

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

**RECEIVED**

APPEAL FROM ANDERSON COUNTY  
Court of Common Pleas

JUN 21 2016

R. Lawton McIntosh, Circuit Court Judge

**SC Court of Appeals**

Case No. 2016-000662

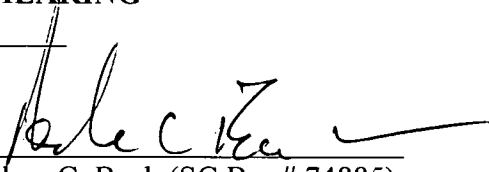
Mattress by Appointment, LLC, a Florida limited liability company  
f/k/a Carolina Bedding Direct, LLC, a Florida limited liability company, .....  
Appellant,

v.

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

**PETITION FOR REHEARING**

June 17, 2016

  
Adam C. Bach (SC Bar # 74885)  
R. Patrick Martin (S.C. Bar # 100172)  
ELLER TONNSEN BACH, LLC  
2201 Augusta Street, Suite 200  
Greenville, SC 29605  
Telephone: (864) 236-5013  
Facsimile: (864) 312-4191  
*abach@etblawfirm.com*  
Attorneys for Appellant

Other Counsel of Record:  
Paul S. Landis  
L. Walter Tollison, III  
Beattie B. Ashmore  
Attorneys for Respondents

On June 9, 2016, this Court entered an order dismissing the Appellant, Mattress by Appointment, LLC's ("MBA") appeal. This Court dismissed the appeal because it found that the Circuit Court's order is interlocutory and not immediately appealable. The order cites to Weldon v. Southern Ry. Co., 167 S.C. 526, 166 S.E. 723 (1932) for the proposition that an order requiring a plaintiff to make a more definite and certain statement is not immediately appealable. Id.

MBA, however, is not seeking appellate review of the Circuit Court's requirement that it make a more definite and certain statement in an amended pleading. Rather, MBA is seeking appellate review of the Circuit Court's requirement that 1) MBA's attorneys verify its pleadings, motions, filings, and discovery responses, 2) MBA's highest ranking corporate officer verify all future pleadings, motions, filings and discovery responses, and 3) MBA identify itself as an entity other than the one it chose. These requirements affect MBA's substantial rights within the meaning of S.C. Code § 14-3-330.

In considering whether the order is immediately appealable, the "appellate court should look to the effect of an interlocutory order to determine its appealability." Thornton v. S.C. Elec. & Gas Corp., 391 S.C. 297, 304, 705 S.E.2d 475, 479 (Ct. App. 2011). An order requiring a party to plead a more definite statement is immediately appealable where it affects a substantial right. See Mason v. S. S. Kresge Co., 247 S.C. 144, 147, 146 S.E.2d 158, 160 (1966).

## **1. Background**

On September 15, 2015, MBA filed its summons and complaint in Anderson County. MBA alleges that the defendants, acting either individually or in concert, hired a former owner and director of MBA, Darren Conrad, to act as their agent for the purpose of competing against MBA. MBA alleges that the defendants are using Conrad to tortiously interfere with their

contracts with third-parties, aiding and abetting Conrad's breach of his fiduciary duties to MBA, engaging in unfair trade practices, and that certain demands made by the defendants to MBA constitute civil conspiracy.

In response to MBA's complaint, the defendants moved to dismiss. Boxdrop Furniture, Inc. ("Boxdrop"), also moved for a more definite statement pursuant to Rule 12(e) because it claimed it was unclear what allegations were made as to Boxdrop. On January 25, 2016, MBA filed an amended complaint seeking to clarify its allegations in response to the defendants' motions to dismiss.

A hearing was held on the defendants' motions on January 26, 2016. On January 27, 2016, the Circuit Court entered a *sua sponte* order – the order that is the subject of this appeal - requiring MBA to provide a more definite and certain statement. See January 27, 2016 Order, attached as **Exhibit A**. The Circuit Court also required that (1) MBA's amended pleading be verified by MBA's attorneys and highest ranking corporate officer; (2) all future pleadings, motions, filings, and discovery responses be verified by the parties' highest ranking corporate officer and their respective attorneys; and (3) MBA identify all predecessors and successors.

On January 29, 2016, MBA filed a motion to reconsider, alter, or amend judgment. See Motion to Alter or Amend Judgment, attached as **Exhibit B (excluding exhibits to the Motion)**. In its motion to reconsider, MBA asked the Circuit Court to clarify whether its requirement that all filings and discovery responses be verified by its attorneys referred to verification as provided for by Rule 11(c) or to the attorney's certification as required by Rule 11(a). MBA also asked the Court to amend its order requiring verification of these documents and to amend or clarify its order requiring MBA to name predecessor and successor entities. MBA asked the Court to stay its order pending a ruling on its motion to reconsider.

On February 2, 2016, the Circuit Court entered an order holding MBA's motion to reconsider in abeyance until the second amended complaint was filed and reviewed. See February 2, 2016 Order, attached as **Exhibit C**. On February 5, 2016, MBA filed its second amended complaint as commanded by the Circuit Court. On February 24, 2016, the Circuit Court entered an order denying MBA's motion to reconsider. See February 24, 2016 Order, attached as **Exhibit D**.

MBA then filed this appeal. On April 4, 2016, this court sent a letter to the parties asking all parties to submit a memorandum addressing whether the circuit court's order was immediately appealable. On April 14, 2016, MBA and the respondents submitted the required memoranda. This Court dismissed the appeal finding that the circuit court's order is interlocutory and not immediately appealable on June 9, 2016.

## **2. The Court of Appeals Order Misapprehends the Basis of MBA's Appeal**

This Court's order dismissing the appeal finds that the order is interlocutory and not immediately appealable. In support the order cites to 1) S.C. Code Ann. § 14-3-330, providing that interlocutory orders are immediately appealable only if they affect a substantial right and 2) Weldon, 167 S.C. 526, a Supreme Court case finding that an order requiring a plaintiff to make a more definite and certain statement is not immediately appealable.

The order appealed by MBA contains four requirements: 1) it orders MBA to file an amended complaint with a more definite and certain statement, 2) it orders MBA's attorneys to verify the amended complaint and all future pleadings, motions, filings, and discovery responses, 3) it orders MBA's highest ranking corporate officer to verify all future pleadings, motions, filings, and discovery responses, and 4) orders MBA to identify all predecessor entities.

MBA is not appealing the first requirement. It is appealing the second, third and fourth requirements pursuant to S.C. Code § 14-3-330.

**a. Requiring MBA's attorneys to verify pleadings, motions, filings, and discovery responses affects MBA's substantial rights**

The Circuit Court's order requires MBA's attorneys to verify MBA's pleadings, filings, motions and discovery responses. Verification under the Rules of Civil Procedure requires that a person swear "before an officer authorized to administer oaths, that the affiant knows the facts stated be true of his own knowledge, except as to those matters stated on information and belief and as to those matters that he believes them to be true." Rule 11(c), SCRPC. MBA's attorneys, however, are not witnesses to any of the facts underlying MBA's complaint, nor should they be. Rule 3.7, RPC, Rule 407, SCACR.

MBA is a limited liability company and can only appear in circuit or appellate court through counsel, see Renaissance Enterp., Inc. v. Summit Teleservices, Inc., 334 S.C. 649, 651, 515 S.E.2d 257, 258 (1999); Travelers Ins. Co. v. Roof Doctor, Inc., 325 S.C. 614, 481 S.E.2d 451 (Ct. App. 1997), and MBA has a constitutional right to retain counsel to act on its behalf. Potashnik v. Port City Constr. Co., 609 F.2d 1101, 1117 (5th Cir.1980) ("the right to retain counsel in civil litigation is implicit in the concept of fifth amendment due process."). Absent counsel, MBA cannot proceed. See Travelers Ins, 481 S.E.2d at 451.

Required to have counsel, MBA has the right to diligent and competent representation within the meaning of the Rules of Professional Conduct. See Rules 1.1 and 1.3, RPC, Rule 407, SCACR; Alex Sanders & John S. Nichols, *Trial Handbook for South Carolina Lawyers*, § 1.53 (5th ed. 2012) ("[E]very client has a right to competent counsel."). Diligent and competent representation means that a lawyer must be able to act within the full scope of the Rules of

Professional Conduct. See Rule 3.1, RPC, Rule 407, SCACR, cmt. 1 (“The advocate has a duty to use legal procedure for the fullest benefit of the client’s cause...The law, both procedural and substantive, establishes the limits within which an advocate may proceed.”); see also Rule 407, SCACR, Preamble [2] (“As advocate, a lawyer zealously asserts the client’s position under the rules of the adversary system.”) and [9] (“These principles include the lawyer’s obligation zealously to protect and pursue a client’s legitimate interests within the bounds of the law.”). Diligence specifically requires that a lawyer take “whatever lawful and ethical measures are required to vindicate a client’s cause or endeavor.” Rule 1.3, RPC, Rule 407, SCACR, cmt. 1.

The Circuit Court’s order is directly at odds with MBA’s attorneys’ duties under the Rules of Professional Conduct. A lawyer is “not required to have personal knowledge of matters asserted in [pleadings and other documents], for litigation documents ordinarily present assertions by the client, or by someone on the client’s behalf, and not assertions by the lawyer.” Rule 3.3, RCP, Rule 407, SCACR at cmt. 3. Instead, a lawyer is required to present evidence helpful to his client even where the lawyer may not believe the evidence so long as he does not know that the evidence is false. Id. at cmt. 8 (“The prohibition against offering false evidence only applies if the lawyer knows that the evidence is false. A lawyer’s reasonable belief that evidence is false does not preclude its presentation to the trier of fact.”). A lawyer is required to move and act even where facts have not yet been fully substantiated, where the lawyer expects to develop evidence during discovery, or where he has relied on the veracity of his client’s statements concerning a case. See Rule 3.1, RPC, Rule 407, SCACR, cmt. 2; Rule 3.3 cmt. 8.

MBA’s lawyers cannot take any of these actions consistently with the Circuit Court’s order because verification requires that they swear under oath that they have personal knowledge of the facts or assertions contained in MBA’s pleadings, motions, filings, and discovery

responses or believe them to be true. MBA's attorneys have no personal knowledge of any facts or evidence in this case. Instead, its attorneys have relied on MBA and its investigation prior to filing the summons and complaint in forming MBA's complaint and acting on its behalf, consistent with their duties under the Rules of Professional Conduct.

The Circuit Court's order leaves MBA's lawyers with an impossible choice – fulfill their duties to their client under the Rules of Professional Conduct by a) relying on MBA (Rule 3.3, cmt. 8, RCP, SCACR); b) zealously acting within the Rules of Professional Conduct (Rule 3.1 cmt. 1, RCP, SCACR); c) acting where facts or evidence have not been fully developed or substantiated (Rule 3.1, cmt. 2, RCP, SCACR); d) preparing documents, pleadings, motions and other filings on behalf of MBA where they do not have personal knowledge of matters asserted therein (Rule 3.3 cmt. 3, RCP, SCACR); e) presenting evidence in pleadings, motions and other filings even where they may doubt that evidence (Rule 3.3, cmt. 8, RCP, SCACR); f) presenting evidence or statements on behalf of MBA that they cannot “vouch” for (Rule 3.3, cmt. 2, RCP, SCACR); or, alternatively, complying with the Circuit Court's order and failing to act except where they can provide a verification pursuant to the Rules. MBA's attorneys cannot both comply with the Circuit Court's order and provide zealous, diligent, and competent representation to MBA as defined by the Rules of Professional Conduct.

Thus, the order is immediately appealable because it affects MBA's substantial right to effective assistance of counsel, its substantial right to prosecute its case consistent with the Rules of Civil Procedure, and effectively discontinues the action. See Thornton v. S.C. Elec. & Gas Corp., 391 S.C. 297, 304, 705 S.E.2d 475, 479 (Ct. App. 2011) (“[A]n appellate court should look to the effect of an interlocutory order to determine its appealability.”); Morrow, 773 S.E.2d at 147.

Additionally, an interlocutory order is immediately appealable where it “establishes a principle which will finally affect the merits of the case.” Thornton, 705 S.E.2d at 479 (quoting Robertson v. Bingley, 6 S.C. Eq. 333, 351 (S.C. App. L. & Eq. 1826)). Here, the Circuit Court has established a principle that will necessarily affect the merits as MBA will be prevented from presenting testimony, facts, and evidence that it could otherwise present consistent with Rules of Civil Procedure because it and/or its attorneys cannot verify them.

South Carolina’s Supreme Court considered a similar situation and found that an interlocutory order disqualifying a party’s chosen attorney affects a substantial right and is immediately appealable. See Hagood v. Sommerville, 362 S.C. 191, 196-97, 607 S.E.2d 707, 709-10 (2005). In so determining, the Supreme Court noted the importance of the party’s right to counsel in an adversarial system and that appeal after final judgment would not adequately protect “a party’s interest because it would be difficult or impossible for a litigant or an appellate court to ascertain whether prejudice resulted.” Id.

Here, the impact of the Circuit Court’s order is more extreme than disqualification of counsel. Although the appellant in Hagood could not proceed with the counsel of his choice, he could still retain new counsel who could zealously and diligently represent him within the full scope of the Rules of Professional Conduct and the Rules of Civil Procedure. The Circuit Court has foreclosed that right for MBA, forcing it and whatever counsel it hires to act within a far narrower and more constrained sphere than the one contemplated by the Rules.

Additionally, to the extent the case proceeds it would be nearly impossible for an appellate court to determine whether MBA was prejudiced by its inability to offer facts and evidence due to the requirements of this order. Review following a final judgment would require the appellate court to review every single document submitted in the case, including all

pleadings, motions, filings, and discovery responses. After reviewing all documents exchanged in the case, the appellate court would then have to consider all potential evidence that was not presented because of the Circuit Court's order. It would then have to determine whether such evidence would have been relevant to the Circuit Court or fact finder at every phase of the case. This would include a review of whether the un-presented evidence would have, for example, resulted in the grant or denial of dispositive motions, been useful for impeachment of witnesses, resulted in the inclusion or exclusion of evidence and testimony, or resulted in a different determination by the jury. Such a review is not possible. Hagood, 607 S.E.2d at 709-10 ("an appeal after final judgment and a new trial, if granted, would not adequately protect a party's interests because it would be difficult or impossible for the affected party or the appellate court to ascertain by any objective standard whether prejudice resulted from the disqualification.").

**b. Requiring MBA's highest corporate officer to verify all pleadings, motions, filings and discovery responses affects MBA's substantial rights**

MBA has a substantial right to prosecute its case consistent with the Rules of Civil Procedure. See Rule 1, SCRCP; Ross v. Med. Univ. of S. Carolina, 312 S.C. 532, 534, 435 S.E.2d 877, 878 (Ct. App. 1993), rev'd, 317 S.C. 377, 453 S.E.2d 880 (1994) ("The South Carolina Rules of Civil Procedure govern actions brought in the courts of South Carolina in all suits of a civil nature."). South Carolina's legislature specifically chose not to require parties to verify their pleadings or other documents. See Rule 11, SCRCP ("Except when otherwise specifically provided by rule or statute pleadings need not be verified or accompanied by an affidavit."); off. cmt. ("Important as this change is, it is not as significant as the Rule itself, which eliminates the verification of pleadings...").

While MBA is permitted to verify its pleadings, it is not required to do so. See Rule 81, SCRCP (“[t]hese rules, or any of them, shall apply to every trial court of civil jurisdiction within this state, within the limits of the jurisdiction and powers of the court provided by law, and the procedure therein shall conform to these rules insofar as practicable.”). Additionally, the circuit court cannot require a certain person verify a corporation’s filings – in many instances the highest ranking corporate officer is not the person with knowledge sufficient to make a verification but that does not mean that the company does not possess the knowledge required to make a verification. By requiring verification contrary to the Rules, and by requiring that a certain person provide the verification, the circuit court has affected MBA’s substantial right to prosecute its case consistent with the Rules of Civil Procedure.

**c. MBA has a substantial right to identify itself as it chooses**

The Circuit Court’s order affects a substantial right by ordering MBA to identify its predecessors and successors. In Neeltec, the South Carolina Supreme Court held that an order substituting a defendant is immediately appealable as affecting a substantial right. 725 S.E.2d 926, 928-29. According to the Supreme Court, “the right of the plaintiff to choose her defendant is a substantial right.” Id. Additionally, MBA has the right to be the “architects of their own complaint,” Morrow, 773 S.E.2d at 146-147, and this right is impacted where a plaintiff cannot choose the identity of the parties to the lawsuit. Id. MBA has a right to identify itself as it chooses in its complaint, just as it has a right to identify its defendants.

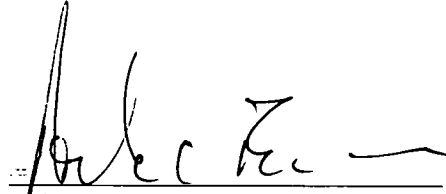
**CONCLUSION**

For the foregoing reasons, MBA respectfully seeks a rehearing of this Court’s order dismissing its appeal.

*Signature page follows*

Respectfully Submitted,

June 17, 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*  
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

---

APPEAL FROM ANDERSON COUNTY  
Court of Common Pleas

R. Lawton McIntosh, Circuit Court Judge

---

Case No. 2016-000662

---

**RECEIVED**

JUN 21 2016

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 Conrad, ..... Respondents.

---

**PROOF OF SERVICE**

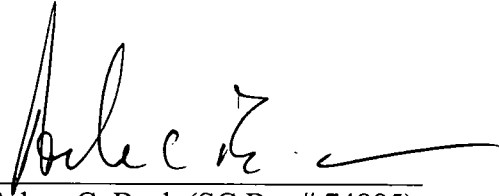
---

I certify that I have served this Petition for Rehearing 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 June 17, 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

A handwritten signature in black ink, appearing to read 'Adam C. Bach', with a long horizontal flourish extending to the right.

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*  
Attorneys for Appellant

June 17, 2016

Greenville, South Carolina

# Exhibit A



Mattress by Appointment, LLC

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

PLAINTIFF(S)

COMMON PLEAS AND  
GENERAL SESSIONS

DEFENDANT(S)

Submitted by:	Attorney for : <input type="checkbox"/> Plaintiff <input type="checkbox"/> Defendant
	or <input type="checkbox"/> 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 (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (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

<b>A TRUE COPY</b>	
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)

\_\_\_\_\_  
\_\_\_\_\_  
ATTORNEYS FOR THE DEFENDANT(S)  
CLERK OF COURT

*Richard S. Kuster*

FILED-CLERK'S OFFICE  
APPROPRIATE SC  
JAN 27 2016

**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  
*Richard S. Kuster*  
CLERK OF COURT

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.

FILED-CLERK'S OFFICE  
ANDERSON SO  
JAN 27 11 08 52  
COMMON S. S. AP  
GENERAL CLERK'S OFFICE

A TRUE COPY  
JAN 27 2016  
Richard K. Kula  
CLERK OF COURT  
Page 3

# Exhibit B

MOTION FEE PAID

STATE OF SOUTH CAROLINA )
COUNTY OF ANDERSON )
Mattress by Appointment, LLC, )
Plaintiff, )
vs. )
Retail Service Systems, Inc., Boxdrop Furniture, )
Inc., Carlton Scott Andrew, and Darren Conrad. )
Defendant. )

IN THE COURT OF COMMON PLEAS

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 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 Date submitted 1/28/2016

SECTION III: Motion Fee
PAID - AMOUNT: \$25.00
EXEMPT: 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, SCRPC)
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: TSG Date Filed: 1-29-16
MOTION FEE COLLECTED: \$ 25.00
CONTESTED - AMOUNT DUE: \$

A TRUE COPY
JAN 29 2016
Richard S. Kintley
ANDERSON CLERK OF COURT

STATE OF SOUTH CAROLINA )

IN THE COURT OF COMMON PLEAS

COUNTY OF ANDERSON )

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

Mattress by Appointment, LLC, )

A TRUE COPY

Plaintiff, )

JAN 29 2016

v. )

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

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

Defendants. )

*Richard X. Kintz*  
ANDERSON CLERK OF COURT

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);

---

<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

---

<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 Serrine 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 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;

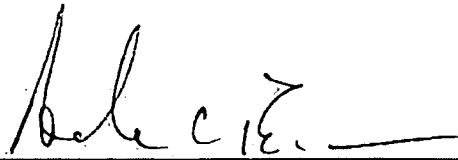
5. Amend the order to remove the requirement that all pleadings, motions, filings, and discovery responses be verified by each party's highest ranking officer and

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,

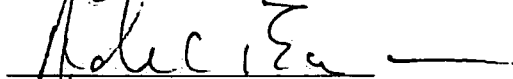


Adam C. Bach (S.C. Bar # 74885)  
ELLER TONNSEN BACH, LLC  
2201 Augusta St., Suite 200  
Greenville, SC 29605  
Telephone: (864) 236-5013  
Facsimile: (864) 312-4191  
[abach@etblawfirm.com](mailto:abach@etblawfirm.com)

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



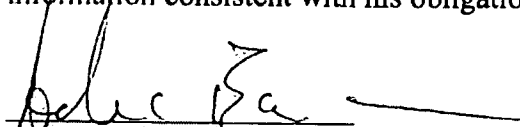
Adam C. Bach

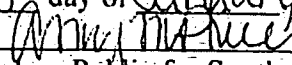
*Verification of attorney on following page*

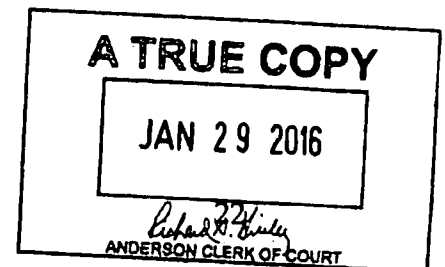
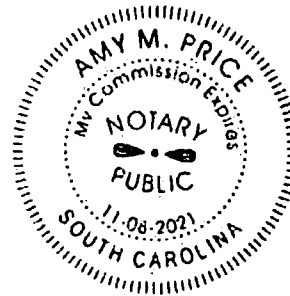
State of South Carolina )  
  )  
County of Anderson )

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 motion 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  
28<sup>th</sup> day of January 2016  
  
Notary Public for South Carolina  
My Commission Expires: 11-8-2021







# Exhibit C



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), 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

TRUE COPY  
FEB - 8 2016  
Clerk of Court

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

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

Plaintiff's Motion to Reconsider, Amend or Alter Judgment [from Form 4 Order dated 1/26/16] is held in abeyance until the amended pleadings have been filed and reviewed by the undersigned.

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 (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (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

2-2-16  
Date



**For Clerk of Court Office Use Only**

This judgment was entered on the 8<sup>th</sup> day of Feb., 2016 and a copy mailed first class or placed in the appropriate attorney's box on this 8<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)  
*Richard S. Jolley*  
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 -8 AM 9:31  
COMMON FILES AND  
GENERAL SESSIONS

# Exhibit D

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

JUDGMENT IN A CIVIL CASE

CASE NO. 2015-CP-04-2161

FILED-CLERK'S OFFICE  
ANDERSON SC



Mattress by Appointment LLC

Retail Service Systems Inc.

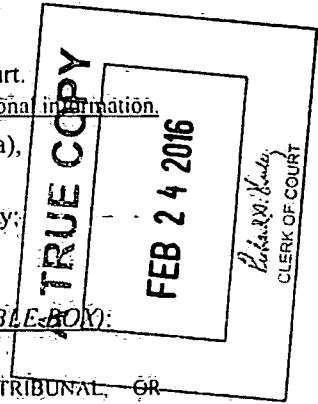
PLAINTIFF(S)

DEFENDANT(S)

Submitted by:	Attorney for : <input type="checkbox"/> Plaintiff <input type="checkbox"/> Defendant
	or <input type="checkbox"/> 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**

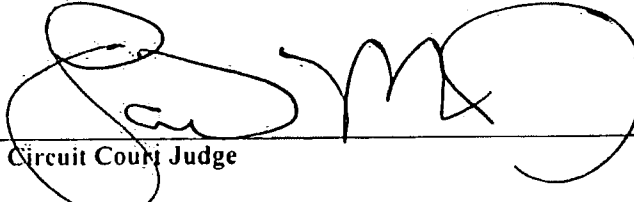
**PLAINTIFF'S MOTION TO RECONSIDER DENIED WITHOUT A HEARING; NO FORMAL ORDER REQUIRED**

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 (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (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

*Richard S. Jankley*

**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  
JAN 27 2016 9:00  
2016 JAN 27 09:11:54  
COMMUNICATIONS



ELLER TONNSEN BACH  
*Attorneys at Law*

Daniel B. Eller\*  
Eric R. Tonnsen  
Adam C. Bach\*  
Walter R. Frye, III  
J. Trey Odom

1306 South Church Street  
Greenville, South Carolina 29605  
Telephone (864) 236-5013  
Facsimile (864) 312-4191

R. Patrick Martin\*  
Weston J. White  
R. Hudson Smith  
Donald L. Van Riper†  
Frances G. Zacher†  
† Of counsel

\*Licensed in both NC and SC

June 17, 2016

Jenny Abbott Kitchings  
Clerk, The South Carolina Court of Appeals  
P. O. Box 11629  
Columbia, SC 29211

RECEIVED  
JUN 21 2016  
SC Court of Appeals

*Re: Mattress by Appointment, LLC vs. Retail Service Systems, Inc., Boxdrop Furniture, Inc., Carlton Scott Andrew, and Darren Conrad  
C. A. No. 2015-CP-04-02161*

Dear Ms. Kitchings:

Enclosed please find an original and six (6) copies of a petition for rehearing on the above-referenced matter, along with proof of service for the same. We would appreciate your filing the original and returning a clocked copy to us in the envelope provided.

If we may provide you with any additional information, please do not hesitate to call or email.

Sincerely,

ELLER TONNSEN BACH, LLC

Adam C. Bach  
abach@etblawfirm.com

ACB/amp  
Enclosures

cc: Attorneys for Respondents:  
Beattie B. Ashmore  
Paul S. Landis  
L. Walter Tollison, III