniture, Inc., to the litigation.

In its Motion to Reconsider, the Plaintiff maintains that the operative pleading is the Plaintiff's amended complaint (motion at 12). The amended complaint is untimely and was not filed by the consent of the parties nor by Order of this Court. Therefore, the Plaintiff's motion is misdirected and should address the Court's January 26, 2016 Order as it is written and directed at the original complaint. *See Rule 15(a) SCRPC.*

The Plaintiff complains that they first learned of the forum selection clause argument the day before the January 26, 2016 hearing. What the motion fails to point out is that all defendants filed motions to dismiss in November of 2015. The Plaintiff never filed a response to any of these motions. Instead, one week prior to the January 26<sup>th</sup> hearing, the Plaintiff mailed to the Defendants a proposed amended complaint and the December 3, 2013 Territory Agreement from Duval County, Florida. Therefore, it certainly knew that the forum selection clause was contained within that document. The email attached as an exhibit to the motion from the undersigned to Mr. Bach was simply an attempt to determine prior to the hearing what possible explanation would exist as to how the Duval County, Florida Territory Agreement could be litigated in Anderson County, South Carolina.

The Plaintiff also attempts to imply that RSS and Scott Andrew consent to jurisdiction in Duval County, Florida. Nowhere in the transcript or pleadings does Scott Andrew or RSS acknowledge or consent to jurisdiction in Duval County, Florida. When the Plaintiff relies on the statement that "...this litigation needs to be in Florida...", it simply means that since the Plaintiff choose to rely upon the one contract in support of its lawsuit, that contract has a forum selection clause dictating jurisdiction in Duval County, Florida. The Plaintiff has provided only one contract in support of its complaint, and that contract is clear that any cause of action concerning that contract must be brought in Duval County, Florida. The parties that are subject to jurisdiction there is an entirely different matter.

The Motion explains the Plaintiff's thinking in that it states that "this case was brought in Anderson County, South Carolina because the Plaintiff believes that one or more of the Defendants would object to jurisdiction in Duval County...". This was confirmed at the January 26<sup>th</sup> hearing when Mr. Bach told the Court that "...if we went to Florida, they'd say, we don't

have jurisdiction, and would probably be correct.” (January 26, 2016 Transcript at p. 9, lines 15-17). The Defendants agree with this analysis.

The motion states that “the Defendants are subject to suit somewhere.” It is not the duty of the Defendants to educate the Plaintiff on where and how to bring a lawsuit against the Defendants. If the Plaintiff wants to sue the Defendants, it has to bring meritorious claims in a Court of competent jurisdiction. The fact that it has been unable to do so and continues to be frustrated in its jurisdictional arguments is quite telling.

The Plaintiff maintains that “[A]ll we have to prove is that there is a contract and the Defendants knew about the contract and interfered with it without justification. (Transcript at p. 8, lines 2-4). Yet the only contract ever referenced and the only contract provided by the Plaintiff is the December 3, 2013 Territory Agreement with the Duval County, Florida forum selection clause.

The Plaintiff admits that the contract that serves as the basis of this lawsuit is the December 3, 2013 Territory Agreement:

THE COURT: And then you also argued that there was a contract that was deemed to be valid, and, therefore, that’s the first step in your complaint. And that is the territorial agreement, correct?

Mr. Bach: Correct. The allegation...  
(Transcript at p. 12 lines 14-18).

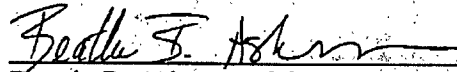
The Plaintiff has offered no rationale, explanation or defense concerning the forum selection clause. It says what it says. If the Plaintiff has some issue concerning that contract, it needs to go to Duval County, Florida.

Beyond the insurmountable difficulties caused by the forum selection clause, the Plaintiff still has to explain how it has standing to sue on a December 3, 2013 Florida contract when it was formed at a later date – January 27, 2014.

The Plaintiff makes a number of extraordinary requests for relief in the motion. In essence, it wants this Court to rule that the Defendants consented to jurisdiction in Florida. There is nothing in the record to support that assertion. Failing that, it wants this South Carolina Court to actually rule that the Defendants are subject to jurisdiction in Florida. In the alternative, it asks this Court to stay this action while it attempts to exercise jurisdiction over the Defendants for however long that may take. The Plaintiff needs to decide where it wishes to bring suit and the Defendants will defend accordingly. It would be unfair to stay this litigation while the Plaintiff attempts to assert jurisdiction over the Defendants in Florida. Numerous other requests are made by the Plaintiff that this Response will not address, however, the Defendants specifically object to Plaintiff's requests 1-4 in its conclusion on page 19. The Defendant leaves requests 5, 6 and 7 in the sound discretion of this Court.

Dated this 4<sup>th</sup> day of February, 2016

BEATTIE B. ASHMORE, P.A.

  
Beattie B. Ashmore, SC Bar No. 010419  
650 E. Washington Street  
Greenville, South Carolina 29601  
(864) 467-1001 (phone)  
(864) 672-1406 (fax)  
[Beattie@BeattieAshmore.com](mailto:Beattie@BeattieAshmore.com)

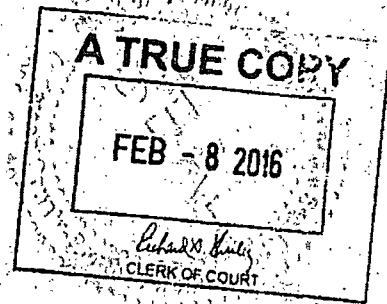
State of South Carolina )

County of Anderson )

Verification by Attorney

The undersigned represents that he has reviewed the response to Plaintiff's Motion to Reconsider and all statements contained therein are true and correct to the best of his knowledge and based upon a review of the pleadings and information provided by his client.

Beattie B. Ashmore  
Beattie B. Ashmore



SWORN to before me this

4th day of February, 2016

Notary Public for South Carolina

My Commission Expires May 19, 2024

Richard M. Bell

STATE OF SOUTH CAROLINA )

COUNTY OF ANDERSON )

Mattress by Appointment, LLC, )

Plaintiff, )

v. )

Retail Service Systems, Inc., Boxdrop  
Furniture, Inc., Carlton Scott Andrew,  
and Darren Conrad, )

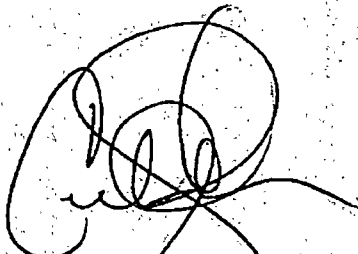
Defendants. )

IN THE COURT OF COMMON PLEAS

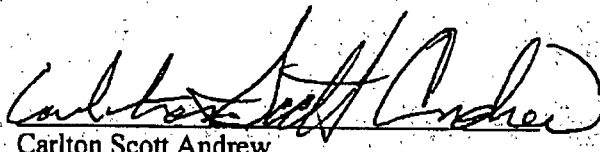
Case No. 2015-CP-04-02161

**VERIFICATION**

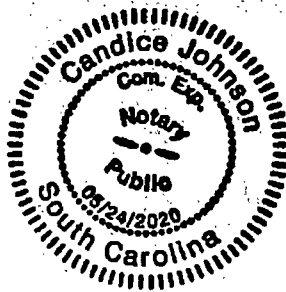
PERSONALLY APPEARED BEFORE ME, Carlton Scott Andrew, who being duly sworn states that he is the owner and highest ranking officer and member of the Defendant R.S.S., and as such is authorized to make this Verification pursuant to the Rules of Civil Procedure and this Court's January 26, 2016 Order; that he has read the foregoing response and that it is true and accurate to the best of his knowledge as to all statements that are within the Defendant's knowledge or, to the extent outside of his knowledge, are based upon information and belief.



SWORN to before me this  
4 day of February, 2016  
Notary Public for South Carolina  
My Commission Expires May 24 2020



Carlton Scott Andrew  
Retail Service Systems, Inc.



## **EXHIBIT 13**

) IN THE COURT OF COMMON PLEAS

) C.A. NO. 2015-CP-04-2161

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whether the parties are subject to jurisdiction in Florida before reaching the merits of the forum selection clause. *See* Loyd & Ring's Wholesale Nursery, Inc. v. Long & Woodley Landscaping & Garden Ctr., Inc., 315 S.C. 88, 94, 431 S.E.2d 632, 636 (Ct. App. 1993) (“It is only after the Florida Court ‘has in personam jurisdiction over the [buyer] that...the enforceability of a forum selection clause comes into play.”); *see also* F.S.A. § 685.101 (“the parties to any contract...may to the extent permitted under the United States Constitution, agree that the law of this state will govern such contract”); F.S.A. § 685.102 (jurisdiction can be placed in Florida provided that “such person or entity located outside this state agrees to submit to the jurisdiction of the courts of this state.”). As non-parties claiming the forum selection clause applies, the Court must first determine that the non-party is so closely related to the dispute that it is bound by the clause. *See* Lipcon v. Underwriters at Lloyd's, London, 148 F.3d 1285, 1299 (11th Cir. 1998) (*cited by* XR C. v. Block & Balestri, P.C., 44 F.Supp.2d 1296 (S.D. Florida 1999)).

The defendants ignore these requirements and ask the Court to simply dismiss the action without making any of the findings required to invoke the Florida forum selection clause. At the hearing, the defendants argued this litigation should be in Florida because of the Florida forum selection clause. *See e.g.*, Hearing Transcript, January 26, 2015 at 4:22-5:1; 11:13-14; 11:25-12:1; 18:21-19:1; 19:15-16. It defies logic that only one party, in this case MBA, could be dismissed from court because it is bound to litigate in Florida by a forum selection clause but not find that the other parties, the actual moving parties, are also bound. MBA cannot be bound to itself. The very nature of a forum selection clause is that the out-of-state parties, or in this case non-parties, have agreed to litigate in

another jurisdiction and are bound by that agreement. *See* F.S.A. § 685.102; Lipcon, 148 F.3d at 1299.

If the defendants' argument is not that they are bound by the forum selection clause but that forum is more convenient in Florida, that argument is also dependent on their being subject to jurisdiction in Florida. It is basic to the doctrine of forum non conveniens that the jurisdiction to which a party seeks transfer has jurisdiction; if it does not, then by definition it is not a more convenient forum. *See* Braten Apparel Corp. v. Bankers Trust Co., 259 S.E.2d 110 (S.C. 1979) ("Forum non conveniens is the discretionary precept which allows a court with proper jurisdiction to dismiss an action, when such would further the ends of justice and promote the convenience of the parties.") (*citing to* Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 506 (1947) ("In all cases in which the doctrine of forum non conveniens comes into play, it presupposes at least two forums in which the defendant is amenable to process; the doctrine furnishes criteria for choice between them."))).

Therefore, whether the defendants are arguing that the suit must be brought in Florida because the parties are subject to a forum selection clause or whether they are arguing forum non conveniens because the contract involved is subject to Florida law, this Court must determine that the defendants are subject to jurisdiction in Florida prior to dismissal.

As it currently stands, MBA has pled that the defendants are subject to jurisdiction in South Carolina and that venue is proper in Anderson County, South Carolina. These allegations must be accepted as true. Chestnut v. AVX Corp., 776 S.E.2d 82, 84 (S.C. 2015). If the defendants believe forum should be in Florida, they

bear the burden of showing that jurisdiction and venue are proper there. Santa Fe Engineers, Inc. v. Carolina Door Products, Inc. 268 S.E.2d 581, 582 (S.C. 1980) (“the plaintiff’s choice of forum should be left undisturbed unless the balance of factors strongly favors the defendant’s motion.”).

The defendants’ statement that they are not required to educate the plaintiff on where it is subject to jurisdiction is only true if the purpose of civil litigation is gamesmanship, rather than providing a forum for a “just, speedy and inexpensive determination of every action.” SCRCP 1. But the problem here is not lack of education, it is the defendants’ lack of specificity. Are they arguing that the forum selection clause controls because they are bound by the agreement to litigate in Florida? They won’t say. Are they arguing that forum is more convenient in Florida because they are subject to jurisdiction there and venue is better placed in Florida? They won’t say.

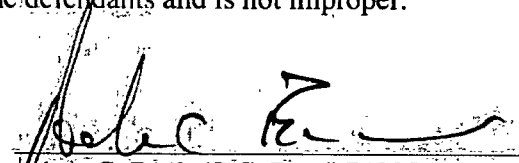
Either way, the finding this Court must make prior to dismissal is the same. The defendants cannot achieve dismissal based on forum without the Court first finding a) the defendants are subject to the forum selection clause, i.e. agreed to litigate in Florida, along with MBA, or b) Florida is a more convenient forum because it also has jurisdiction and is a better venue. By moving the Court to dismiss the case because “this litigation should be in Florida” the defendants answered the question of whether they are subject to jurisdiction there. MBA is simply asking the Court to include in its order the findings required by law prior to granting their request.

## 2. Amended Pleading

The defendants’ argument that MBA’s amended complaint filed on January 29, 2016 was improperly filed is incorrect. A party may amend its pleading “once as a

matter of course at any time before...a responsive pleading is served." SCRC 15. A motion is not a responsive pleading. SCRC 7. MBA's amended complaint was filed before a responsive pleading was filed by the defendants and is not improper.

Respectfully submitted,



Adam C. Bach (S.C. Bar # 74885)  
ELLER TONNSEN BACH, LLC  
2201 Augusta St., Suite 200  
Greenville, SC 29605  
Telephone: (864) 236-5013  
Facsimile: (864) 312-4191  
[abach@etblawfirm.com](mailto:abach@etblawfirm.com)

February 5, 2016  
Greenville, SC

Attorneys for the plaintiff

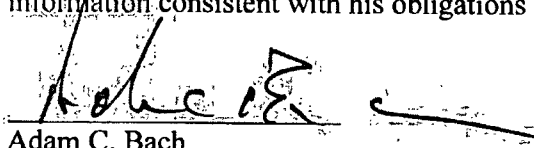
*Verification of attorney on following page*

State of South Carolina )

County of Anderson )

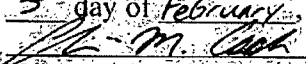
Verification by Attorney

To the extent the Court's January 26, 2016 order requires counsel as attorney for the plaintiff to make a sworn verification as contemplated in Rule 11(c), the counsel states that, except for matters of public record or which are obtainable in the public domain, the facts as set forth in this reply are based upon the information and representations provided to him by his client or third parties and that he has acted and moved on that information consistent with his obligations under the Rules of Professional Conduct.

  
Adam C. Bach

SWORN to before me this

5 day of February, 2016

  
Notary Public for South Carolina

My Commission Expires 9/29/21



) IN THE COURT OF COMMON PLEAS  
) C.A. NO. 2015-CP-04-2161

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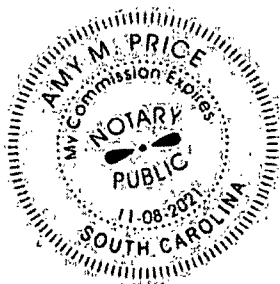
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**C. Edwin Shoffner, Member**  
**Mattress by Appointment, LLC**

Notary Public for South Carolina

rolina  
1-8-2021



IN THE COURT OF COMMON PLEAS  
C.A. NO. 2015-CP-04-2161

## CERTIFICATE OF SERVICE

This is to certify that I, Amy M. Price, an employee of the law firm of Eller Tonnsen Bach, LLC have this day served a true and correct copy of the within and foregoing verified reply in support of motion to amend upon attorneys of record for the defendants by depositing same in the United States mail with sufficient postage thereon to assure delivery as follows, to-wit:

**Paul S. Landis**  
**Fayssoux Law Firm, P.A.**  
**209 E. Washington Street**  
**Greenville, SC 29601**

Beattie B. Ashmore  
Beattie B. Ashmore, P.A.  
650 E. Washington St.  
Greenville, SC 29601

**L. Walter Tollison, III**  
**The Tollison Law Firm**  
**24 Vardry Street, Suite 203**  
**Greenville, SC 29601**

This 5<sup>th</sup> day of February, 2016.

By:

*Carrie A. Cooper for*  
Amy M. Price  
2201 Augusta Street, Suite 200  
Greenville, SC 29605

## **EXHIBIT 14**

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF ANDERSON )  
 )  
Mattress by Appointment, LLC, a Florida )  
limited liability company f/k/a Carolina )  
Bedding Direct, LLC, a Florida, limited )  
liability company )

Plaintiff, )

v. )

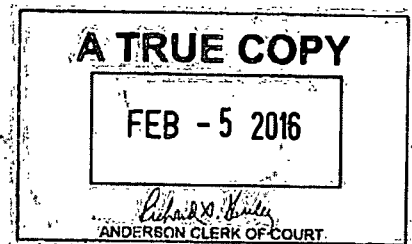
Retail Service Systems, Inc., Boxdrop )  
Furniture, Inc., Carlton Scott Andrew, and )  
Darren Conrad, )

Defendants. )

IN THE COURT OF COMMON PLEAS  
C.A. NO. 2015-CP-04-02161

**VERIFID SECOND AMENDED  
COMPLAINT**

**(Jury Trial Demanded)**



The plaintiff, Mattress by Appointment, LLC, formerly known as Carolina Bedding Direct, LLC, pursuant to this Court's order entered on January 26, 2016, complaining of the defendants, Retail Service Systems, Inc., Boxdrop Furniture, Inc., Carlton Scott Andrew, and Darren Conrad, would respectfully allege and show unto the Court as follows:

**JURISDICTION AND VENUE**

1. Plaintiff, Mattress by Appointment, LLC, is a Florida limited liability company and was formerly known as Carolina Bedding Direct, LLC, a Florida limited liability company ("MBA").<sup>1</sup>

2. MBA has been in the business of selling and marketing mattresses throughout the United States since April 2012.

---

<sup>1</sup> Mattress by Appointment, LLC of South Carolina was incorporated in August 2014 in anticipation of amending MBA's dealer agreements to make South Carolina law controlling. This amendment was put on hold pending resolution of the below-described Florida litigation. MBA of South Carolina was originally named in this action in case the amendment occurred during the pendency of this action.

3. Defendant, Retail Service Systems, Inc. ("RSS") is, upon information and belief, an Ohio corporation doing business in South Carolina.

4. Defendant Boxdrop Furniture, Inc. ("Boxdrop") is, upon information and belief, a South Carolina Corporation with its principal place of business in Anderson County, South Carolina.

5. Carlton Scott Andrew ("Andrew") is an individual and resident of Anderson County, South Carolina and, upon information and belief, is an owner and officer of RSS.

6. Defendant Darren Brett Conrad ("Conrad") is an individual and previously was a resident of Duval County, Florida. Upon information and belief, he is an employee or agent working on behalf of RSS, Boxdrop, or Andrew, as discussed below.

7. Upon information and belief, venue and jurisdiction are proper in this Court pursuant to S.C. Code § 36-2-802, § 36-2-803, and § 15-7-30.

#### **INTRODUCTION AND BACKGROUND**

8. MBA is in the business of selling and marketing mattresses through a network of independent dealers who solicit and schedule one-on-one appointments with customers and potential customers. MBA's dealers are able to take advantage of MBA's relationships with mattress manufacturers to obtain favorable pricing.

9. MBA's dealers enter into a Territory Agreement with Protective Covenants ("Territory Agreement"), which governs each dealer's relationship with MBA.

10. Conrad incorporated Carolina Bedding Direct, LLC in Florida ("CBD") on April 11, 2012. *See* Articles of Incorporation, attached as Exhibit A to the Motion to Reconsider, Alter or Amend Judgment filed by the plaintiff on January 29, 2016 (the "Motion to Amend").

11. In November 2012, Conrad formed Mattress by Appointment, LLC 1 (“MBA 1”) in Florida. *See* Entity Detail, attached as Exhibit B to the Motion to Amend.

12. On March 19, 2013, Edwin Shoffner became a minority shareholder of CBD. Prior to acquiring his minority interest in CBD, Shoffner had no ownership in any company owned or ever owned by Conrad.

13. In November 2013, CBD began doing business as “Mattress by Appointment, LLC.” *See* Affidavit of Conrad at ¶ 3, attached as Exhibit C to the Motion to Amend. While at the time MBA 1 was still in existence, this entity was never used for any purpose and never conducted any business. *See* Letter from Conrad to Florida Secretary of State, attached as Exhibit D to the Motion to Amend. Instead, as described by Conrad in his affidavit and subsequent testimony, and as found by the Florida Court as described below, while CEO and majority shareholder of CBD, Conrad created a Territory Agreement and entered into the Territory Agreement with CBD on December 3, 2013 and December 5, 2013. Conrad Affidavit at ¶¶ 3-7; Florida Court Order, attached to the Motion to Amend as Exhibit I.

14. Conrad filed articles of amendment officially changing CBD’s name to Mattress by Appointment on February 4, 2014. *See* Articles of Amendment, attached as Exhibit E to the Motion to Amend. Conrad’s affidavit affirms throughout that CBD was the operative entity in November and December 2013 and this was again confirmed by Conrad in a letter he provided to the Florida Secretary of State on January 27, 2014. *See* Letter of Conrad to Florida Secretary of State. MBA 1 was dissolved on February 6, 2014. *See* Entity Detail.

15. In March 2014, Shoffner was terminated as President by majority shareholder Conrad and the board of CBD. In total, Shoffner was a co-employee with Conrad for

approximately one year and was co-owner of only one business formed or owned by Conrad, MBA, the plaintiff in this action.

16. During the year in which Shoffner was a co-employee and owner with Conrad, RSS filed suit against two entities previously created by Conrad, Carolina Bedding Direct, a dissolved North Carolina entity, and MBA 1, but did not file suit against CBD of Florida, the current plaintiff. *See* Report and Recommendation of Mark Abel, Magistrate Judge, at page 7, attached as Exhibit F to Motion to Amend. (“Carolina Bedding, LLC (FL), quite simply, is not a party to this action.”) *affirmed*, Retail Service Systems, Inc. v. Carolina Bedding Direct, LLC, *et. al.*, 2:13-994-GCS, Docket Entry 102, August 27, 2014 (S. D. Ohio). RSS proceeded against CBD of North Carolina and MBA 1 and a default judgment was entered in Ohio against CBD of North Carolina and MBA 1 in February 2015.

17. The plaintiff in this litigation has existed in Florida since it was created by Conrad in 2012 and, except for a name change in 2014, has always existed in the same corporate form, with the same Florida filing number and the same employer identification number. *See* Entity Detail.

18. On July 3, 2014, Conrad filed for bankruptcy in the United States Bankruptcy Court for the Middle District of Florida. *See In Re Darren Conrad*, 3:14-bk-3268-PMG (Bankr. M.D. Fla. 2014). On September 4, 2014, Shoffner purchased Conrad’s majority interest in the plaintiff. *See* Order Approving Sale, attached as Exhibit G to the Motion to Amend. RSS was a party to and consented in proceedings resulting in the transfer of Conrad’s interest to Shoffner and received \$150,000.00 of the sale proceeds to facilitate the transaction. *See* Motion for Order to Approve Sale, excerpts attached as Exhibit H to Motion to Amend.

19. Following the sale of Conrad's interest to Shoffner in September 2014, Shoffner learned that Conrad had begun taking steps to begin forming a competing business. *See* Florida Order, attached as Exhibit I to the Motion to Amend. Part of these steps was to begin contacting the plaintiff's dealers in an effort to convince them to begin doing business with Conrad's newly planned entity. *Id.* All of these actions were in violation of a Territory Agreement developed and signed by Conrad and the plaintiff's operating agreement to which Conrad was a party.

20. On October 13, 2014, MBA filed a verified complaint against Conrad in Duval County, Florida alleging that Conrad had entered into a Territory Agreement with it, violated multiple provisions of that agreement, breached fiduciary duties owed to the plaintiff, and interfered with the plaintiff's business relationships. *See Mattress by Appointment, LLC, a Florida Limited Liability Company f/k/a Carolina Bedding Direct, LLC, a Florida Limited Liability Company v. Darren Conrad and Mattress Direct, LLC, 16-2014-CA-7243*, Fourth Judicial Circuit (Duval County, Florida, October 13, 2014). The plaintiff filed two subsequent verified amended complaints containing the same allegations and Conrad filed answers to these complaints.

21. MBA moved for a preliminary injunction and the Florida Court held five evidentiary hearings on the motion – January 9, 2015, January 20, 2015, January 23, 2015, January 27, 2015, and January 29, 2015. *See* Florida Order. Darren Conrad, Edwin Shoffner, and other relevant witnesses provided sworn testimony at these hearings. During those hearings, the Florida Court reviewed testimony and evidence that Conrad began taking steps to compete against the plaintiff in August 2014 under a new entity named "Mattress Direct, LLC" of Florida. Following five evidentiary hearings, the presentation of live testimony, discovery conducted by the parties, and arguments of counsel, the Court entered an order granting the plaintiff's motion

for a preliminary injunction on April 29, 2015. *See* Florida Order. In its order, the Florida Court made findings of fact relevant to this action, including:

a. Conrad authorized and developed MBA's Territory Agreement (Order ¶ 2);

b. Conrad agreed to the terms of the Territory Agreement with MBA (Order ¶¶ 3, 33);

c. All of the plaintiff's dealers and key personnel entered into MBA's Territory Agreements with Protective Covenants (Order ¶ 4);

d. Conrad solicited certain dealers in violation of both his Territory Agreement and the individual dealers' Territory Agreements, including:

1. Leroy Adams
2. James Amistadi
3. Scott Anderson
4. Randy Butson
5. Gail Carlson
6. Doreen Carson
7. Clyde Faus
8. Gary Gallo
9. Thomas Gray
10. Troy and Laurie Meath
11. Mark Randall
12. Kyle Sherratt
13. John Swanson
14. Rachel Taylor
15. Chris Webb
16. David Zaczynski<sup>2</sup>

(Order Second ¶ 4, page 15)

e. That the Territory Agreement was reasonable and enforceable under Florida law (Order ¶ 17 - 21);

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<sup>2</sup> The individuals listed in the Florida order were named by Conrad during his testimony in the Florida evidentiary proceedings. The plaintiff has since identified at least another ten dealers that Conrad has interfered with through subsequent depositions with fact witnesses.

f. That Conrad owed fiduciary duties to the plaintiff pursuant to the Operating Agreement and his status as an officer or former officer of the plaintiff (Order ¶ 22-23).

22. Conrad was held in contempt for his continued violation of the Florida Order on July 28, 2015, *see* Contempt Order, attached as Exhibit J to the Motion to Amend, and his pleadings were stricken.

23. The Florida Order, including the injunction, judgment and factual determinations, are entitled to Full Faith and Credit in this proceeding pursuant to Article IV of the United States Constitution.

#### **GENERAL ALLEGATIONS**

24. MBA adopts and re-alleges each and every allegation set forth above.

25. Conrad has continued to violate the Florida Order by working in a competing business, soliciting MBA's customers, soliciting MBA's dealers, and using MBA's confidential information and property to compete with MBA.

26. Boxdrop and RSS are engaged in the mattress industry and sell mattresses either through retail locations or, upon information and belief, through dealers. Boxdrop and RSS are competitors of MBA.

27. On or around August 2015, Defendant Andrew informed MBA that Conrad was "now working for him."

28. Shortly thereafter, MBA discovered that Conrad developed Boxdrop's Facebook page. Conrad is or was identified as the page's administrator and represents himself as an agent of Boxdrop. Conrad is identified as a speaker at an upcoming conference hosted by Boxdrop.

Mattress Direct, an entity created by Conrad to illegally compete with MBA, is identified on Boxdrop's Facebook page. Id.

29. Upon information and belief, RSS and Boxdrop are related companies, either as parent/subsidiary, shared ownership, affiliates, sister companies, alter-egos, or controlled by common owners, members, officers, boards, directors, partners, shareholders, or other individuals, all of which is known or will be determined through the course of discovery. This belief is based on the following:

a. RSS identifies itself as a provider of "business programs." RSS's website represents that it licenses business owners to make money using one of its "programs" and invites readers to learn how its "programs" can match your aspirations as an entrepreneur.

b. RSS identifies Boxdrop as one of its "Programs & Affiliations." See <http://rssprograms.com>. When a reader clicks the link for "Boxdrop Furniture" provided under RSS's "Programs and Affiliations," the reader is taken to Boxdrop's website.

c. Readers of RSS's website are invited to "Apply Now" to become a licensee of one of RSS's "programs." <http://rssprograms.com/about/>. When a reader on RSS's website clicks on the "Apply Now" link, the reader is taken to an application for "Boxdrop, Mattress & Furniture Direct". See <http://rssprograms.com/contact-us/>. The trade name and logo on the application are the same as for Boxdrop Furniture, Inc.

d. RSS's homepage contains an imbedded video with the title "Welcome to Retail Service Systems." The video's front imbedded image shows Boxdrop's name and logo with an invitation to "Join our Team." The video identifies "multiple" licensing "programs" an entrepreneur can join, including Boxdrop. The video contains a segment

that is introduced with a voiceover stating: "Let's go over our programs." The voice over then identifies all of the programs listed on its website, including "Boxdrop furniture" as a "national branding opportunity." The imbedded video can be located at <https://www.youtube.com/watch?v=xv4goIsCWN0&feature=youtu.be>.

e. Boxdrop and RSS appear to share the same location in South Carolina.

<http://rssprograms.com/locations/>.

f. Boxdrop identifies RSS and Retail Funding Solutions, another RSS program, as its affiliates. <http://boxdropfurniture.com/anderson/our-affiliates/>.

g. Boxdrop is owned by Andrew's wife, Daphene Andrew.

30. Conrad continues to represent himself as an agent of Boxdrop on its website, Facebook pages, and to third parties.

31. Other third-party witnesses have informed MBA that Conrad is an agent of RSS or Boxdrop.

32. On August 11, 2015, Shoffner, owner of MBA, received a call from Andrew threatening him with litigation if he did not agree to merge his business with RSS. During this call, Andrew repeatedly represented that Conrad was now "working for him."

33. Andrew has identified Conrad as his "agent" or recruiter.

34. Upon information and belief, Andrew hired Conrad to work for him and his businesses, RSS and Boxdrop, both of which are competitors of MBA.

35. Upon information and belief, RSS, Boxdrop, and/or Andrew have acted in jointly and individually to hire Conrad to solicit or recruit dealers from MBA and the specific nature of these entities' relationship will be determined through discovery.

**FOR A FIRST CAUSE OF ACTION**  
**(Tortious Interference with a Contract as to RSS, Andrew and Boxdrop)**

36. MBA adopts and re-alleges every allegation set forth above.

37. MBA's Territory Agreement contains a confidentiality provision that restricts the use of MBA's confidential information except as authorized by the agreement, including the use of any of MBA's customer lists, business plans, pricing and discount information, financial information, advertising and marketing strategies, personnel information, and technical information ("Confidentiality Agreement"). Id. at ¶ 17. The Territory Agreement also contains a non-competition clause ("Non-Competition Agreement") that provides that MBA has a legitimate business interest in protecting its confidential information and that the dealers' actions as competitor would harm such interests, including the disclosure of confidential information to a competitor. Id. at ¶ 18. The Non-Competition Agreement provides that during the existence of the Territory Agreement and for a period of one (1) year after its termination, dealers agree that they will not, "in any capacity, either directly or indirectly, and whether for dealer's own account or as an employee, partner, franchise, officer, agent, investor, or otherwise for or with any other person, firm, corporation, or entity" engage in business in the Territory; provide services within the Territory that are competitive with MBA; solicit, induce or influence any Customer to stop doing business with MBA; or solicit, induce, or attempt to induce any dealer for MBA to cease being a dealer for MBA. Id. The dealers further agree that the Non-Competition Agreement protects MBA's legitimate business interests and are reasonable. Id.

38. The Territory Agreement is governed by Florida law. Id. at ¶19(b). A Florida Court has determined that the Territory Agreement, including the confidentiality and non-competition provisions, are valid and enforceable contracts. *See* Florida Order at ¶¶ 17 - 20, 25, 31, 33, and pages 13-15.

39. The first element of tortious interference with a contract is the existence of a valid contract. See Broach v. Carter, 732 S.E.2d 185 (S.C. Ct. App. 2012).

40. The Florida Court has determined that MBA and Conrad entered into the Territory Agreement and that the agreement is a valid contract. The Florida Court's determination is entitled to Full Faith and Credit under Article IV of the United States Constitution. Additionally, Conrad is bound by that determination by res judicata and all of the defendants are bound by the doctrines of collateral estoppel and issue preclusion.

41. The Florida Court has determined that MBA and its dealers enter into a Territory Agreement and its agreement with its dealers is a valid contract; such dealers include, but are not limited to, the dealers previously identified, and dealers who MBA believes will be discovered through the course of discovery (collectively the "Dealers"). Supra at ¶ 21(d). The Florida Court's determination is entitled to Full Faith and Credit under Article IV of the United States Constitution.

42. The second element of tortious interference with a contract is the defendants' knowledge of the contract. Broach, 732 S.E.2d at 188.

43. Conrad developed and knew of the Territory Agreement, the Florida Order, and the Dealers' Territory Agreements. Conrad is an agent of RSS, Boxdrop and/or Andrew and his knowledge is imputable to them. Citizens Bank v. Heyward, 133 S.E. 190 (S.C. 1925). Additionally, Andrew has been informed by MBA of Conrad's Territory Agreement, the Dealers' Territory Agreements, Conrad's fiduciary duties, and the Florida order. Additionally, RSS, Boxdrop, and Andrew have had notice of Conrad and the Dealers' Territory Agreements and Conrad's fiduciary duties since service of this lawsuit. Additionally, MBA believes it will

discover other and further evidence of the defendants' knowledge of Conrad and the Dealers' Territory Agreements and Conrad's fiduciary duties.

44. The third element of tortious interference with a contract is the defendants' intentional procurement of the contract's breach. Broach, 732 S.E.2d at 188.

45. Andrew procured Conrad's breach of his Territory Agreement by hiring Conrad as a recruiter for RSS and/or Boxdrop to recruit Dealers. Upon information and belief Conrad, working as an agent of RSS or Boxdrop, has procured the breach of the following dealers: Troy Meath, Mark Randall, Kyle Sherrat, Jimmy Amastadi, and Doreen Carson. MBA believes discovery will reveal additional Dealers who have breached their Territory Agreement as a result of Conrad, Boxdrop, or RSS's inducement.

46. Upon information and belief, Andrew, RSS and/or Boxdrop have also acted either in their own capacity or by and through their agent Conrad to procure the breach of the Dealers' Territory Agreements in one or more of the following ways:

- a. Using Dealers and Conrad's knowledge of MBA's Territory Agreements, supplier agreements, pricing, systems, training, advertising, dealer information, customer information, supplier information, and other information to compete against MBA.
- b. Providing pricing at or below MBA's;
- c. Funding legal counsel for Conrad or the Dealers to respond to allegations concerning their breaches;
- d. Providing training to Dealers to enable them to compete against MBA;
- e. Arranging suppliers for Dealers to enable them to sell competing products;
- f. And in such other ways as will be discovered.

47. The fourth element is that the defendants acted without justification or used improper methods. Id.; Grandall Corp. v. Navistar Intern. Transp. Corp., 395 S.E.2d 179, 180 (S.C. 1990).

48. The Non-Competition Agreement and Confidentiality Agreement are necessary to protect MBA's legitimate business interests. The defendants are liable for their agent Conrad's breach of these provisions of his agreement, which resulted in the defendants gaining an unfair and unjustified business advantage over MBA.

49. Additionally, the defendants cannot benefit from Conrad and the Dealers' breaches of their contractual or legal duties to MBA without liability. By inducing Conrad and the Dealers to become dealers or agents for Boxdrop or RSS in violation of the Non-Competition Agreement and the Confidentiality Agreement, the defendants acted without justification or used improper methods. MBA also believes further lack of justification or improper methods will be discovered.

50. The final element is resulting damages or prejudice. Broach, 732 S.E.2d at 188; Vortex Sports & Entertainment, Inc. v. Ware, 662 S.E.2d 444, 449 (S.C. Ct. App. 2008). MBA has suffered and continues to suffer damages as a result of the defendants' interference.

51. Therefore, MBA prays for a judgment against RSS, Boxdrop and Andrew, jointly and severally, in the amount of actual, compensatory, and punitive damages as may be determined by a jury.

**FOR A SECOND CAUSE OF ACTION**  
**(Aiding and Abetting Breach of Fiduciary Duty as to RSS, Andrew and Boxdrop)**

52. MBA adopts and re-alleges each and every allegation set forth above not inconsistent with this cause of action.

53. Conrad was a former officer and shareholder of MBA.

54. As a former officer and shareholder of MBA, Conrad owed MBA certain duties, including a duty of loyalty as defined by F.S.A. § 605.04091. The Florida court determined that Conrad was breaching his fiduciary duties to MBA by competing with MBA, interfering with MBA's business relationships, interfering with MBA's dealers, interfering with MBA's key personnel, and by using confidential information obtained from MBA, including the identity of its dealers and customers, its pricing, its agreements with dealers, and its business processes. *See* Exhibit I of Motion to Amend at ¶¶ 23-24. The Florida court has ordered Conrad to cease and desist from any further or continuing breach of his duties to MBA.

55. The first element of aiding and abetting a breach of fiduciary duty is a breach of a fiduciary duty owed to the plaintiff. Vortex Sports, 662 S.E.2d at 448. The Florida court has determined that Conrad has breached his fiduciary duties to MBA and that determination is entitled to Full Faith and Credit pursuant to Article IV of the United States Constitution. Conrad is also barred from re-litigating the Florida Court's determination by the doctrines of res judicata and all of the defendants are bound by the doctrines of collateral estoppel and issue preclusion.

56. The second element of aiding and abetting a breach of fiduciary duty is the defendant's knowing participation in the breach. Id.

57. RSS, Andrew and/or Boxdrop have knowledge of Conrad's duties for the reasons stated above. They have participated in Conrad's breach by hiring him as their agent/recruiter to take advantage of the breach of his duties by his recruiting MBA's dealers and customers and using its confidential information.

58. As a direct and proximate result, MBA has suffered damages, the third element of aiding and abetting a breach of fiduciary duty. Id. Therefore, MBA is entitled to actual, compensatory and punitive damages in an amount to be determined by the trier of fact.

**FOR A THIRD CAUSE OF ACTION**  
**(Unfair and Deceptive Trade Acts and Practices as to RSS, Boxdrop and Andrew)**

59. MBA adopts and re-alleges each and every allegation set forth above not inconsistent with this cause of action.

60. RSS, Boxdrop, Andrew, and Conrad's actions outlined above occurred in the course of commerce and affected commerce.

61. By hiring Conrad as its recruiter and using Conrad or confidential information obtained from Conrad to compete with MBA, and in other ways to be discovered, RSS, Boxdrop, and Andrew's actions constitute unfair and deceptive trade practices pursuant to S.C. Code Ann. § 39-5-20.

62. RSS, Boxdrop, and Andrew knew or should have known that their conduct constituted a violation of S.C. Code Ann. § 39-5-20.

63. By illegally using a former member and officer of MBA to solicit MBA's dealers and customers in violation of a Non-Competition Agreement and a sister court's order, by using pricing and other information obtained from Conrad to compete with MBA and solicit its dealers, and in other ways to be discovered, RSS, Boxdrop and Andrew's conduct affects the public interest and is capable of repetition.

64. RSS, Boxdrop, and Andrew's actions directly and proximately caused MBA damages in the form of lost dealers, customers, revenue, business advantages, goodwill, and profit.

65. MBA is entitled to judgment against RSS, Boxdrop, and Andrew for actual damages, compensatory damages, treble damages, costs, and attorneys' fees.

**FOR A FOURTH CAUSE OF ACTION  
(Civil Conspiracy as to all defendants)**

66. MBA adopts and re-alleges each and every allegation set forth above not inconsistent with this cause of action.

67. The first element of civil conspiracy is the combination of two or more persons. Hackworth v. Greywood at Hammett, LLC, 682 S.E.2d 871, 874 (S.C. 2009). The second element is that these persons combine for the purpose of injuring the plaintiff. Id. The third element is damages. Id.

68. Upon information and belief, RSS, Boxdrop, Andrew and Conrad have combined for the specific purpose of injuring MBA.

69. After hiring Conrad as his “recruiter”, Andrew threatened MBA with litigation unless MBA agreed to merge its business with RSS.

70. As part of his threat, Andrew represented that he and Conrad were now working together and that Conrad would “testify for him.”

71. RSS filed suit in Ohio against MBA in August 2015. Conrad submitted an affidavit in the Ohio litigation contradicting previous representations concerning MBA, contradicting previous representations concerning the source of MBA’s business model, offering self-serving testimony concerning his new employer, and offering testimony otherwise helpful to RSS.

72. Based upon these circumstances, MBA believes that RSS and Andrew have promised Conrad that they will give up continued pursuit of Conrad in exchange for Conrad becoming an agent/recruiter for RSS and/or Boxdrop, providing RSS, Andrew and Boxdrop with MBA’s confidential information and for Conrad’s testimony against MBA.

73. Upon information and belief, RSS and Andrew have agreed to pay for Conrad's legal fees, including in this litigation, in order to assist Conrad in working to injure MBA, and have arranged counsel for Conrad.

74. Additionally, upon information and belief, RSS, Andrew and/or Boxdrop have conspired to gain access to MBA's confidential information, pricing, dealer information, customer information, and other protected information by hiring Conrad to recruit MBA's dealers.

75. All of these actions are directed at injuring MBA by forcing MBA to either merge with RSS or to close its business and have resulted in special damages to MBA, including legal fees, money provided to RSS in reliance on Conrad's previous representations concerning the formation of MBA, the loss of MBA's goodwill, loss of MBA's confidential information, lost money and resources in developing relationships with dealers, customers, suppliers and others, and in other ways that will be discovered and proven at trial.

76. MBA is entitled to a judgment against the defendants in the amount of its special damages as may determined by the trier of fact.

**FOR A FIFTH CAUSE OF ACTION  
(Preliminary and Permanent Injunction as to RSS, Boxdrop and Andrew)**

77. MBA adopts and re-alleges each and every allegation set forth above not inconsistent with this cause of action.

78. RSS, Boxdrop, and Andrew, through Conrad, have wrongfully procured valuable customers and Dealers from MBA in violation of the Dealers' Territory Agreements, solicited MBA Dealers to breach their Territory Agreements, and assisted Conrad in competing with MBA in violation of the Territory Agreements, all of which is in violation of the Non-Compete and Florida Order.

79. Conrad has, unlawfully, copied or obtained lists of MBA dealers for the purpose of soliciting a breach of their Territory Agreements. Conrad has breached his duties to MBA and the Territory Agreement. RSS, Boxdrop, and Andrew have solicited, procured and participated in Conrad's breaches, all in violation of the Non-Compete and Florida Order.

80. As a direct and proximate result of the defendants' actions, MBA has suffered and will continue to suffer irreparable harm.

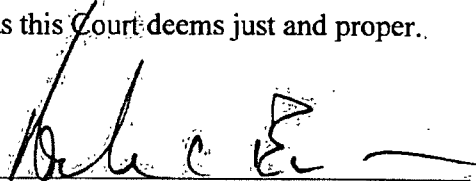
81. MBA is, therefore, entitled to a preliminary and permanent injunction ordering Conrad, RSS, Boxdrop, and Andrew to cease and desist from any further actions in violation of the Territory Agreements, Non-Compete and Florida Order; further tortious interference with MBA's business; and further conspiracy directed at MBA.

**WHEREFORE**, MBA respectfully requests the Court enter a judgment awarding it the following relief:

- a. For actual, consequential, compensatory, incidental, special and general damages against RSS, Boxdrop, and Andrew, jointly and severally, in amounts to be determined by the trier of fact;
- b. For treble damages against RSS, Boxdrop, and Andrew, jointly and severally, in amounts to be determined by the trier of fact;
- c. For punitive damages against RSS, Boxdrop, and Andrew in amounts to be determined by the trier of fact;
- d. For special damages against RSS, Boxdrop, Andrew and Conrad in amounts to be determined by the trier of fact;
- e. For an injunction against RSS, Boxdrop, and Andrew;
- f. For a trial by jury;

- g. For pre-judgment and post-judgment interest;
- h. For the cost of this action;
- i. For attorneys' fees; and
- j. For such other and further relief as this Court deems just and proper.

Respectfully submitted,

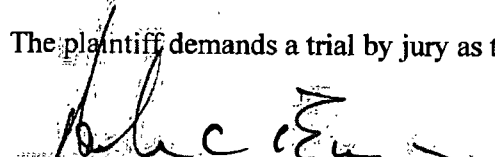


Adam C. Bach (S.C. Bar # 74885)  
R. Patrick Martin (S.C. Bar # 100172)  
ELLER TONNSEN BACH, LLC  
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Greenville, SC 29605  
Telephone: (864) 236-5013  
Facsimile: (864) 312-4191  
[abach@etblawfirm.com](mailto:abach@etblawfirm.com)

February 4, 2016  
Greenville, SC

Attorney for the plaintiff

The plaintiff demands a trial by jury as to all issue so triable:

  
Adam C. Bach

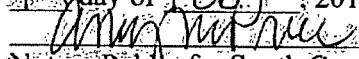
State of South Carolina )  
 )  
County of Anderson )

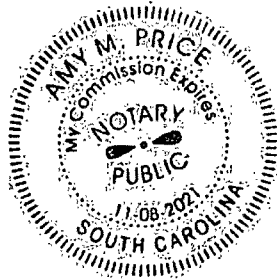
Verification by Attorney

To the extent the Court's January 26, 2016 order requires counsel as attorney for the plaintiff to make a sworn verification as contemplated in Rule 11(c), the counsel states that, except for matters of public record or which are obtainable in the public domain, the facts as set forth in this pleading are based upon the information and representations provided to him by his client or third parties and that he has acted and moved on that information consistent with his obligations under the Rules of Professional Conduct.

  
Adam C. Bach

SWORN to before me this  
4<sup>th</sup> day of Feb : 2016

  
Notary Public for South Carolina  
My Commission Expires: 11-8-2021



) IN THE COURT OF COMMON PLEAS  
) C.A. NO. 2015-CP-04-2161

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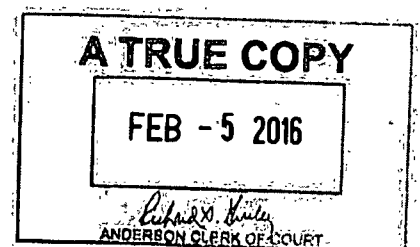
## )

PERSONALLY APPEARED BEFORE ME, C. Edwin Shoffner, who begin duly sworn, that he is the owner and highest ranking officer and member of the plaintiff, and as such is authorized to make this Verification pursuant to the *Rules of Civil Procedure* and this Court's July 26, 2016 order; that he has read the foregoing Second Amended Complaint, and that it is true and accurate to the best of his knowledge as to all statements that are within the plaintiff's knowledge or, to the extent outside of his knowledge, are based upon information and belief; that the reason this Verification is made by deponent is because the plaintiff is a corporation acting through its officers and agents, of which he is one.

**C. Edwin Shoffner, Member**  
**Mattress by Appointment, LLC**

SWORN to before me this  
4<sup>th</sup> day of Feb. 2016

Notary Public for South Carolina  
My Commission Expires: 1-8



IN THE COURT OF COMMON PLEAS  
C.A. NO. 2015-CP-04-2161

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This is to certify that I, Amy M. Price, an employee of the law firm of Eller Tonnson Bach, LLC have this day served a true and correct copy of the within and foregoing verified second amended complaint upon attorneys of record for the defendants by depositing same in the United States mail with sufficient postage thereon to assure delivery as follows, to-wit:

**Paul S. Landis**  
**Fayssoux Law Firm, P.A.**  
 209 E. Washington Street  
 Greenville, SC 29601

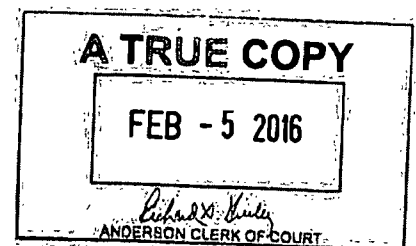
Beattie B. Ashmore  
Beattie B. Ashmore, P.A.  
650 E. Washington St.  
Greenville, SC 29601

**L. Walter Tollison, III**  
**The Tollison Law Firm**  
**24 Vardry Street, Suite 203**  
**Greenville, SC 29601**

This 5<sup>th</sup> day of February, 2016..

Amey M. Dinkar

Amy M. Price  
2201 Augusta Street, Suite 200  
Greenville, SC 29605



## **EXHIBIT 15**

STATE OF SOUTH CAROLINA )

IN THE COURT OF COMMON PLEAS )

COUNTY OF ANDERSON )

Case No. 2015-CP-04-02161 )

Mattress by Appointment, LLC, )

Plaintiff, )

v. )

RETAIL SERVICE SYSTEMS, INC.  
AND CARLTON SCOTT ANDREW'S  
NOTICE OF MOTION AND MOTION  
TO DISMISS THE SECOND  
AMENDED COMPLAINT AND  
MEMORANDUM IN SUPPORT

Retail Service Systems, Inc., Boxdrop  
Furniture, Inc., Carlton Scott Andrew,  
and Darren Conrad,

Defendants. )

TRUE COPY

FEB 23 2016

*Richard D. Butler*  
ANDERSON CLERK OF COURT

Please take notice that the defendants, Retail Service Systems, Inc. and Carlton Scott Andrew, by and through their attorney, Beattie B. Ashmore, hereby move to dismiss the Second Amended Complaint because the plaintiff failed to comply with the Court's January 26, 2016 Order. After a hearing on the defendant's first motion to dismiss, the Court ordered the plaintiff to provide a more definite and certain statement, including the "[d]ate and places of incorporation of Plaintiff, Mattress by Appointment, LLC, the names of any and all predecessor's entities, including dates and places of incorporation." (January 26, 2016 Order, ¶ A) (emphasis added). The plaintiff has failed to identify its predecessor entities in violation the Court's Order, therefore this case should be dismissed.

The defendants further move to dismiss the Second Amended Complaint pursuant to Rule 12(b) of the South Carolina Rules of Civil Procedure because the plaintiff has yet to explain how the plaintiff is in fact the entity "Mattress by Appointment, LLC, a Florida Limited Liability Company." Based on the allegations in the plaintiff's Second Amended Complaint, the plaintiff was not the Mattress by Appointment that was a Florida limited liability company in December

2013. Therefore, this particular plaintiff has no standing. The defendants incorporate herein the arguments made in their previously filed Motion to Dismiss the Complaint and Memorandum in Support with respect to this issue.

In the alternative, the defendants move to dismiss the plaintiff's first and second causes of action for failure to state facts sufficient to constitute these causes of action. Because the Florida Court's Preliminary Order upon which these causes of action rely is not final, it is not controlling here and res judicata, collateral estoppel, and issue preclusion do not apply. The defendants further move pursuant to Rule 12(f) of the South Carolina Rules of Civil Procedure to strike from the Amended Complaint all references to the Florida Court's Order. The defendants also move to dismiss the plaintiff's fifth cause of action because it fails to state facts sufficient to constitute the requisite elements for a preliminary and permanent injunction.

**I. THIS CASE SHOULD BE DISMISSED BECAUSE THE PLAINTIFF FAILS TO COMPLY WITH THE COURT'S JANUARY 26, 2016 ORDER**

The plaintiff claims to be Mattress by Appointment, LLC formed in Florida on February 4, 2014 ("MBA (FL) II") formerly known as Carolina Bedding Direct, LLC formed in Florida on April 11, 2012 ("CBD (FL)"). (Second Am. Compl. ¶¶ 10, 14, 17). It has not identified any predecessor entities. The significance of which entities existed and when is tremendous as there is a judgment in the Ohio Federal courts is against entities known as MBA I and Carolina Bedding Direct, LLC formed in North Carolina.

The plaintiff states that it "has existed in Florida since it was created by Conrad in 2012 and, except for a name change in 2014, has always existed in the same corporate form, with the same Florida filing number and the same employer identification number." (Second Amended Complaint, ¶ 17, emphasis added). The plaintiff's testimony in Florida and its various websites indicate that it has a predecessor entity that dates back to October of 2011 when Carolina

Bedding Direct, LLC was formed in North Carolina, and likely further. The plaintiff has not stated the names of any and all of its predecessor entities, including dates and places of incorporation, as required by the Court's Order. Tellingly, it has not alleged that it has no predecessor entities.

It is clear that the Carolina Bedding Direct, LLC formed in North Carolina in October 2011 ("CBD (NC)") is the plaintiff's predecessor. To this day, the plaintiff uses the same employer identification number that was used by CBD (NC). (Second Am. Compl. ¶ 17, alleging that Mattress by Appointment formed in Florida in February 2014 uses the same EIN number as did Carolina Bedding Direct formed in Florida in April 2012; Exhibit A, Carolina Bedding Direct of Florida's Annual Report, listing its EIN number; Exhibit B, Schedules E (Form 1040) 2011 and K-1 (Form 1120S) listing the same EIN number for CBD (NC)).<sup>1</sup>

The plaintiff also uses the same bank account as did CBD (NC). (Exhibit C, excerpts from bank account records). The bank records reveal that the account was opened by CBD (NC) on October 19, 2011. (Exhibit C, excerpts from bank account records). This is one day after the North Carolina Secretary of State filed CBD (NC)'s Articles of Organization. (Exhibit D, CBD (NC) Articles of Organization). The initial address for CBD (NC) on the bank account records is 11849 James Richard Drive, Charlotte, North Carolina, which is the same address that is listed on CBD (NC) Articles of Organization. (Exhibit C, excerpts from bank account records; Exhibit D, CBD (NC) Articles of Organization). In April 2012, the address on the account was changed to 8201 Bar Harbor Lane, Charlotte, North Carolina, which is CBD (FL)'s mailing address, as stated in its Articles of Organization filed on April 11, 2012. (Exhibit C, excerpts from bank

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<sup>1</sup> The Carolina Bedding Direct, LLC identified in Exhibit B, Schedules E (Form 1040) 2011 and K-1 (Form 1120S) had to be CBD (NC) because, according to the plaintiff's Second Amended Complaint, CBD (FL) did not become an entity until April 11, 2012. (Second Am. Compl. ¶ 10).

account records; Exhibit E, CBD (FL) Articles of Organization). In August 2012, the address on the bank account was changed to 320 1<sup>st</sup> Street N., Apt 904, Jacksonville Beach, Florida, which is CBD (FL)'s principal office address. (Exhibit C, excerpts from bank account records; Exhibit E, CBD (FL) Articles of Organization). The bank records continue to April 30, 2014, over a year after Shoffner, who signed the verification that the Second Amended Complaint was true and correct, became a 45% owner and president of the plaintiff.<sup>2</sup> (See Second Am. Compl. ¶¶ 12, 15).

The plaintiff's very own public website also states that it was formed in 2011 as Carolina Bedding Direct, LLC:

## **Our History**

### **2014**

Carolina Bedding Direct changed its name to Mattress By Appointment in order to appeal to a national audience and better describe what we do.

### **2012-2013**

Carolina Bedding Direct successfully grew in to [sic] 39 States with over 100 Locations. Carolina Bedding Direct doubled its growth with National expansion.

### **2011**

Carolina Bedding Direct LLC was formed to focus solely on the mattress industry and to expand Nationally into 400 markets.

(Exhibit F, [www.mattressbyappointment.com/history/php](http://www.mattressbyappointment.com/history/php), accessed February 10, 2016). Its website also states it has been a privately owned and operated company since 2011:

Headquartered in Greenville, SC. Mattress By Appointment LLC markets the Mattress By Appointment line of Mattresses that are of the highest quality. Our mattresses are manufactured at facilities across the USA. Mattress By Appointment LLC is a privately owned and operated company since 2011.

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<sup>2</sup> The plaintiff may have continued to use this account after April 30, 2014, however the defendants do not possess the records at this time.

(Exhibit F, [www.mattressbyappointment.com/history/php](http://www.mattressbyappointment.com/history/php), accessed February 10, 2016). In fact, the website states that Shawn McAllister, the plaintiff's VP of Operations, "joined the Mattress By Appointment team in 2011." (Exhibit G, [www.mattressbyappointment.com/our-people.php](http://www.mattressbyappointment.com/our-people.php), accessed February 10, 2016). McAllister similarly testified before the Florida court that he started working with the plaintiff in November 2011:

Q: And how long have you been with Mattress by Appointment?

A: I started working with - - well, previously Carolina Bedding Direct, in November of 2011.

(Exhibit H, excerpted pages from Transcript of Proceedings, Volume I, January 20, 2015, at p. 7; *see also* p. 58). It is clear that CBD (NC) - - the only Carolina Bedding Direct that was in existence prior to April 2012 - - was the plaintiff's predecessor. Yet the plaintiff has failed to identify this predecessor company as required by the Court's Order.

Even further, Shoffner testified that the plaintiff was launched in October 2011 when Darren Conrad made a verbal commitment to the president and regional sales manager with Serta:

Q: Did MBA have a supply agreement with Serta?

A: Darren Conrad made a verbal commitment to the president and regional sales manager with Serta in order to launch the company in October of 2011.

(Exhibit I, excerpted pages from Deposition of Charles Edwin Shoffner, December 10, 2014, at p. 191). According to Shoffner, Conrad had a verbal agreement to continue to buy mattresses from Serta for the rest of the plaintiff's existence. (Exhibit I, excerpted pages from Deposition of Charles Edwin Shoffner, December 10, 2014, at p. 191). At the time, Shoffner was Serta's commissioned sales representative to the plaintiff, and was paid commissions for his Serta sales

to the plaintiff. (Exhibit I, excerpted pages from Deposition of Charles Edwin Shoffner, December 10, 2014, at p. 192).

The plaintiff's bank records reflect a substantial amount of money being paid to Serta, including November 2011 through March 2012, before the plaintiff now claims it was in the mattress business. (Exhibit C, excerpts from bank records reflecting the following payments to Serta: \$21,290.00 (11/29/11); \$14,445.00 (12/06/11); \$23,220.00 (12/12/11); \$25,040.00 (12/20/11); \$25,935.00 (12/28/11); \$20,935.00 (01/05/12); \$25,370.00 (01/13/12); \$20,480.00 (01/18/12); \$44,950.00 (01/30/12); \$52,715.00 (02/07/12); \$49,455.00 (02/14/12); \$75,030.00 (02/21/12); \$74,540.00 (02/27/12); \$84,575.00 (03/08/12); \$87,420.00 (03/15/12); \$98,540.00 (03/20/12); \$77,551.00 (03/27/12)). Although Shoffner testified that he was Serta's representative for the plaintiff and made commission off sales, the plaintiff has failed to identify its predecessor entity prior to April 2012. (See Second Am. Compl. ¶ 2).

Bank records further reveal that the plaintiff made payments from this account to Mattress Wholesale, Shoffner's other mattress business, and to Shoffner personally while Shoffner was 45% owner and president in the plaintiff. (Exhibit C, excerpts from bank records, \$15,000.00 (09/06/13 payment to Mattress Wholesale); \$11,925.00 (10/11/13 payment to Mattress Wholesale); \$16,350.00 (11/18/13 payment to Mattress Wholesale); \$16,969.00 (12/17/13 payment to Shoffner); \$14,385.00 (02/05/14 payment to Shoffner); \$15,234.10 (02/27/14 payment to Mattress Wholesale); \$1,000.00 (04/11/14 payment to Mattress Wholesale)). Again, this bank account was opened and used by CBD (NC), who the plaintiff does not identify as its predecessor.

Shoffner also testified that he "bought into" the company in October 2011:

Q: Was there a Facebook page for Mr. Conrad when you joined the company?

A: For Mr. Conrad?

Q: Yes.

A: I would think so. He likes social media.

Q: Did he have LinkedIn when he joined the company?

A: He did not. I think that came after.

Q: And how do you know that?

A: LinkedIn was pretty new technology.

Q: When did you buy into the company?

A: It was October of 2011. That was initial seed money. ...

(Exhibit J, excerpted pages from the Deposition of Charles Edwin Shoffner, Volume II, December 29, 2014, at pp. 250-51). In fact, when discussing the pricing the plaintiff had with Serta, Shoffner testified that the plaintiff has not gotten any new pricing from Serta since late 2011 or January 2012, when Serta changed to a new operating system. (Exhibit J, excerpted pages from the Deposition of Charles Edwin Shoffner, Volume II, December 29, 2014, at pp. 236-37). Yet, it now claims to have begun its business of selling and marketing mattresses in April 2012 and has not identified any predecessor companies. (Second Am. Compl. ¶ 2).

Similarly, the plaintiff's website in April 2013 depicted various employees of the plaintiff and described them as starting with the plaintiff well before April 2012. (Exhibit K, [www.carolinabeddingdirect.com/our-people](http://www.carolinabeddingdirect.com/our-people), accessed on April 28, 2013). Moreover, Nick Lyle testified that he was a dealer for the plaintiff from 2009 – 2012, and a paid 1099 manager of the

plaintiff from March 2012 through August 2012. (Exhibit L, excerpted pages from the Deposition of Nick Lyle).

It is clear that the plaintiff began selling mattress before April 2012. It has at least one predecessor company, CBD (NC), which was formed in October 2011 and had employees, an employer identification number, purchased mattresses from Serta through Shoffner, and sold mattresses through various dealers.

The plaintiff likely has additional predecessor companies that date back further than CBD (NC). As stated above, Nick Lyle testified he started working for the plaintiff in 2009. The plaintiff's webpage as it existed on August 11, 2013 describes the plaintiff's history as going back to 1999:

#### **Our History**

**1999** Started in the mattress business in Columbus, Ohio. Within 3 years the store was doing a million retail dollars from 800 sq. ft. store that was operated by one person.

**2003** Carolina Bedding and Furniture Inc. was established in Greenville, SC. The company was created to focus it's business in the Southeast United States working with a Regional manufacturer. As Carolina Bedding Direct has grown we have received the attention of a national manufacturers.

**2009** Carolina Bedding Direct eclipsed the smaller mattress organizations and has built strategic relationships with industry leaders. The company's successful programs were replicated throughout the organization, leading to sustained annual growth of over 20% for most of the last decade.

**2011** Carolina Bedding Direct LLC was formed to focus solely on the mattress industry and to expand Nationally into 400 markets.

**2012** Carolina Bedding Direct successfully grew in to 38 States with over 100 Locations. CBD doubled it's growth with National expansion.

**2013-2018** CBD is expecting 50% growth each year for the next consecutive five years, with a five year location goal of [sic]; 500+ locations nationwide.

(Exhibit M, [www.carolinabeddingdirect.com/our-company](http://www.carolinabeddingdirect.com/our-company), accessed on August 11, 2013).

Sometime between August 11, 2013 and October 16, 2015, the plaintiff deleted its history on its website prior to 2003:

## Our History

### 2014

Carolina Bedding Direct changed it's name to Mattress By Appointment in order to appeal to a national audience and better describe what we do.

### 2012-2013

Carolina Bedding Direct successfully grew in to 39 States with over 100 Locations. Carolina Bedding Direct doubled it's [sic] growth with National expansion.

### 2011

Carolina Bedding Direct LLC was formed to focus solely on the mattress industry and to expand Nationally into 400 markets.

### 2009

Carolina Bedding Direct eclipsed the smaller mattress organizations and has built strategic relationships with industry leaders. The company's [sic] successful programs were replicated throughout the organization, leading to sustained annual growth of over 20% for most of the last decade.

### 2003

Carolina Bedding and Furniture Inc. was established in Greenville, SC. The company was created to focus it's [sic] business in the Southeast United States working with a Regional manufacturer. As Carolina Bedding Direct has grown we have received the attention of a national manufacturers.

(Exhibit N, plaintiff's website accessed on October 16, 2015; *see also* Exhibit O, plaintiff's website produced by the plaintiff in its Florida litigation). McAllister testified that the public had access to the website, and he was involved in producing the website and developed 90% of it. (Exhibit P, excerpted pages from the Deposition of McAllister, December 4, 2014, Vol. II, pp. 300-01).

After RSS filed this version of the webpage in Ohio, the plaintiff deleted from its website the history of the company prior to 2011. (Exhibit Q, plaintiff's website accessed on December

2, 2015). Nevertheless, as of February 10, 2016, the plaintiff's website continues to state that it was formed in 2011. The plaintiff now alleges it was formed in Florida on April 11, 2012 and has been in the business of selling and marketing mattresses since April 2012. (Second Am. Compl. ¶¶2, 10).

In the plaintiff's original complaint, it specifically alleged that Mattress by Appointment that was in existence in December 2013 ("MBA (FL) I") is not the same entity as the plaintiff ("MBA (FL) II"). (Complaint ¶ 8). The defendants moved to dismiss the complaint because the entity who allegedly entered into the Territory Agreement in December 2013 was "Mattress by Appointment, LLC a Florida Limited Liability Company," who the plaintiff asserted it was not. The plaintiff now attempts to circumvent the defendants' argument by alleging that it began using the name "Mattress by Appointment, LLC" in November 2013 and MBA I "was never used for any purpose and never conducted any business." (Second Am. Compl. ¶ 13). However, despite the plaintiff's contention, this is not what the letter from Conrad to the Florida Secretary of State states. (See Second Am. Compl. ¶ 13). The January 27, 2014 letter that is attached as Exhibit D to the plaintiff's Motion to Amend, states that "[t]he LLC that is currently named Mattress by Appointment, LLC is not *currently* being used for any business purpose . . . ." (bold added). This does not mean, *nor does it say as asserted by the plaintiff*, that MBA I was *never* used for any business purpose.

The plaintiff alleges that it began doing business as "Mattress by Appointment, LLC" in November 2013 and officially changed its name to Mattress by Appointment, LLC on February 4, 2014. (Second Am. Compl. ¶¶ 13, 14). It has yet to explain how the plaintiff was the entity "Mattress by Appointment, LLC, a Florida Limited Liability Company" that was party to the Territory Agreement in December 2013, when it allegedly was not the "Mattress by

Appointment” that was a Florida limited liability company February 2014. The defendants incorporate herein their arguments as stated in their previously filed motion to dismiss. The only Mattress by Appointment, LLC existing in December 2013 *as a Florida limited liability company* was MBA I, which the plaintiff claims is not it. This case therefore must be dismissed.

The defendants assert that the plaintiff here (who claims to be only MBA (FL) II and CBD (FL)), in addition to Mattress by Appointment, LLC formed in South Carolina, are continuations of, and successors to, CBD (NC) and MBA I. This is the subject of the Ohio Federal Case Number 2 filed prior to this matter which has been deemed by the Court to be “related” to the Ohio Federal Case Number 1 between these parties that was filed in 2013. (Exhibit R, Related Case Memorandum Civil Cases). The defendants’ argument for purposes of this motion is that this Court ordered that the plaintiff identify by name, and by dates and places of incorporation, all predecessor entities. It is clear that the plaintiff has at least one predecessor entity that existed prior to April 2012, and likely more. The plaintiff has not identified any and all predecessor entities as required by the Court’s Order. Therefore this case should be dismissed.

**II. IN THE ALTERNATIVE, THIS COURT SHOULD DISMISS THE PLAINTIFF’S FIRST, SECOND, AND FIFTH CAUSES OF ACTION FOR FAILURE TO STATE FACTS SUFFICIENT TO CONSTITUTE A CAUSE OF ACTION AND STRIKE REFERENCE TO THE FLORIDA COURT’S ORDER**

**A. This Court should dismiss the plaintiff’s first and second causes of action for failure to state facts sufficient to constitute a cause of action**

The plaintiff relies on the alleged factual findings and legal conclusions of the Florida Court’s “Order Granting Emergency Motion for Preliminary Injunction and Entering Preliminary Injunction” (the “Florida Order”) to plead facts to constitute its first and second causes of action. However, the Florida Order is a non-final order that may be modified and amended at any time.

In fact, the Florida court and/or jury may make different findings of facts and/or conclusions of law at a final hearing or trial in the Florida case. Therefore, as explained below, the Florida Order is not controlling here.

“The Full Faith and Credit Clause of the United States Constitution requires courts of one state give ‘such force and effect to a foreign judgment as the judgment would receive in its own state.’” Fleet Capital Leasing-Technology Finance v. Seal Jet of Carolinas, Inc., 358 S.C. 240, 242-43, 594 S.E.2d 538, 540 (Ct. App. 2004) (quoting Colonial Pacific Leasing Corp. v. Taylor, 326 S.C. 529, 532, 484 S.E.2d 595, 597 (Ct. App. 1997)). “As a general rule, the temporary or interlocutory orders of one state are not entitled to full faith and credit in another state.” Purdie v. Smalls, 293 S.C. 216, 220, 359 S.E.2d 306, 308 (Ct. App. 1987) (citations omitted). “However, the validity and effect of a foreign judgment must be determined by the laws of the state that rendered the judgment.” Purdie, 293 S.C. at 220, 359 S.E.2d at 308 (citations omitted).<sup>3</sup>

Under Florida law, the Florida Order is not final. “In Florida a judgment is final ‘where nothing further remains to be done to fully effectuate termination of the cause between the parties directly affected except enforcement by execution or otherwise.’” Joannou v. Corsini, 543 So.2d 308, 310 (Fla. Ct. App. 1989) (quoting Chan v. Brunswick Corp., 388 So.2d 274, 275 (Fla. Ct. App. 1980)). “That termination occurs when the trial court loses jurisdiction over the cause upon the expiration of the time limits set forth in Florida Rule of Civil Procedure 1.530(b).”<sup>4</sup> Joannou, 543 So.2d at 310. “Florida follows the rule that a judgment becomes final

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<sup>3</sup> The defendants object to the plaintiff’s characterization of the Florida Order as a “judgment.” It is a non-final Order.

<sup>4</sup> Rule 1.530(b) states “[a] motion for a new trial or for rehearing shall be served not later than 10 days after the return of the verdict in a jury action or the date of filing of the judgment in a non-

only when the appellate process, once started, has been completed.” Geico Financial Services, Inc. v. Kramer, 575 So.2d 1345, 1347 (Fla. Ct. App. 1991). The Florida Order at issue here is a temporary injunction,<sup>5</sup> it is not a final order terminating the case.

The findings of fact and conclusions of law allegedly made in the Florida Order are not binding in Florida, therefore they are not binding here. Fleet Capital Leasing-Technology Finance, 358 S.C. at 242-43, 594 S.E.2d at 540 (effect of foreign judgment is determined by the laws of the state that rendered the judgment). In Florida, “[b]ecause a party is not required to prove his case in full at a preliminary injunction hearing, the findings of fact and conclusions of law made by the court at the hearing are not binding at the trial on the merits.” Ladner v. Plaza Del Prado Condominium Ass’n, Inc., 423 So.2d 927, 929 (Fla. Ct. App. 1982) (citing University of Texas v. Camenisch, 421 U.S. 390, 395, 101 S.Ct. 1830, 1833, 68 L.Ed.2d 175 (1981)). “[A] temporary injunction does not purport to decide any material points in controversy . . . . A temporary injunction is clearly not conclusive; its provisions may be merged in, or dissolved by, the final decree . . . or it may be attacked while the suit is pending.” Adoption Hot Line, Inc. v. State, 385 So.2d 682, 684, fn. 2 (Fla. Ct. App. 1980) (internal citations omitted).

“A trial court’s findings on a preliminary injunction do not constitute ‘law of the case’ on a final hearing.” Kozich v. DeBrino, 837 So.2d 1041, 1043 (Fla. Ct. App. 2003) (citation omitted). “The law of the case doctrine is concerned with the extent to which the law applied in decisions at various states of the same litigation becomes the governing principle in later stages.” Klak v. Eagles’ Reserve Homeowners’ Ass’n, Inc., 862 So.2d 947, 951 (Fla. Ct. App. 2004).

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jury action. A timely motion may be amended to state new grounds in the discretion of the court at any time before the motion is determined.”

<sup>5</sup>In Florida, the terms “preliminary injunction” and “temporary injunction” are used interchangeably and have the same meaning. Ladner v. Plaza Del Prado Condominium Ass’n, Inc., 423 So.2d 927, 929 fn. 1 (Fla. Ct. App. 1982) (citing Black’s Law Dictionary 923 (rev. 4<sup>th</sup> ed. 1968)).

"Because a decision based on a less-than-full hearing – such as the issuance or denial of a preliminary injunction – is by its very nature provisional, it would be nonsensical to give it binding effect on the subsequent proceedings in the same case." Klak v. Eagles' Reserve Homeowners' Ass'n, Inc., 862 So.2d 947, 952 (Fla. Ct. App. 2004); *see also* Kozich, 837 So.2d at 1043 ("The findings of fact and conclusions of law made at a preliminary injunction hearing are not binding on the court on final hearing, where the parties present their full case to the court"). Conrad and all of the defendants in the Florida case are free to argue at the final hearing that the Territory Agreement is invalid and unenforceable.

Further, the defendants here are not barred by res judicata to argue that the Territory Agreement is invalid and unenforceable. "Res judicata is only applicable where there is a relevant prior final judgment." Klak, 862 So.2d at 951 (citing Fla Dep't of Transp. v. Juliano, 801 So.2d 101, 105 (Fla. 2001) (stating that "a judgment on the merits rendered in a *former* suit is required for application of res judicata"); Thoman v. Ashley, 170 So.2d 332, 333 (Fla. Ct. App. 1964) ("One of the necessary elements in rendering a cause res judicata is a prior final judgment"); Donnell v. Indus. Fire & Cas. Co., 378 So.2d 1344 (Fla Ct. App. 1980) ("No order may be res judicata as to a subsequent case unless it is a final judgment which disposes of the controversy in the first one")). Here, the Florida Order is a non-final.

The doctrines of collateral estoppel and issue preclusion are also inapplicable here because the Florida Order is non-final.<sup>6</sup> "[I]n order for collateral estoppel to apply, the issue must have been fully litigated and determined in a contest which results in a final decision of a

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<sup>6</sup> Florida refers to issue preclusion as collateral estoppel. Government Employees Ins. Co. v. Kisha, 163 So.3d 1266, 1267 (Fla. Ct. App. 2015) (citations omitted) ("The vernacular of [collateral estoppel] ... varies, with some courts referring to it as 'collateral estoppel' while others also refer to it as 'issue preclusion' or 'estoppel by judgment.' ... We shall refer to it as collateral estoppel").

court of competent jurisdiction.” Kisha, 163 So.3d at 1268 (internal quotations and citations omitted); *see also* Prudential Ins. Co. of America v. Turkal, 528 So.2d 487, 488 (Fla. Ct. App. 1988) (“[c]ollateral estoppel may be applied only where the parties and issues are identical and where a particular matter has been fully litigated and determined in a prior litigation which has resulted in a final decision in a court of competent jurisdiction”).

Even further, *res judicata*, collateral estoppel and issue preclusion would not bar the defendants from litigating the issues here because the parties here are not identical to the parties in the Florida case. Wendy v. Time Customer Services, 132 So.3d 841, 844 (Fla. Ct. App. 2013) (“where the second suit is upon the same cause of action and between the same parties as the first, *res judicata* applies”); Turkal, 528 So.2d at 488 (insurance company was not collaterally estopped from litigating issues decided in a probate proceeding, where the insurance company was not party to the probate action nor in privity with any party); Stogniew v. McQueen, 656 So.2d 917, 919 (Fla. 1995) (“Florida has traditionally required that there be a mutuality of parties in order for the doctrine to apply . . . Thus, unless both parties are bound by the prior judgment, neither may use it in a subsequent action”); J.B. Richburg v. Baughman, 290 S.C. 431, 434-35 351 S.E.2d 164, 166 (1986) (“Some litigants – those who never appeared in a prior action – may not be collaterally estopped without litigating the issue. They never had a chance to present their evidence and arguments on the claim. Due process prohibits estopping them despite one or more existing adjudications of the identical issue which stand squarely against their position”).

In its Second Amended Complaint, the plaintiff relies solely on the Florida Order in an attempt to meet the elements of its first and second causes of action. In its first-cause of action, tortious interference with a contract as to RSS, Andrew, and Boxdrop, the plaintiff alleges as follows:

38. The Territory Agreement is governed by Florida law. ... A Florida Court has determined that the Territory Agreement, including the confidentiality and non-compete provisions, are valid and enforceable contracts. ...

39. The first element of tortious interference with a contract is the existence of a valid contract. ...

40. The Florida Court has determined that MBA and Conrad entered into the Territory Agreement and that the agreement is a valid contract. The Florida Court's determination is entitled to Full Faith and Credit under Article IV of the United States Constitution. Additionally, Conrad is bound by that determination by res judicata and all of the defendants are bound by the doctrines of collateral estoppel and issue preclusion.

41. The Florida Court has determined that MBA and its dealers enter into a Territory Agreement and its agreement with its dealers is a valid contract; such dealers include, but are not limited to, the dealers previously identified, and dealers who MBA believes will be discovered through the course of discovery ... The Florida Court's determination is entitled to Full Faith and Credit under Article IV of the United States Constitution.

(Second Am. Compl. ¶¶ 38-41). The only facts alleged to meet the first element, the existence of a valid contract, is that Full Faith and Credit, res judicata, collateral estoppel, and issue preclusion require this Court to find there was a valid contract. However, as demonstrated above, this is not the case. This Court, and the Florida Court for that matter, may find that there was not a valid contract as to Conrad or as to any of the other Florida defendants. Moreover, the doctrines of res judicata, collateral estoppel, and issue preclusion do not apply here because the Florida Order is non-final, and the parties here are not the same as in Florida. The plaintiff has failed to state facts sufficient to constitute a cause of action, therefore this claim must be dismissed.

Similarly, with respect to its second cause of action, aiding and abetting breach of fiduciary duty as to RSS, Andrew, and Boxdrop, the plaintiff alleges the following:

55. The first element of aiding and abetting a breach of fiduciary duty is a breach of a fiduciary duty owed to the plaintiff ... The Florida court has determined that Conrad has breached his fiduciary duties to MBA and that

determination is entitled to Full Faith and Credit pursuant to Article IV of the United States Constitution. Conrad is also barred from re-litigating the Florida Court's determination by the doctrines of res judicata and all of the defendants are bound by the doctrines of collateral estoppel and issue preclusion.

(Second Am. Compl. ¶ 55). Again, the only facts alleged to meet the first element, breach of a fiduciary duty, is that Full Faith and Credit, res judicata, collateral estoppel, and issue preclusion require that this Court find there was such a breach. However, as demonstrated above, this is not the case. This Court or the Florida court may find that Conrad did not breach his fiduciary duties to MBA. Moreover, the doctrines of res judicata, collateral estoppel, and issue preclusion do not apply here because the Florida Order is non-final, and the parties here are not the same as in Florida. The plaintiff has failed to state facts sufficient to constitute a cause of action, therefore this claim must be dismissed.

**B. This Court should strike reference to the Florida Order**

Pursuant to Rule 12(f), SCRCP, the Court "may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent or scandalous matter." Neither this Court, the Florida court, a South Carolina jury, nor a Florida jury are bound by the findings of fact and conclusions of law in the Florida Order. *See supra*. In fact, the Florida Order would be inadmissible at trial in this matter. Allegro, Inc. v. Scully, 409 S.C. 392, 409, 762 S.E.2d 54, 63 (Ct. App. 2014), reh'g denied (Aug. 26, 2014), cert. granted (Apr. 22, 2015) ("It is hard for this court to determine an instance where admission of a preliminary injunction order into the trial record would not be highly prejudicial. While Appellants did not state specific grounds for their objection, we find the introduction of the order for temporary injunction into evidence was inherently prejudicial, and thus, the grounds for the objection were patent. ... We believe admitting this order had a high possibility of influencing the jury due to its numerous findings of

fact and statements concluding defendants' liability for the alleged charges. The trial court abused its discretion in admitting the order into evidence").

The plaintiff's reference to, and incorporation of, the Florida Order should be stricken from the Second Amended Complaint as redundant, immaterial, impertinent, or scandalous, and its incorporation is unduly prejudicial to the defendants; the findings of the Florida court have no bearing on this case. See Lindsey-Grobes v. United Airlines, Inc., 2014 WL 5298030, \*3 (D. Md. 2014) (striking reference to the Equal Employment Opportunity Commission's determination that the defendant's conduct violated Title VII of the Civil Rights Act); Chancey v. North American Trade Schools, Inc., 2010 WL 4781306, \*3 (D. Md. 2010) ("Because federal district courts review discrimination claims *de novo*, the EEOC findings are immaterial to [the plaintiff's] causes of action. Also, [the plaintiff's] inclusion of these prejudicial findings when he has demanded a jury trial and admits that a juror might see the complaint may be an attempt to evade the Federal Rules of Evidence"); Mitchell v. Bendix Corp., 603 F.Supp. 920, 922 (N.D. Ind. 1985) ("The state administrative agency findings as to plaintiff's dismissal has no preclusive effect upon this court. The allegations . . . concerning the findings of the administrative referee are therefore irrelevant to this cause of action. Under the principles of Rule 12(f), defendant would be entitled to have those allegations stricken from the complaint").

**C. The Court should dismiss the plaintiff's fifth cause of action for failure to state facts sufficient to constitute a cause of action**

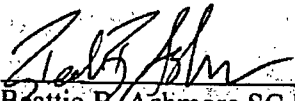
The plaintiff's fifth claim, preliminary and permanent injunction as to RSS, Boxdrop, and Andrew, should be dismissed for failure to state facts sufficient to constitute a cause of action. "The plaintiff's complaint must allege facts sufficient to constitute a cause of action for injunction and demonstrate it is reasonably necessary to protect the legal rights of the plaintiff pending in the action." AJG Holdings, LLC v. Dunn, 382 S.C. 43, 51, 674 S.E.2d 505, 508 (Ct.

App. 2009) (citations omitted). "Generally, for a preliminary injunction to be granted, the plaintiff must establish that: (1) he would suffer irreparable harm if the injunction is not granted; (2) he will likely succeed on the merits of the litigation; and (3) there is an inadequate remedy at law." *Id.* (citations omitted); *see also Knohl v. Duke Power Co.*, 260 S.C. 374, 376 196 S.E.2d 115, 116 (1973) ("[w]e have held that a complaint fails to state a cause of action for injunctive relief unless facts are alleged which show that the plaintiff has no adequate and complete remedy at law"). Similarly, the power of a court to grant a permanent injunction is in equity, *Doe v. South Carolina Medical Malpractice Liability Joint Underwriting Assn.*, 347 S.C. 642, 645, 557 S.E.2d 670, 672 (2001), and only available where there is no adequate remedy at law, *Santee Cooper Resort, Inc. v. South Carolina Public Service Com'n*, 298 S.C. 179, 185, 379 S.E.2d 119, 123 (1989). Here, the plaintiff fails to allege that it will likely succeed on the merits of the litigation, and it fails to allege that there is an inadequate remedy at law. Therefore, its claim for a preliminary and permanent injunction must be dismissed.

### **CONCLUSION**

For the reasons stated herein, the reasons stated in the defendants' previously filed motion to dismiss the complaint, and for those which may be demonstrated at a hearing on this matter, the Court should dismiss the Second Amended Complaint. In the alternative, the Court should dismiss the plaintiff's first, second, and fifth causes of action and strike reference to the Florida Court's Order.

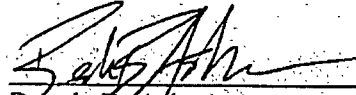
Dated this 19 day of February, 2016

  
Beattie B. Ashmore SC Bar # 10419  
Beattie B. Ashmore, P.A.  
650 E. Washington St.  
Greenville, SC 29601  
(864) 467-1001  
Attorney for Retail Service Systems,  
Inc. and Carlton Scott Andrew

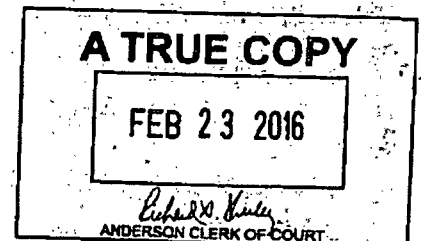
State of South Carolina )  
 )  
County of Anderson )

Verification by Attorney

The undersigned represents that he has reviewed Retail Service Systems, Inc. and Carlton Scott Andrew's Notice of Motion and Motion to Dismiss the Second Amended Complaint and Memorandum in Support of Motion and all statements contained therein are true and correct to the best of his knowledge and based upon review of the pleadings and information provided by his client.

  
Beattie B. Ashmore

SWORN to before me this  
19th day of February, 2016  
Notary Public for South Carolina  
My Commission Expires May 19, 2024



STATE OF SOUTH CAROLINA )

COUNTY OF ANDERSON )

Mattress by Appointment, LLC, )

Plaintiff, )

v. )

Retail Service Systems, Inc., Boxdrop  
Furniture, Inc., Carlton Scott Andrew,  
and Darren Conrad, )

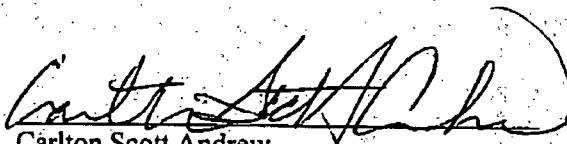
Defendants. )

IN THE COURT OF COMMON PLEAS

Case No. 2015-CP-04-02161

**VERIFICATION**

PERSONALLY APPEARED BEFORE ME, Carlton Scott Andrew, who being duly sworn states that he is the owner and highest ranking officer and member of the defendant RSS, and as such is authorized to make this Verification pursuant to the Rules of Civil Procedure and this Court's January 26, 2016 Order; that he has read Retail Service Systems, Inc. and Carlton Scott Andrew's Notice of Motion and Motion to Dismiss the Second Amended Complaint and Memorandum in Support of Motion, and that it is true and accurate to the best of his knowledge as to all statements that are within the defendant's knowledge or, to the extent outside of his knowledge, are based upon information and belief.



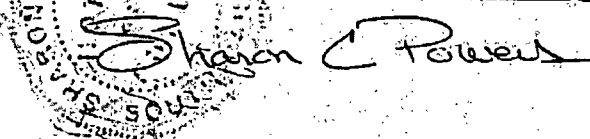
Carlton Scott Andrew  
Retail Service Systems, Inc.

SWORN to before me this

19<sup>th</sup> day of Feb, 2016

Notary Public for South Carolina

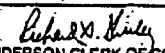
My Commission Expires 6/30/2018



Sharon C. Powers

**A TRUE COPY**

**FEB 23 2016**

  
ANDERSON CLERK OF COURT

## **EXHIBIT 16**

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PAGE 01/02

FORM 4

JUDGMENT IN A CIVIL CASE

STATE OF SOUTH CAROLINA  
 COUNTY OF ANDERSON  
 IN THE COURT OF COMMON PLEAS  
 FILED-CLERK'S OFFICE  
 ANDERSON SC

CASE NO. 2015-CP-04-2161

Mattress by Appointment LLC

Retail Service Systems Inc.



2016 FEB 24 AM 11:50

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:

COMMON PLEAS AND  
GENERAL SESSIONS

Attorney for : ☐ Plaintiff ☐ Defendant  
 or  
☐ Self-Represented Litigant

## 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. ☐ See Page 2 for additional information.
- ☐ **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
- ☐ **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:

## ORDER INFORMATION

PLAINTIFF'S MOTION TO RECONSIDER DENIED WITHOUT A HEARING; NO FORMAL ORDER REQUIRED

This order ☐ ends ☒ does not end the case.

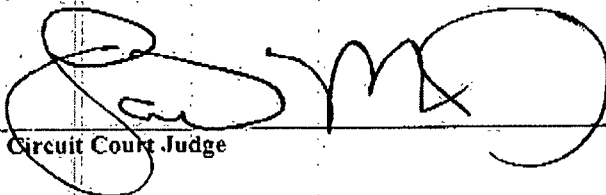
## INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

| Judgment in Favor of<br>(List name(s) below) | Judgment Against<br>(List name(s) below) | Judgment Amount To be Enrolled<br>(List amount(s) below) |
|----------------------------------------------|------------------------------------------|----------------------------------------------------------|
|                                              |                                          | \$                                                       |
|                                              |                                          | \$                                                       |
|                                              |                                          | \$                                                       |

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.



Circuit Court Judge

2155  
Judge Code2-23-16  
Date

02/25/2016 10:29 8642604715

PAGE 02/02

**For Clerk of Court Office Use Only**

This judgment was entered on the 24<sup>th</sup> day of Feb., 2016 and a copy mailed first class or placed in the appropriate attorney's box on this 24<sup>th</sup> day of Feb., 2016 to attorneys of record or to parties (when appearing pro se) as follows:

\_\_\_\_\_  
\_\_\_\_\_  
ATTORNEY(S) FOR THE PLAINTIFF(S)

\_\_\_\_\_  
\_\_\_\_\_  
ATTORNEY(S) FOR THE DEFENDANT(S)  
\_\_\_\_\_  
CLERK OF COURT

**Court Reporter:**  
\_\_\_\_\_

**ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON  
PAGE 1**

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

FILED-CLERK'S OFFICE  
ANDERSON SC  
2016 FEB 24 AM 11:54  
COMMON PLEAS AND  
GENERAL SESSIONS

## **EXHIBIT 17**

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

APPEAL FROM ANDERSON COUNTY  
Court of Common Pleas

R. Lawton McIntosh, Circuit Court Judge

Case No. 2015-CP-04-2161

Mattress by Appointment, LLC, a Florida limited liability company  
f/k/a Carolina Bedding Direct, LLC, a Florida limited liability company, .....  
Appellant,

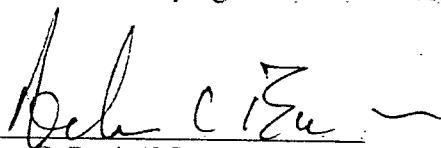
v.

Retail Service Systems, Inc., Boxdrop Furniture, Inc., Carlton Scott Andrew,  
and Darren Conrad, ..... Respondents.

**NOTICE OF APPEAL**

Mattress by Appointment, LLC, appeals the order of the Honorable R. Lawton McIntosh dated January 26, 2016. Appellant timely filed a motion to alter or amend judgment on January 29, 2016. Appellant received written notice of entry of the order denying the motion to alter or amend on February 29, 2016.

March 24, 2016

  
Adam C. Bach (SC Bar # 74885)  
ELLER TONNSEN BACH, LLC  
2201 Augusta Street, Suite 200  
Greenville, SC 29605  
Telephone: (864) 236-5013  
Facsimile: (864) 312-4191  
[abach@etblawfirm.com](mailto:abach@etblawfirm.com)  
Attorneys for Appellant

Other Counsel of Record:  
Paul S. Landis  
L. Walter Tollison, III  
Beattie B. Ashmore  
Attorneys for Respondents

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM ANDERSON COUNTY  
Court of Common Pleas

R. Lawton McIntosh, Circuit Court Judge

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Case No. 2015-CP-04-2161

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Mattress by Appointment, LLC, a Florida limited liability company  
f/k/a Carolina Bedding Direct, LLC, a Florida limited liability company, .....  
Appellant,

v.

Retail Service Systems, Inc., Boxdrop Furniture, Inc., Carlton Scott Andrew,  
and Darren Conrad; ..... Respondents.

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**PROOF OF SERVICE**

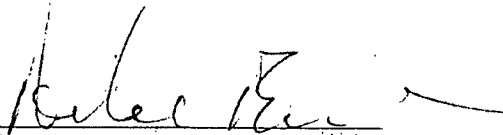
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I certify that I have served the Notice of Appeal on the Respondents, Retail Service Systems, Inc., Boxdrop Furniture, Inc., Carlton Scott Andrew, and Darren Conrad by depositing a copy of same in the United States Mail, postage prepaid, on March 24, 2016, addressed to their attorneys of record as follows:

Paul S. Landis  
Fayssoux Law Firm, P.A.  
209 E. Washington Street  
Greenville, SC 29601

Beattie B. Ashmore  
Beattie B. Ashmore, P.A.  
650 E. Washington St.  
Greenville, SC 29601

L. Walter Tollison, III  
The Tollison Law Firm  
24 Vardry Street, Suite 203  
Greenville, SC 29601



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Adam C. Bach (SC Bar # 74885)  
ELLER TONNSEN BACH, LLC  
2201 Augusta Street, Suite 200  
Greenville, SC 29605  
Telephone: (864) 236-5013  
Facsimile: (864) 312-4191  
[abach@etblawfirm.com](mailto:abach@etblawfirm.com)  
Attorneys for Appellant

March 24, 2016

Greenville, South Carolina

STATE OF SOUTH CAROLINA  
COUNTY OF ANDERSON  
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2015-CP-04-02161

Mattress by Appointment, LLC

Retail Service Systems, Inc., Boxdrop  
Furniture, Inc., Carlton Scott Andrew and  
Darren Conrad

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:

Attorney for : ☐ Plaintiff ☐ Defendant  
or  
☐ Self-Represented Litigant

## 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. ☐ See Page 2 for additional information.
- ☐ **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
- ☐ **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:

See Pages Two (2) and Three (3).

## ORDER INFORMATION

This order ☐ ends ☐ does not end the case.

Additional Information for the Clerk : \_\_\_\_\_

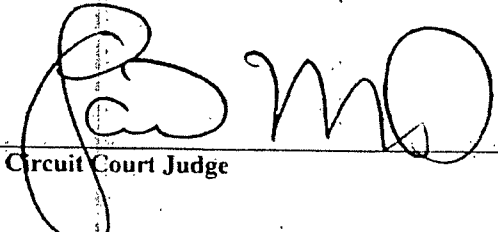
## INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

| Judgment in Favor of<br>(List name(s) below) | Judgment Against<br>(List name(s) below) | Judgment Amount To be Enrolled<br>(List amount(s) below) |
|----------------------------------------------|------------------------------------------|----------------------------------------------------------|
|                                              |                                          | \$                                                       |
|                                              |                                          | \$                                                       |
|                                              |                                          | \$                                                       |

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

  
Circuit Court Judge

2155

Judge Code

A TRUE COPY

1-26-16  
Date JAN 27 2016

CLERK OF COURT  
Page 1

For Clerk of Court Office Use Only

This judgment was entered on the 27<sup>th</sup> day of Jan, 2016 and a copy mailed first class or placed in the appropriate attorney's box on this 27<sup>th</sup> day of Jan, 2016 to attorneys of record or to parties (when appearing pro se) as follows:

\_\_\_\_\_  
ATTORNEY(S) FOR THE PLAINTIFF(S)

\_\_\_\_\_  
ATTORNEY(S) FOR THE DEFENDANT(S)  
\_\_\_\_\_  
CLERK OF COURT

FILED-CLERK'S OFFICE

Court Reporter:

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

The Court is, sua sponte, requiring the Plaintiff to provide more definite and certain statements in the Complaint. The Amended Complaint shall be verified by Plaintiff's highest ranking corporate officer and Plaintiff's attorney. The amendment shall be as follows and shall be due no later than Friday, February 5, 2016 by 5:00 pm (unless otherwise ordered by the Court). The more definite and certain statement shall include:

A) Date and places of incorporation of Plaintiff, Mattress by Appointment, LLC; the names of any and all predecessor's entities, including dates and places of incorporation;

B) Date, places and names of incorporation of any and all successor entities of Mattress by Appointment, LLC (including but not limited to all successor entities of identical name) principle places of business(es);

C) A brief description of the nature and matter by which Mattress by Appointment, LLC of Fla and Mattress by Appointment, LLC of South Carolina <sup>(1)</sup> are legal successors in interest to Carolina Bedding Direct and how each legally became successors in interest to Carolina Bedding Direct (CBD), a Florida LLC;

D) Facts to support Plaintiff's underlying allegation(s) that Boxdrop Furniture, Inc. is wholly or partially owned by Defendant Retail Service Systems, Inc.;

E) Facts to support Plaintiff's contention in Paragraph 8 of its complaint that "Mattress by Appointment, LLC I" <sup>(1)</sup> never conduct business, <sup>(2)</sup> is not a part of the Plaintiff Mattress by Appointment, LLC. <sup>(3)</sup> any and all facts to support Plaintiff's contention that "Mattress by Appointment, LLC I" was dissolved on February 6, 2014;

F) Facts to support Plaintiff's contention that Edwin Shoffner on September 4, 2014 purchased 55% interest in both "CBO/MBA" from the bankruptcy trustee;

TRUE COPY

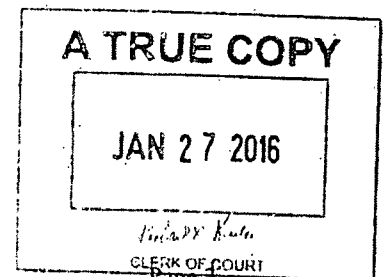
JAN 27 2016

G) Facts to support Plaintiff's contention in Paragraph 21 that on or around June, 2015 Conrad began acting as agent of RSS; H) Facts to support Plaintiff's contention that "contracts existed between MBA and Conrad. . ." (Paragraph 28 Complaint);

I) Facts to support Plaintiff's contention (Paragraph 30 Complaint) that RSS and Andrew tortiously interfered with these contracts;

J) Facts to support Plaintiff's contention in Paragraph 35 of the Complaint that RSS and Andrew assisted and/or abetted Conrad's breach of fiduciary duties.

Henceforth, all future pleadings, motions and filings and discovery responses shall be verified by the highest ranking corporate officer of each entity, the individual parties and their respective attorneys. No formal order is requested.



STATE OF SOUTH CAROLINA  
COUNTY OF ANDERSON  
IN THE COURT OF COMMON PLEAS

## JUDGMENT IN A CIVIL CASE

CASE NO. 2015-CP-04-2161

Mattress by Appointment LLC

Retail Service Systems Inc.

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:

Attorney for : ☐ Plaintiff ☐ Defendant  
or  
☐ Self-Represented Litigant

## 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. ☐ See Page 2 for additional information.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other
- ☐ **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:

## ORDER INFORMATION

PLAINTIFF'S MOTION TO RECONSIDER DENIED WITHOUT A HEARING; NO FORMAL ORDER REQUIRED

This order ☐ ends ☒ does not end the case.

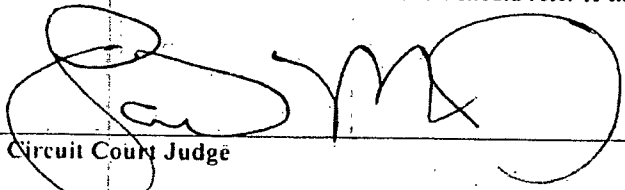
## INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

| Judgment in Favor of<br>(List name(s) below) | Judgment Against<br>(List name(s) below) | Judgment Amount To be Enrolled<br>(List amount(s) below) |
|----------------------------------------------|------------------------------------------|----------------------------------------------------------|
|                                              |                                          | \$                                                       |
|                                              |                                          | \$                                                       |
|                                              |                                          | \$                                                       |

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

  
Circuit Court Judge

2155  
Judge Code

2-23-16  
Date

For Clerk of Court Office Use Only

This judgment was entered on the 24<sup>th</sup> day of Feb, 2016 and a copy mailed first class or placed in the appropriate attorney's box on this 24<sup>th</sup> day of Feb, 2016 to attorneys of record or to parties (when appearing pro se) as follows:

\_\_\_\_\_  
\_\_\_\_\_  
ATTORNEY(S) FOR THE PLAINTIFF(S)

\_\_\_\_\_  
\_\_\_\_\_  
ATTORNEY(S) FOR THE DEFENDANT(S)  
\_\_\_\_\_  
CLERK OF COURT

Court Reporter:

\_\_\_\_\_  
ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON  
PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

FILED-CLERK'S OFFICE  
FEBRUARY 20 2016

## CERTIFICATE OF SERVICE

I hereby certify that the foregoing document, Memorandum Addressing Issue of Appealability, and the accompanying exhibits were served on this date via U.S. mail as addressed below, and I filed the foregoing document via U.S. Mail:

**RECEIVED**

|                                                                                                                                  |                                                                                                                                      |
|----------------------------------------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------|
| South Carolina Court of Appeals<br>Clerk of Court<br>Calhoun State Office Building<br>1220 Senate Street<br>Columbia, S.C. 29211 | Adam C. Bach<br>APR 18 2016<br>Eller Tonnsen Bach<br>2201 Augusta Street, Suite 200<br>Greenville, S.C. 29605<br>SC Court of Appeals |
| James W. Fayssoux, Jr.<br>Fayssoux Law Firm P.A.<br>209 E. Washington Street<br>Greenville, S.C. 29601                           | Paul Landis<br>Fayssoux Law Firm P.A.<br>209 E. Washington Street<br>Greenville, S.C. 29601                                          |
| Walt Tollison<br>L. Walt Tollison Law Office<br>104 South Main Street<br>Greenville, S.C. 29601                                  |                                                                                                                                      |

THIS THE 14<sup>th</sup> DAY OF APRIL, 2016.

  
Rhonda Bell  
Beattie B. Ashmore, P.A.  
650 E. Washington St.  
Greenville, SC 29601

**BEATTIE B. ASHMORE, P.A.**

ATTORNEY AT LAW

650 E. WASHINGTON STREET  
GREENVILLE, SOUTH CAROLINA 29601

TELEPHONE (864) 467-1001  
EMAIL: Beattie@BeattieAshmore.Com

April 14, 2016

**RECEIVED**

APR 18 2016

**SC Court of Appeals**

Jenny Abbott Kitchings, Clerk of Court  
South Carolina Court of Appeals  
Calhoun State Office Building  
1220 Senate Street  
Columbia, S.C. 29211

Re: Mattress by Appointment, LLC v. Retail Service Systems, Inc., et al.  
Appellate Case No. 2016-000662 Circuit Case No. 2015-CP-04-2161

Dear Ms. Kitchings:

Enclosed please find the original Memorandum Addressing Issue of Appealability and the accompanying exhibits with required six (6) copies along with check #4193 in the amount of \$25 to be filed in the above referenced matter. Also enclosed is an additional copy to be clocked and returned in the enclosed envelope.

Should you have any questions, do not hesitate to contact the office.

Sincerely,

*Beattie B. Ashmore/rmb*

Beattie B. Ashmore

BBA/rmb  
Enclosures

Cc: Adam C. Bach  
Paul S. Landis  
James W. Fayssoux, Jr.  
L. Walter Tollison, III

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Beattie B. Ashmore, P.A.  
650 E. Washington Street  
Greenville, South Carolina 29601

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South Carolina Court of Appeals  
Clerk of Court  
Calhoun State Office Building  
1220 Senate Street  
Columbia, S.C. 29211

1 of 3