

IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

RECEIVED

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

JUN 30 2016

SC Court of Appeals

R. Lawton McIntosh, Circuit Court Judge

Appellate Case No. 2016-000662

Circuit Case No. 2015-CP-04-2161

Mattress by Appointment, LLC, ...
Appellant,

v.

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

RETURN TO PETITION FOR REHEARING

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For the reasons set forth in the Respondents' Memorandum Addressing Appealability (hereinafter the "Respondents' Memorandum"), the entirety of which is incorporated herein, this Court correctly dismissed the appeal. The respondents further address the arguments contained in the appellant's Petition for Rehearing below.

I. PROCEDURAL HISTORY.

The procedural history of this case is set forth in the Respondents' Memorandum. (*See* Respondents' Memorandum, pp. 1-6). However, since the respondents filed their Memorandum, additional litigation has ensued in Ohio Federal Case No. 2:13-cv-00994 (referred to as "Ohio Case No. 1"). In that case, "Mattress by Appointment, LLC, Mattress by Appointment, LLC, and C. Edwin Shoffner" have sought to intervene and stay the proceedings. (Exhibit 1, Intervenor Mattress by Appointment, LLC, Mattress by Appointment, LLC, and Edwin Shoffner's Motion to Intervene and Stay Proceedings). This comes only after CBD (NC) and MBA (FL) I litigated the case for almost a year, default was entered against both entities, a permanent injunction was entered against CBD (NC), and the court held an extensive damages hearing.¹ Retail Service Systems has sought sanctions for this latest attempt to delay the case. (Exhibit 2, Retail Service Systems Memorandum in Opposition, p. 20).

II. RESPONSE TO APPELLANT'S BACKGROUND OF CASE.

The respondents dispute the appellant's characterization of various facts as stated in their Petition.

First, despite the appellant's characterization, the verification requirements are not specific to the appellant. The circuit court's January 26, 2016 Order (1) directs the appellant to amend its complaint by providing more definite and certain statements; (2) requires all parties to

¹ The designations of the various entities are for ease of reference only. The respondents in no way concede that any of the entities are distinct.

verify future pleadings, motions, filings, and discovery responses by the highest ranking corporate officer of each entity or the individual parties; and (3) requires all attorneys to verify future pleadings, motions, filings, and discovery responses. (January 26, 2016 Order, Exhibit 10 to Respondent's Memorandum).

Second, as discussed more fully below, the appellant's "verification" arguments completely rest on a false premise: That by use of the term "verification," the Order "requires" that the attorneys and parties "swear under oath that they have personal knowledge of the assertions contained in MBA's pleadings, motions, filings, and discovery responses or believe them to be true." (Petition for Rehearing pp. 6-7). This is simply not the case. Interestingly, the appellant has not always construed the Order this way. In the appellant's Motion to Reconsider, Amend or Alter Judgment, it sought "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)." (Motion to Reconsider, p. 18, attached as Exhibit 11 to Respondents' Memorandum). The appellant, the respondents, and their respective attorneys have been submitting verifications, none of which the circuit court has struck due to noncompliance with its Order.

Third, the requirement that the appellant identify its predecessor and successor companies in an amended complaint is a requirement for a more definite and certain statement. The Order does not prohibit the appellant from bringing this lawsuit in the name of whatever entity it chooses. The appellant is able to choose who it is, and the Order does not affect this choice. It simply requires that the appellant (whoever that may be) allege additional facts identifying its

predecessor and successor entities. As discussed more fully below, the appellant is not deprived of any substantial right by being required to allege these facts.

The circuit court had concerns as to the pending motions to dismiss and to this case. (Honorable Lawton McIntosh email, attached as Exhibit 9 to Respondents' Memorandum). The respondents moved to dismiss the case because the appellant brought various causes of actions based on duties allegedly owed to MBA (FL) I and damages allegedly suffered by MBA (FL) I. (Respondents' Memorandum, Exhibit 5). Yet, it specifically alleged that it was *not* MBA (FL) I. (Respondents' Memorandum, Exhibit 5, ¶ 8). Due to the circuit court's concerns, it ordered verifications and more definite and certain statements. There is nothing improper about the Order.

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 (*italics original*); *see also* Edwards v. SunCom, 369 S.C. 91, 94, 631 S.E.2d 529, 530 (2006). The Order does not fall into any of these categories, therefore the Court correctly dismissed this appeal.²

III. THE CIRCUIT COURT’S REQUIREMENT THAT THE PARTIES’ ATTORNEYS VERIFY ALL FUTURE PLEADINGS, MOTIONS, FILINGS AND DISCOVERY RESPONSES DOES NOT AFFECT THE APPELLANT’S SUBSTANTIAL RIGHTS.

The entire basis of the appellant’s argument is that by using the term “verify,” the Order requires its attorneys to “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.” (Appellant’s Petition for Rehearing, pp. 6-7). This is not what the Order states. The circuit court merely uses the term “verify.” The attorneys in this case, including those for the appellant, have submitted verifications in which the attorneys *do not* swear under oath that they have personal knowledge of the facts or assertions contained in the submitted pleading or believe them to be true. These verifications and the pleadings associated therewith have not been struck by the circuit court for failure to comply with its Order.

For example, the respondents’ attorney submitted the following verification with the respondents’ response in opposition to plaintiff’s motion to reconsider:

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.

(Respondents’ Memorandum, Exhibit 12, p. 5). The circuit court did not strike this pleading due to non-compliance with its Order. Similarly, the appellant’s attorney submitted the following verification with the appellant’s Verified Reply in Support of Motion to Amend:

² The appellant has not asserted that subparts (1), (3), or (4) apply here, and in fact they do not (*see* Respondents’ Memorandum).

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), 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.

(Respondents' Memorandum, Exhibit 13, p. 6). The circuit court did not strike this pleading due to non-compliance with its Order. The appellant's attorney submitted an identical verification with the appellant's Second Amended Complaint, which the court did not strike due to non-compliance with its Order. (Respondents' Memorandum, Exhibit 14, p. 20).

Even assuming that by use of the term "verify," the Order requires the appellant's attorneys to "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," the Order does not affect a substantial right of the appellant.

The appellant argues that the Order affects its "substantial right to effective assistance of counsel." (Petition for Rehearing, p. 7). The appellant's argument is premised on its attorney's alleged "impossible choice" between complying with the Order or acting in conformance with the Rules of Professional Conduct. (Petition for Rehearing, p. 7). However, it has already submitted pleadings and verifications pursuant to the Order. Clearly the appellant is not arguing that its attorney violated the Rules of Professional Conduct by submitting these pleadings and verifications.³

³ Even if the appellant is arguing that its attorneys violated the Rules of Professional Conduct by submitting these pleadings and verifications, the appellant has waived the right to challenge the Order insofar as it relates to the filings and verifications already submitted to the court. *See Ex parte Whetstone*, 289 S.C. 580, 580-81, 347 S.E.2d 881, 881-82 (1986); *see also* Respondents' Memorandum.

What the appellant is actually arguing is that by using the term “verify,” the Order *may* require its attorneys, *at some time in the future*, to choose between complying with the Order or complying with the Rules of Professional Conduct. However, if in the future the Order requires the appellant’s attorneys to make this “impossible choice,” the correct procedure would be to refuse to comply with the Order, and if held in contempt for failing to comply, appeal that contempt order. *See* Preamble, Rule 407, SCACR (“While it is a lawyer’s duty, when necessary, to challenge the rectitude of official action, it is also a lawyer’s duty to uphold legal process”); Ex parte Whetstone, 289 S.C. 580, 580-81, 347 S.E.2d 881, 881-82 (1986) (instead of immediately appealing an order requiring a non-party to participate in discovery, the non-party has two alternatives. He may either comply with the discovery order and waive any right to challenge it on appeal, or refuse to comply with the order and appeal after he is held in contempt for his failure to comply). This procedure is consistent with S.C. Code Ann. § 18-1-30, which limits appellate review to parties aggrieved by a judgment or order below. *See Ex parte Whetstone*, 289 S.C. at 581, 347 S.E.2d at 882 (citations omitted). Here, the appellant has not been aggrieved. *Id.* (“The Court has defined an aggrieved party as one who is injured in a legal sense or one who has suffered an injury to person or property”).

The appellant argues that the verification portion of the Order “effectively discontinues the action.” (*See* Petition for Rehearing, p. 7). However, the language of S.C. Code Ann. § 14-3-330(2)(a) is that an order affecting a substantial right is one that “in effect determines the action and prevents a judgment from which an appeal might be taken *or* discontinues the action.” (italics added); *see also Edwards v. SunCom*, 369 S.C. 91, 94, 631 S.E.2d 529, 530 (2006) (“Interlocutory orders affecting substantial rights may be immediately appealed pursuant to § 14-3-330(2). Orders affecting a substantial right ‘discontinue an action, prevent an appeal, grant or

refuse a new trial, or strike out an action or defense”) (quoting Mid-State Distribs. v. Century Importers, Inc., 310 S.C. 330, 334, 426 S.E.2d 777, 780 (1993)). The phrase “effectively discontinues the action” does not appear in the statute.

The Order here does not “effectively discontinue the action,” nor does it “in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues the action.” It merely directs the appellant provide more definite and certain statements and all parties and their attorneys to verify future pleadings. Other than the automatic stay pursuant to Rule 241(a), SCACR, this case has been continuing since the circuit court entered the Order. The appellant has filed a Second Amended Complaint and verifications. The respondents have filed a Motion to Dismiss the Second Amended Complaint and verifications.

Moreover, the Order does not disqualify the appellant’s attorney. See Hagood v. Sommerville, 362 S.C. 191, 607 S.E.2d 707 (2005) (holding that an order disqualifying a party’s attorney in a civil case affects a substantial right and may be immediately appealed under Section 14-3-330(2)). It does not deprive the appellant of a mode of trial to which it is entitled to as a matter of right. See Flagstar Corp. v. Royal Surplus Lines, 341 S.C. 68, 72, 533 S.E.2d 331, 333 (2000) (“An order granting bifurcation of issues for trial simply does not strike to the heart of this Court’s traditional analysis of claims of denial of a mode of trial. That analysis proceeds by determining whether or not a party is erroneously denied a trial by jury in a law case, or is erroneously required to proceed before a jury in an equity case”).

The appellant argues that if this 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.” (Petition for Rehearing, p. 8). However, compliance with the Order does not prevent the appellant (or any of the parties) from offering

facts and evidence. It does not “establish any principle which will *finally* affect the merits of the case.” (Petition for Rehearing p. 8) (italics added).⁴ It only requires the parties and their attorneys to verify pleadings related to his case. In the future, if the appellant’s attorneys are not able to verify a pleading because such verification would violate the Rules of Professional Conduct, they can chose to not verify the pleading or verify it in a way that fulfills their obligations under Rules of Professional Conduct, and then appeal any contempt ruling.

Further, the Order does not affect the appellant’s alleged “substantial right to prosecute its case consistent with the Rules of Civil Procedure.” (Petition for Rehearing p. 7). The alleged “right” to prosecute a case consistent with the Rules of Civil Procedure is not a “substantial right” within the meaning of S.C. Code Ann. § 14-3-330. The Rules of Civil Procedure are procedural rules and do “not involve substantial or essential legal rights which require attention prior to final judgment.” Knowles v. Standard Sav. and Loan Ass’n, 274 S.C. 58, 59, 261 S.E.2d 49 (1979) (holding that class certification is “essentially procedural in nature [and] does not involve substantial or essential legal rights which require attention prior to final judgment”) (citing Ex Parte Ferguson, 82 S.C. 563, 64 S.E. 750 (1909) (“wherein an order requiring certain individuals be named as defendants was held merely an administrative act, not subject to appeal”)).

It is not uncommon for parties to disagree about the meaning or the application of the Rules of Civil Procedure. It would have a debilitating effect on judicial administration if parties were permitted to appeal every interlocutory order they believed violated their “rights” under the Rules of Civil Procedure. See Knowles, 274 S.C. at 59, 261 S.E.2d at 49 (approving the rational

⁴ The appellant cites to Thornton, 705 S.E.2d at 479 in support of its argument. (Petition for Rehearing p. 8). However, it appears the appellant meant to cite to Tatnall v. Gardner, 350 S.C. 135, 138, 564 S.E.2d 377, 379 (Ct. App. 2002), in which the Court quoted Robertson v. Bingley, 6 S.C. Eq. (1 McCord Eq.) 333, 351 (Ct. App. 1826).

of the U.S. Supreme Court in Coopers and Lybrand v. Livesay, 437 U.S. 463, 98 S.Ct. 2434, 57 L.Ed.2d 351 (1978), in restricting appellate review in order to prevent the “debilitating effect on judicial administration caused by piecemeal appeal disposition of what is, in practical consequence, but a single controversy”); *see also* Hagood v. Sommerville, 362 S.C. 191, 196, 607 S.E.2d 707, 709 (2005) (“Piecemeal appeals should be avoided and most errors can be corrected by the remedy of a new trial”); 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).

Even further, the Rules of Civil Procedure do not prohibit circuit courts from ordering that future pleadings, motions, filings, and discovery responses be verified. Courts have the

inherent authority to protect themselves from fraud, administer judicial functions, and control the order of business before them. 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). This is what the circuit court did here. This Court properly dismissed the appeal.

IV. THE CIRCUIT COURT’S REQUIREMENT THAT APPELLANT’S HIGHEST CORPORATE OFFICER VERIFY ALL FUTURE PLEADINGS, MOTIONS, FILINGS, AND DISCOVERY RESPONSES DOES NOT AFFECT THE APPELLANT’S SUBSTANTIAL RIGHTS.

The appellant again claims that it has a “substantial right to prosecute its case consistent with the Rules of Civil Procedure.” (Petition p. 9). As explained above, the alleged “right” to prosecute a case consistent with the Rules of Civil Procedure is not a “substantial right” within the meaning of S.C. Code Ann. § 14-3-330. *See supra*; *see also Knowles*, 274 S.C. at 59, 261 S.E.2d at 49; Ex Parte Ferguson, 82 S.C. 563, 64 S.E. 750. It would have a debilitating effect on judicial administration if parties were permitted to appeal every interlocutory order they believed violated their “rights” under the Rules of Civil Procedure. *See supra*; *see also Knowles*, 274 S.C. at 59, 261 S.E.2d at 49.

Despite the appellant’s contention, the circuit court can require the highest ranking corporate officer to verify pleadings. The circuit court here was “concerned” about this case. (Honorable Lawton McIntosh email, Respondents’ Memorandum, Exhibit 9). The Court

therefore imposed verification requirements. *See Brantley*, 279 S.C. at 217, 305 S.E.2d at 235; *Crestwood Golf Club, Inc.*, 328 S.C. at 212, 493 S.E.2d at 832; *Langford*, 400 S.C. at 435, 735 S.E.2d at 478. There is nothing improper about the Order.

Nevertheless, even if the circuit court did not have such authority, the Order does not affect the appellant's substantial rights. Clearly the appellant is not arguing that its corporate officer committed perjury when he submitted verifications pursuant to the Order. In the future, if the Order would require the appellant's corporate officer to commit perjury, he can refuse to comply with the Order, and if held in contempt for failing to comply, appeal that contempt order. *See Ex parte Whetstone*, 289 S.C. 580-81, 347 S.E.2d at 881-82. As discussed above, this procedure is consistent with S.C. Code Ann. § 18-1-30, which limits appellate review to parties aggrieved by a judgment or order below. *See Ex parte Whetstone*, 289 S.C. at 581, 347 S.E.2d at 882.

Moreover, as explained in Respondents' Memorandum, the attorney or party 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 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)). The Court correctly dismissed the appeal.

V. THE ORDER DOES NOT PREVENT THE APPELLANT FROM IDENTIFYING ITSELF AS IT CHOOSES.

The portion of the Order directing the appellant identify its predecessor and successor companies in an amended complaint *is* an order for a more definite and certain statement. The Order does not prohibit the appellant from bringing this lawsuit in the name of whatever entity it chooses. The appellant is able to choose who it is and the Order does not affect this choice. It merely requires that the appellant (whoever that may be) to identify its predecessor and successor entities. This is the result of the motion to dismiss and accompanying oral arguments wherein the true nature of various entities has been brought into question.

As discussed in the Respondents' Memorandum, South Carolina courts have long held that orders directing a party to provide more definite and certain statements are not immediately appealable. *See Pickett v. Fidelity & Casualty Co.*, 52 S.C. 584, 30 S.E. 614, 615 (1898); *Dawkins v. Columbia Electric St. Ry. Light & Power Co.*, 82 S.C. 166, 63 S.E. 746 (1909); *Thornton v. South Carolina Elec. & Gas Corp.*, 391 S.C. 297, 306, 705 S.E.2d 475, 408 (Ct. App. 2011). The respondents incorporate their arguments herein by reference. By ordering the appellant to provide more definite and certain statements identifying its predecessors and successors, the circuit court did not strike out any allegations of the appellant's original complaint, nor did it require the appellant to change its identity. The appellant had the right to name itself as the plaintiff in the Second Amended Complaint, and had the right to include each and every allegation of its original Complaint in its Second Amended Complaint. This appeal was properly dismissed.

VI. THE NOTICE OF APPEAL WAS NOT TIMELY SERVED.

“Service of the notice of intent to appeal is a jurisdictional requirement, and this Court has no authority to extend or expand the time in which the notice of intent to appeal must be served.” Mears v. Mears, 287 S.C. 168, 169, 337 S.E.2d 206, 207 (1985) (citations omitted); Vulcan Materials Co. v. Greenville County Bd. of Zoning Appeals, 342 S.C. 480, 489, fn. 7, 536 S.E.2d 892, 896, fn. 7 (Ct. App. 2000) (“the timeliness of an appeal from a zoning board’s decision is a jurisdictional requirement and, as such, may be raised at anytime by either party or *sua sponte* by this Court”) (citations omitted).

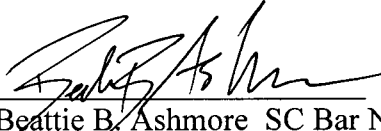
As explained in the Respondents’ Memorandum, the Notice of Appeal was not timely served. The respondents incorporate their argument herein. For clarification, the respondents’ argument is *not* that a party cannot file a motion to reconsider, alter or amend an interlocutory order. An interlocutory order can be reconsidered, altered or amended by the circuit court. Rather, the respondents’ argument is that a motion to reconsider, alter or amend an interlocutory order is not (and could not be) a motion made pursuant to Rule 59(e), SCRCPP. This is because Rule 59(e), SCRCPP, only applies to final judgments. This distinction is significant because only a Rule 59(e) motion to reconsider, alter or amend will stay the time to file a notice of appeal. *See* Rule 203(b)(1), SCACR. There is no similar rule that stays the time to file a notice of appeal when a party files a motion to reconsider, alter or amend an interlocutory order. 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.

VII. CONCLUSION.

For these reasons, and for those stated in the Respondents’ Memorandum, the Court correctly dismissed this appeal and the appellant’s Petition for Rehearing should be denied.

This 27th day of June, 2016

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Beattie B. Ashmore', written over a horizontal line.

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EXHIBIT 1

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO, EASTERN DIVISION**

RETAIL SERVICE SYSTEMS, INC.,	:	
	:	
Plaintiff,	:	CASE NO. 2:13-CV-994
	:	
v.	:	Judge Sargus
	:	
CAROLINA BEDDING DIRECT,	:	
LLC, et al.,	:	
	:	
Defendants.		

INTERVENORS MATTRESS BY APPOINTMENT, LLC, MATTRESS BY APPOINTMENT, LLC, AND EDWIN SHOFFNER'S MOTION TO INTERVENE AND STAY PROCEEDINGS

AND NOW come Intervenors, Mattress by Appointment, LLC, Mattress by Appointment, LLC, and C. Edwin Shoffner (collectively "Intervenors") by and through counsel, and hereby respectfully move to intervene in this action. Pursuant to Fed. R. Civ. P. 24(a)(2) and 24(b)(1)(B), the proposed Intervenors hereby move this Court for leave to intervene in this action as of right, as interested third parties, and to stay all proceedings pending the outcome of the case filed by Plaintiff Retail Service Systems, Inc. (hereinafter "RSS") against these Intervenors in the U.S.D.C. for the Southern District of Ohio at Case No. 2:15-cv-02769. In the alternative, Intervenors seek permissive intervention. RSS is improperly attempting to hold Intervenors liable for the default judgment obtained against the defendants in this matter on the basis of successor liability, despite the fact that this tactic has previously been attempted by Plaintiff and rejected by this Court. Therefore, Intervenors have a significant interest in the subject matter of this case and the existing Defendants cannot adequately represent their own interest. The grounds for this Motion are set forth in the Memorandum below.

Respectfully submitted,

/s/ Jessica A. Reese

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Carolina Bedding Direct, LLC), Mattress by
Appointment, LLC, and C. Edwin Shoffner*

MEMORANDUM IN SUPPORT OF MOTION TO INTERVENE AND STAY

Intervenors hereby move this Court, pursuant to Fed. R. Civ. P. 24(a)(2) and/or Fed. R. Civ. P. 24(b)(1)(B) for leave to intervene and stay, and in support of their motion, aver as follows:

I. INTRODUCTION

In October of 2015 RSS filed an action against Intervenors in the Southern District of Ohio, Eastern Division, alleging that Intervenors violated Ohio's Uniform Trade Secrets Act. *See Retail Service Systems, Inc. v. Mattress by Appointment, LLC et al* 2:15-cv-02769 (hereinafter the "2015 Litigation"). It has now become apparent that RSS seeks to avoid actually litigating the 2015 Litigation on the merits, including meeting their burden of proving that an alleged trade secret exists or that Intervenors somehow misappropriated that alleged trade secret. Instead, RSS is attempting an "end-run" around the 2015 Litigation by improperly attempting to utilize a default judgment it obtained against Carolina Bedding Direct, LLC, a dissolved North Carolina entity, and Mattress by Appointment, LLC (hereinafter "MBA (FL) I"), a dissolved Florida entity, both of whom RSS well knows are unable to defend themselves, for alleged violation of the Ohio Uniform Trade Secrets Act in this matter (hereinafter the "2013 Litigation").

RSS's attempt to use offensive collateral estoppel of a default judgment against the Intervenors is improper and should not be condoned by this Court. During the 2013 Litigation, after RSS obtained defaults against the dissolved entities, RSS had multiple opportunities to amend its Complaint to add Intervenors as a defendant, including

Intervenors' offers to accept service¹, so that RSS's claims involving alleged misappropriation of trade secrets could be heard on the merits. Rather than litigate on the merits, however, RSS chose to ignore Intervenors' offer to accept service or to enter the case as a named defendant. Instead, RSS maintained that the default judgments against the dissolved defendants did not include a default against the Intervenors and pursued its claims against only those dissolved entities.

Then, despite not naming Intervenors as parties to the 2013 Litigation or actually pleading theories of successor liability, RSS attempted in the 2013 Litigation to use the default judgments entered against the dissolved defendants against the Intervenors on the basis of successor liability/alter-ego. This Court has already ruled that Intervenors were not parties to the 2013 Litigation and that the Complaint in the 2013 Litigation did not include a claim for successor liability. (See 07.25.14 Report and Recommendation of Magistrate Judge Abel, Dkt. 89). Thereafter, undersigned counsel for Intervenors specially appeared at a hearing in the 2013 Litigation on April 8, 2015, before Magistrate Judge Deavers, for the exclusive purpose of clarifying to the Court that Intervenors were a different entity than the named defendant in the 2013 Litigation and should have no involvement in the 2013 Litigation. Following that limited appearance by undersigned counsel, RSS made no effort to amend to add Intervenors to the 2013 Litigation and proceeded against the dissolved entities as determined by the Court.

¹ "If RSS wants full-blown merits discovery against multiple individuals and entities, it has options. It can amend its Complaint. **It can accept defendants' qualified offer to accept service.** What it cannot do, however, is abuse the limited authority this Court gave it to conduct discovery against a single entity for a limited purpose. **Either RSS continues pursuit of its limited default hearing against a single dissolved entity, or it names the parties it really wants and affords them the opportunity to defend themselves.**" (Dkt. 52, p. 5)

As further evidence that RSS is well aware that the defaulted defendants in this case are not the same as or the predecessors of the Intervenor, RSS attempted to direct third-party discovery against Intervenor in the 2013 Litigation. As was made clear by this Court in the 2013 Litigation, and as was also clear to and not contested by RSS, the 2013 Litigation did not involve the Intervenor. Accordingly, the Intervenor at that time did not have reason or standing to become involved in the 2013 Litigation, and indeed RSS confirmed that Intervenor had no basis to be involved in the 2013 Litigation. (See RSS Memo in Opp. to Motion to Cont., Dkt. 23). Accordingly, RSS was ultimately able to obtain an uncontested default judgment without having to prove its case on the merits for either liability or, more recently, damages.

In spite of the determinations already made by this Court concerning the Intervenor, RSS's treatment of Intervenor as separate parties who were not involved in the 2013 Litigation, and RSS's deliberate choice not to join or name Intervenor as defendants in the Default Judgment when it had the opportunity to do so, RSS is again seeking to hold Intervenor responsible for the judgment obtained in the 2013 Litigation. Therefore, Intervenor seek to intervene so that this attempted judicial "end-run" may be properly prevented and to stay all further proceedings or findings in the 2013 Litigation until the Court in the 2015 Ligation makes a determination on the merits.

Intervenor have a right to intervene in this action as interested parties under Fed. R. Civ. P. 24(a) because, as a result of RSS's apparent attempts to hold Intervenor liable for the judgment obtained in the 2013 Litigation, Intervenor now have an interest relating to the property or transaction which was the subject of the 2013 Litigation. Any further proceedings in the 2013 Litigation will undoubtedly impair and/or impede Intervenor's

abilities to protect their interests. It is respectfully submitted that under these circumstances, this Honorable Court should grant the relief being requested pursuant to Rule 24(a). However, even in the event the Court would find that Intervenorors do not have a right to intervene in the 2013 Litigation, then Intervenorors should be permitted to intervene under Fed. R. Civ. P. 24(b)(1)(B) because Intervenorors have one or more claims or defenses that share with the main action a common question of law or fact; *i.e.*, whether a trade secret exists, whether a trade secret has been misappropriated by Intervenorors individually or as successors to the defendants in the 2013 Litigation and whether Intervenorors can be held responsible for the default judgment obtained against the defendants in the 2013 Litigation.

Intervenorors only recently became aware of RSS's intention to attempt to improperly hold Intervenorors responsible for alleged damages in the 2013 Litigation (where said alleged damages were based on a default judgment and provided to the Court without the benefit of any cross-examination or scrutiny whatsoever), when counsel for RSS sent a letter to counsel for Intervenorors notifying the latter of this objective. (See RSS Counsel's March 22, 2016 letter, a true and correct copy of which is attached hereto and marked as Exhibit "1").

II. FACTS

Intervenorors are currently involved in litigation with RSS, wherein RSS's claims that Intervenorors violated Ohio's Uniform Trade Secrets Act and are liable as successors-in-interest for the misappropriation of RSS/RSS's predecessor's trade secrets. (See RSS's Complaint in the 2015 Litigation, a true and correct copy of which is attached here to as Exhibit "2"). RSS alleges that prior to the date of either litigation, two companies,

collectively known as the PMD Entities, developed “a unique and comprehensive marketing program that they applied to the mattress and furniture industry.” (Exhibit 2 at ¶ 12). Pursuant to a 2013 Purchase Agreement, RSS, an Ohio corporation, allegedly now owns the majority of the assets of the PMD Entities, including the intellectual property rights to the marketing, selling, and management system for establishing this specialized retail business in the mattress and furniture industry. (Exhibit 2 at ¶¶ 6, 13).

Darren Conrad (hereinafter “Conrad”) was an employee of Power Marketing Direct, LLC (hereinafter “PMD”), one of the PMD Entities, from 2000 until 2003. (Exhibit 2 at ¶¶ 16-17). Following his departure, RSS alleges that Conrad started his own competing business and used training and sales/marketing materials he took from PMD in violation of his separation agreement. (Exhibit 2 at ¶¶ 17-19). Upon becoming aware of Conrad’s competing business and his use of materials from PMD, PMD filed an action in the Court of Common Pleas of Franklin County, Ohio, where it was successful in obtaining a judgment and injunctive relief against Darren Conrad for his conduct in misappropriating his employer’s proprietary information.² (Exhibit 2 at ¶¶ 20-26). PMD first obtained a preliminary injunction and, following Conrad’s failure to adhere to the terms of that preliminary injunction, PMD obtained a fifteen-month permanent injunction which commenced in January of 2009. (Exhibit 2 at ¶¶ 22-26). Plaintiff RSS claims that soon after the fifteen-month injunction was imposed, Darren Conrad and Edwin Shoffner (an Intervenor) jointly and knowingly used PMD’s trade secrets and methodologies to engage

² Although this issue is not before the Court at this time, it should be noted that Intervenor’s dispute that the aforementioned “marketing, selling, and management system,” purchased from PMD by RSS, which is now the subject of the present alleged violation of Ohio’s Uniform Trade Secrets cause of action against Intervenor’s, is in fact a “trade secret,” under Ohio’s Uniform Trade Secrets Act.

new mattress dealers in Greenville, South Carolina and Charlotte, North Carolina. (Exhibit 2 at ¶¶ 20-28).

RSS's Complaint in the 2015 Litigation goes on to describe a variety of subsequent companies created by Conrad to carry out his business, including the defendants in this matter. RSS claims that after Defendant Carolina Bedding (NC) dissolved in 2012, Carolina Bedding (FL) "continued the business of Carolina Bedding (NC), recruiting, training, and advising dealers across the country, including in Ohio, using RSS' proprietary marketing, merchandising, sales, and management systems." (Exhibit 2 at ¶33). RSS boldly claims in the 2015 Litigation that the Intervenor, one of whom who has been identified by Plaintiff as "Mattress by Appointment, LLC (MBA (FL) II)" (formerly known as Carolina Bedding Direct, LLC of Florida/Carolina Bedding (FL), which may be referred to at times herein as Carolina Bedding (FL) or CBD (FL)) is a successor-in-interest to these companies. (Exhibit 2 ¶¶ 7, 29-46).³

On February 24, 2015, RSS obtained a default judgment against the named defendants to the 2013 Litigation, Carolina Bedding (NC) and MBA (FL) I (Dkt. 117). At the time the Complaint was filed in the 2013 Litigation, Carolina Bedding (NC) was dissolved. Additionally, MBA (FL) I was non-operational when the lawsuit was filed and eventually dissolved during the pendency of the 2013 Litigation. Neither of the dissolved defendants to the 2013 Litigation are operational nor do they have any assets.

Moreover, while the 2013 Litigation was ongoing, RSS acknowledged that Carolina Bedding Direct of Florida was a third-party that was not involved in the then-ongoing lawsuit, including the following statements made on the record:

³ Intervenor dispute, both here and in the 2015 Litigation, that they are successors-in-interest to the defendants in the 2013 Litigation.

a. "The [default judgment] hearing **does not involve ... 'Carolina Bedding Direct, LLC that is organized under Florida law....'**" (Pl's Mem in Opp'n to Motion to Continue Hr'g at 4-5, Dkt. 23)(emphasis added);

b. "Plaintiff maintains that it **sued Carolina Bedding Direct, LLC, which was formed and dissolved in North Carolina.** Plaintiff asserts that ... the Clerk of Court entered judgment against that entity." Therefore, "Carolina Bedding Direct, LLC (Florida) February 10, 2014 motion to continue the February 20, 2014 hearing on plaintiff's motion for default judgment (Doc. 21) is DENIED." (Order at 1-2, Dkt. 25)

c. "**Carolina Bedding (FL) ... is not party** to the default that has been entered against ... Carolina Bedding Direct, LLC, a North Carolina limited liability company." (Pl's Response to Motion to Set Aside Entry of Default at 1 (Dkt. 31); (emphasis added); and,

d. "RSS therefore could not have served Carolina Bedding (FL) through Mr. Lyle, **nor has RSS ever claimed that it had.** Further, Carolina Bedding (FL) is not the subject of the Clerk's entry of default." (Id. at 4-5.) (emphasis added);

Further evidence that RSS did not consider Carolina Bedding (FL) a party to the 2013 Litigation or subject to the default judgments therein is evidenced by the fact that RSS sought discovery from "Carolina Bedding Direct LLC (as incorporated in Florida)" by way of a Fed.R.Civ.P. 45 subpoena. (See Notice of Service of Subpoenas, Dkt. 40, and 40-2 at pp. 960-969)

Nevertheless, during the course of the pending 2013 Litigation, RSS tried to assert the same position it now attempts by claiming that any judgments against the defendants in the 2013 Litigation would be enforceable against the Intervenor by way of successor liability. The first time that RSS presented this theory was at a status conference on February 7, 2014, wherein this Court noted the following:

Additional information provided by counsel during the February 7 telephone conference. Counsel said there were

three entities RSS believes have violated the Ohio Trade Secrets Act: Carolina Bedding Direct of North Carolina, LLC, Carolina Bedding Direct of Florida, LLC, and Mattress By Appointment, LLC. Further, Carolina Bedding Direct of North Carolina, LLC filed a dissolution with the North Carolina Secretary of State before this lawsuit was filed. RSS asserts that Carolina Bedding Direct of Florida, LLC and/or Mattress By Appointment, LLC are successor limited liability companies of Carolina Bedding Direct of North Carolina, LLC. A judgment against Carolina Bedding Direct of North Carolina, LLC would be good against them.

(See 02.07.14 Scheduling Conference Order, Dkt. 20, pp. 2-3)

However, this Court determined otherwise on July 25, 2014, wherein it held that:

Equally misguided, however, are RSS's attempts to assert that there are three named defendants rather than two. **Carolina Bedding, LLC (FL), quite simply, is not a party to this action.** Despite RSS's assertion that Carolina Bedding Direct of Florida, LLC and/or Mattress By Appointment, LLC are successor limited liability companies of Carolina Bedding Direct of North Carolina, LLC, and a judgment against Carolina Bedding Direct of North Carolina, LLC would be good against them, the complaint makes no such allegations. If RSS intended to bring this action against Carolina Bedding, LLC (FL) in addition to CBD Dissolved, the case caption should have clearly identified Carolina Bedding, LLC (FL) as a defendant.

(Dkt. 89, p. 7) (emphasis added).

Additionally, undersigned counsel for Intervenor specially appeared at a hearing in the 2013 Litigation on April 8, 2015, before Magistrate Judge Elizabeth A. Preston Deavers, for the exclusive purpose of clarifying to the Court that Intervenor were different entities than the named defendants in the 2013 Litigation and had no involvement in the 2013 Litigation. Following that limited appearance by undersigned counsel, RSS made no effort to amend to add Intervenor to the 2013 Litigation and proceeded against the dissolved entities as determined by the Court.

Despite RSS's previous, unsuccessful attempts during the 2013 Litigation to tie the default judgment to Intervenor, it appears that RSS is once again seeking to hold Intervenor liable for the default judgment obtained in the 2013 Litigation instead of actually litigating the 2015 Litigation on the merits. As a result, Intervenor seeks to intervene and stay the 2013 Litigation pending the outcome of the 2015 Litigation and the Court's determination on liability therein and then, if necessary, open the default entered in this case.

III. LAW & ARGUMENT

A. Fed. R. Civ. P. 24(a)

Under Fed. R. Civ. P. 24(a), "an outsider may intervene as 'of right': '(2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.'" *Michigan State v. Miller*, 103 F.3d 1240, 1245 (6th Cir. 1997). The U.S. Court of Appeals for Sixth Circuit "has interpreted [Fed. R. Civ. P. 24(a)] as establishing four elements, each of which must be satisfied before intervention as of right will be granted: (1) timeliness of the application to intervene, (2) the applicant's substantial legal interest in the case, (3) impairment of the applicant's ability to protect that interest in the absence of intervention, and (4) inadequate representation of that interest by parties already before the court." *Id.*; *Cuyahoga Valley Ry. Co. v. Tracy*, 6 F.3d 389, 395 (6th Cir. 1993).

(1) The Motion to Intervene was timely filed.

The first element necessary to establish a right to intervene is that the motion must be timely filed. The determination of whether a motion to intervene is timely rests “within the sound discretion of the trial court.” *Bradley v. Milliken*, 828 F.2d 1186, 1191 (6th Cir. 1987); *NAACP v. New York*, 413 U.S. 345, 365 (1973); (citations omitted). The mere fact that a final judgment has been entered in an action is not in and of itself sufficient as a basis for denial of a motion to intervene. *Taylor v. KeyCorp*, 680 F.3d 609, n. 7 (6th Cir. 2012); *United Airlines, Inc. v. McDonald*, 432 U.S. 385, 394-96 (1977) (holding that a motion to intervene, filed after final judgment, should have been granted.). The Sixth Circuit has considered the following factors in determining whether a motion has been timely filed:

(1) the point to which the suit has progressed; (2) the purpose for which intervention is sought; (3) the length of time preceding the application during which the proposed intervenor knew or reasonably should have known of his or her interest in the case; (4) the prejudice to the original parties due to the proposed intervenor’s failure, after he or she knew or reasonably should have known of his or her interest in the case, to apply promptly for intervention; and (5) the existence of unusual circumstances militating against or in favor of intervention.

United States v. City of Detroit, 712 F.3d 925, 930-931 (6th Cir. 2013); *Grubbs v. Norris*, 870 F.2d 343, 345-346 (6th Cir. 1989).

With respect to the first consideration, Intervenor note that although the 2013 Litigation has progressed to the point of final judgment, Intervenor are not seeking to participate in the 2013 Litigation in the traditional sense of the word. Rather, Intervenor are seeking to stay any further action pending the outcome of the 2015 Litigation. RSS has not yet sought to execute the judgment in the 2013 Litigation, but upon information and

belief it intends to do, albeit improperly; therefore, this Court may properly grant a stay in these proceedings.

The second consideration questions the purpose for which intervention is sought. As discussed above, Intervenorors seek to intervene in and stay the proceedings in the 2013 Litigation until the Court in the 2015 Litigation makes a determination on the merits regarding both liability and damages, which will directly relate to RSS's attempts to hold Intervenorors liable for the judgment obtained in the 2013 Litigation. Therefore, Intervenorors motion is for a limited purpose and should be granted.

The third factor relates to the length of time the intervenor knew or should have known of its interest in the case. In this matter, Intervenorors were assured by statements made by RSS that they were not parties to 2013 Litigation, determinations of this Court that they were not parties to the 2013 Litigation, and undersigned counsel also confirmed the same by specially appearing at hearing before the Court on April 8, 2015 to clarify Intervenorors' lack of involvement in the 2013 Litigation. Intervenorors had a reasonable basis to believe all concerned parties knew they did not have an interest in the 2013 Litigation. However, given RSS's notification on March 22, 2016 that it nevertheless intends to hold Intervenorors responsible for the judgment obtained in the 2013 Litigation, Intervenorors believe this Motion to be necessary to again reassert their posture. Accordingly, this motion is timely.

The fourth factor considers the prejudice to the original parties of the litigation. Considering that RSS is also the Plaintiff in the 2015 Litigation, wherein it will have full opportunity to litigate its trade secrets claims, it is respectfully submitted that this Motion in no way prejudices the parties as the requirement for RSS to prove liability and damages

on the merits does not constitute actual prejudice. It was RSS's choice to forego litigating against Intervenor as part of the 2013 Litigation – it cannot now achieve a windfall by avoiding litigation on the merits against Intervenor but relying upon a default judgment against dissolved entities. Furthermore, the prejudice element is limited only to the issue of timeliness of the motion to intervene, not the prejudice of the intervention itself. *Blount-Hill v. Zelman*, 636 F.3d 278, 284 (6th Cir. 2011) (The fourth factor considers “prejudice to the original parties due to the proposed intervenors’ failure to promptly intervene after they knew or reasonably should have known of their interest in the case.”); *United States v. City of Detroit*, 712 F.3d 925, 933 (6th Cir. 2013) (Analysis of the fourth factor is “limited to the prejudice caused by the untimeliness, not the intervention itself.”); *Davis v. Lifetime Capital, Inc.* 560 Fed. Appx., 477, 493 (6th Cir. 2014) (“The only prejudice relevant to the timeliness determination is incremental prejudice from a would-be intervenor’s delay in intervening, not prejudice from the intervention in and of itself.”); *Also see Cameron v. Hess Corp.*, 2013 U.S. Dist. LEXIS 117972 (S.D. Ohio 2013); Additionally, as explained further below, offensive collateral estoppel, let alone one attempting to use a default judgment, is disfavored in Ohio.

Likewise, no prejudice whatsoever will result to the named defendants in the 2013 Litigation, which consists of a dissolved entity and a non-operational, now dissolved entity which have no assets and will not be able to pay that judgment. A stay in the proceedings of the 2013 Litigation will not have any negative impact on the parties to that litigation.

In fact, the only parties who stand to be prejudiced if this Court were to deny their motion to intervene and stay are the Intervenor. It is the Intervenor whom were not afforded any opportunity whatsoever to raise defenses on the merits of RSS’s claims in the

2013 Litigation, and who now would suffer the same fate in the 2015 Litigation based on RSS's present attempt to avoid litigating its claims on the merits and instead apply the default judgment. This is the very essence of prejudice and judicial inequity.

The final factor considers the existence of unusual circumstances. In this case, unusual circumstances support the grant of intervention. Default judgment in the 2013 Litigation was only entered as a direct result of the ever-shifting testimony of RSS's current agent and employee, Darren Conrad. When the 2013 Litigation was commenced, Darren Conrad was the CEO of Mattress by Appointment of Florida, f/k/a Carolina Bedding Direct, LLC of Florida (Carolina Bedding (FL) or CBD (FL)), one of the Intervenor here, and was previously the incorporator of CBD of North Carolina, the dissolved entity currently a party to the 2013 Litigation. (See Conrad Affidavit, attached as Exhibit 1 to Defendants' Motion to Set Aside Entry of Default, to Deny Motion for Default Judgment, to Vacate Hearing date and for Leave to Move or Plead in Response to the Complaint, Dkt. 27-2). Conrad submitted an affidavit in this action confirming that CBD of Florida was not served with a summons and complaint and was a separate entity from CBD of North Carolina. *Id.* Conrad further represented to this Court that "although Plaintiff knew Carolina Bedding was a Florida company, it did not even attempt service on Carolina Bedding and, instead, attempted service only a dissolved out of state company." (Dkt. 18 at p. 3) Conrad further represented – "Plaintiff served process on Nicholas Lyle as alleged statutory agent for a dissolved company in North Carolina. But defendant Carolina Bedding is a Florida company, not a North Carolina company, and has no affiliation with Mr. Lyle." *Id.* at 4.

This Court originally let CBD of North Carolina out of default and permitted it to file an answer. (Dkt. 89 and Order Adopting, Dkt. 102). Twenty-two days prior to

recommending that CBD of North Carolina be let out of default and permitted to answer, Conrad filed a voluntary petition for Chapter 7 bankruptcy. (See Conrad Bankruptcy Petition, a true and correct copy of which is attached hereto as Exhibit 3). On October 24, 2014, CBD of North Carolina's attorney moved to withdraw as counsel and filed an affidavit in support. (See Affidavit of Daniel Clark, Dkt. 106-1). Mr. Clark explained that he was withdrawing as counsel for CBD of North Carolina because "the Court correctly determined that CBD of Florida 'quite simply is not a party to this action.'" (Dkt. 106-1, ¶ 5). Because of this determination, Clark explained that "the two named defendants are dissolved limited liability companies [CBD of NC and MBA 1 of Florida]" and any judgment against CBD of North Carolina would only be "against the members to the extent of distributions received." Therefore, "any such recovery efforts will be directed toward Mr. Darren Conrad...who is in Chapter 7 bankruptcy proceedings at this time." *Id.* at ¶ 6.

This Court granted Clark's motion to withdraw and ordered CBD of North Carolina to obtain new counsel within 28 days. (Dkt. 107). CBD of North Carolina failed to do so, RSS moved for default on that basis (Dkt. 111), and default was entered as to CBD of North Carolina. (Dkt. 112).

CBD of North Carolina, therefore, was only put into default because of the representations by Conrad that CBD of North Carolina was a separate entity from CBD of Florida. (See Clark Aff., Dkt. 106-1, ¶ 5). Conrad became employed by RSS in the summer of 2015. Following his employment by RSS, Conrad signed an affidavit "confessing" that all of his previous sworn testimony to the Court was false and that CBD of NC was really CBD of Florida. (Compare Dkt. 18 at 4 ("Plaintiff served process on Nicholas Lyle as alleged statutory agent for a dissolved company in North Carolina. But defendant Carolina Bedding

is a Florida company, not a North Carolina company, and has no affiliation with Mr. Lyle”) with Dkt. 8-1 of the 2015 Litigation, a true and correct copy of which is attached hereto as Exhibit 4, at ¶¶ 26-27 (“CBD of Florida was meant to continue in place of the North Carolina version...(Carolina Bedding (NC)).” Replace Conrad’s testimony from the 2015 Litigation (after he became employed by RSS) with Conrad’s testimony from the 2013 Litigation (when he was being sued by RSS), and Attorney Clark would not have withdrawn as counsel in the 2013 Litigation, and default would not have been entered. RSS agent Conrad’s representations were the direct and only cause of CBD of North Carolina’s counsel withdrawal, which was the direct and only cause of CBD of North Carolina’s default.

RSS submitted its agent’s new version of the facts on October 19, 2015. (Exhibit 4). The Intervenor, however, did not begin to understand RSS’s scheme until 2016, when RSS began to reveal its plan in litigation pending in South Carolina and Florida. (See Hearing Transcript, January 26, 2016, *Mattress by Appointment, LLC v. Retail Service Systems, Inc., et al.* 2015-CP-04-2161 (Anderson County, South Carolina), a true and correct copy of which is attached hereto as Exhibit 5, at p. 20-21 (RSS Attorney Beattie Ashmore: MBA 1 is being sued in federal court in Ohio, and a huge judgment is getting ready to get handed down against MBA 1. MBA 1 was in default. What they’ve been doing is playing shell games, Your Honor...And the damages are anywhere between six hundred thousand and six million. They don’t want to be MBA 1.); see also Defendants’ Motion to Strike filed in pending litigation in Florida, a true and correct copy of which is attached hereto as Exhibit 6) (CBD of Florida “has never had to explain why, if it actually owns the protected information, it is also permanently enjoined from using the trade secrets because Plaintiff was careful not to

disclose to the Court...the fact that a permanent injunction had been entered against its predecessor just two weeks before Plaintiff filed the instant actions.”)

Although RSS is now using the default judgment offensively, it has never disclosed to the South Carolina or Florida courts that default judgment was only obtained against CBD of North Carolina because of its agent Conrad’s previous sworn testimony, which resulted in CBD of North Carolina’s attorney’s withdrawal, which resulted in default. RSS has also failed to disclose to these sister courts that Ohio previously determined that CBD of Florida and CBD of North Carolina are not the same entities and that RSS failed to sue CBD of Florida in the 2013 Litigation.

While this scheme should not be permitted in any circumstances, RSS has already jumped the gun. RSS has gone on offense with its default judgment without obtaining a determination from any court anywhere in the country that CBD of North Carolina and CBD of Florida are related entities. Instead, the only Court to examine that issue – this Court – found that they were not. Fortunately, RSS has revealed its scheme in time for Intervenor to intervene in this action and prevent RSS from further offensive use of a default judgment obtained through its agent’s representations. Given this, unusual circumstances exist and Intervenor should be permitted to intervene in this action.

(2) Intervenor has substantial legal interest in the case.

The second element necessary to establish a right to intervene is that the applicant must have a substantial legal interest in the litigation. The Sixth Circuit has adopted a broad interpretation of the word “interest.” *Bradley*, 828 F.2d at 1192. (“[T]his Court has acknowledged that “interest” is to be construed liberally.”). The issue of whether an

intervener has a substantial legal interest in the case is a fact-based inquiry. *Michigan State*, 103 F.3d at 1245.

RSS's recent tactics in the 2015 Litigation clearly establish Intervenor's substantial interest in the 2013 Litigation. The Court in the 2013 Litigation clearly held that Intervenor was not a party to that litigation, a fact also conceded on multiple occasions by RSS. Despite that ruling, RSS now seeks to hold Intervenor liable for a default judgment obtained in the 2013 Litigation on the sole unsupported and unestablished basis of alleged successor liability.

In addition to its attempt to argue that Intervenor was a party to the 2013 Litigation, RSS is also using the default judgment in the South Carolina matter. *See Supra* 15; *Mattress by Appointment, LLC v. Retail Service Systems, Inc., Boxdrop Furniture, Inc. Carlton Scott Andrew, and Darren Conrad*, Case NO. 2015-CP-04-02161. RSS and Scott Andrew, RSS's President, (hereinafter "Andrew") filed a Motion to Dismiss MBA (FL) II's Second Amended Complaint in the South Carolina litigation based on its claim that CBD of North Carolina is MBA (FL) because "[t]he significance of which entities existed and when is tremendous as there is a judgment in the Ohio Federal court against entities known as MBA 1 and Carolina Bedding Direct, LLC formed in North Carolina." (See Andrew's Motion to Dismiss, a true and correct copy of which is attached hereto and marked as Exhibit 7). Andrew unilaterally refers to CBD (NC) (one of the entities involved in the 2013 Litigation) as MBA (FL) II's alleged predecessor, thereby further confirming RSS's scheme to seek application of the default judgment against MBA (FL) II. Similarly, Conrad alleges in his Motion to Dismiss in the South Carolina matter that Carolina Bedding (FL) (not a party to either 2013 Litigation or 2015 Litigation) changed its name to MBA (FL) II to "avoid

liability” in the 2013 Litigation. (See Conrad’s Motion to Dismiss, a true and correct copy of which is attached hereto and marked as Exhibit 8).

Lastly, portions of the hearing transcript from the South Carolina case regarding the above-mentioned Motions to Dismiss further suggest RSS’s intention to attempt to improperly hold MBA (FL) II liable for the default judgment in the 2013 Litigation. During that hearing, counsel for RSS repeatedly argued that MBA (FL) II is playing “shell games” in an effort to avoid being considered a successor to MBA (FL) I and to avoid liability under the default judgment. (Exhibit 5). It is clear that RSS intends to attempt to hold Intervenor, who were not parties to the 2013 Litigation, liable for the default judgment entered in the 2013 Litigation.

In deciding this Motion, this Court should also consider the implications of what RSS is attempting to accomplish. In addition to Intervenor’s substantial legal interest in this matter, there are also strong public policy considerations against permitting RSS’s attempted use of offensive collateral estoppel, which has been consistently disfavored by Ohio courts. *O’Nesti v. Debartolo Realty Corp.*, 862 N.E.2d 803, 809 (Ohio 2007) (Holding that courts will not permit a plaintiff to assert offensive collateral estoppel when its use will discourage judicial economy and create unfairness.); *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 329-330 (1979) (Where “application of offensive collateral estoppel would be unfair to a defendant, a trial judge should not allow the use of offensive collateral estoppel.”).

Offensive collateral estoppel is disfavored because of its inherent potential to encourage parties “to wait and see whether the outcome will be in their favor while not running the risk of being bound by an adverse judgment.” *O’Nesti* at 809. The Sixth Circuit has held that it would be unfair to apply offensive issue preclusion in situations where the

defendant had little or no incentive to defend the first lawsuit or where the subsequent lawsuit was not foreseeable. *U.S. v. Guy*, 257 Fed. Appx. 965, 967 (6th Cir. 2007).

Intervenors were repeatedly assured that they were not parties to the 2013 Litigation; therefore, Intervenors had no incentive to litigate that lawsuit. Furthermore, RSS knowingly continued the 2013 Litigation against a dissolved entity and a non-operational entity, even after it became aware that Intervenors were not parties. RSS made no effort to add Intervenors as parties to that litigation; yet, RSS now would seek to hold Intervenors liable for the judgment in that case. It is now apparent that RSS's intentions all along were to obtain a default judgment against the defunct entities so as to avoid resistance in hopes of still later using that judgment against Intervenors in the 2015 Litigation. RSS's proposed use of offensive collateral estoppel should not be condoned by allowing the 2013 Litigation to eliminate RSS's obligations to prove liability and damages on the merits in the 2015 Litigation.

Moreover, Ohio Courts have consistently declined to give default judgments issue preclusive effect, unless "the judgment expressly adjudicates an issue. A default judgment based on an unanswered complaint does not constitute an express adjudication." *Kline v. Mortg. Elec. Sec. Sys.*, 2011 U.S. Dist. LEXIS 30821, *17 (S.D. Ohio 2011). RSS only obtained a default judgment in the 2013 Litigation because of the defendants' failure to file a responsive pleading and through the misguided testimony of Darren Conrad. Thus, the issues in the 2013 Litigation matter were not expressly adjudicated, and RSS's use of offensive collateral estoppel against Intervenors under these circumstances would be unjust.

The inappropriateness of RSS's attempt to assert offensive collateral estoppel in this matter is further evidenced by the wholly contradicting testimony by its star witness, Darren Conrad. The default judgment obtained by RSS was largely based on testimony of Conrad, who is presently an employee of RSS, regarding the existence and the misappropriation of trade secrets. (See, December 16, 2016 Hearing Transcript from 2013 Litigation, a true and correct copy of which will be filed under seal as Exhibit 9). This testimony was at complete odds with Conrad's prior testimony in 2009, when he was not an employee of RSS/PMD but instead being sued by RSS/PMD, wherein he argued that PMD's methods were not protected trade secrets. (See Decision and Entry Granting Permanent Injunction, in *Power Marketing Direct, Inc. v. Darren Conrad v. Jeffrey Hosking*, Case No. 04CVH-02-1519, a true and correct copy of which is attached hereto and marked as Exhibit 10)

By way of further example, on January 20, 2009, Conrad, at the request of Scott Andrew (RSS's current President), signed an affidavit in a lawsuit brought by Andrew against PMD wherein Conrad asserted that all or most of PMD's sales and advertising techniques were actually taken from a different third party, Vector Marketing. (See Conrad January 20, 2009 Affidavit, a true and correct copy of which is attached here to and marked as Exhibit 11; see also January 10, 2009 e-mail from Scott Andrew to Darren Conrad, a true and correct copy of which is attached hereto and marked as Exhibit 12) Yet on June 30, 2015, in direct conflict with the aforementioned affidavit, Conrad signed yet another affidavit claiming this time that both Conrad and PMD developed the sales and advertising system used by PMD. (See June 30, 2005 Conrad Affidavit, a true and correct copy of which is attached hereto and marked as Exhibit 13) Conrad also claimed that he did not

understand that this system belonged to PMD, that it was PMD's intellectual property, or that he was not allowed to use it in his new businesses. *Id.*

Similarly, in a pending Florida lawsuit, Conrad claimed to have personally developed the marketing and training materials used by MBA (FL) II. (See Defendant's Response and Memorandum in Opposition to Plaintiff's Emergency Motion for Preliminary Injunction in *Mattress by Appointment, LLC f/k/a Carolina Bedding Direct, LLC v. Darren Conrad*, Case No. 16-2014-CA-7243 (Fourth Judicial Circuit, Duval County, Florida), true and correct copies of which are attached hereto, collectively marked as Exhibit 14). Conrad also maintained that the business of selling mattresses is a business "from which a trade secret cannot possibly be derived." *Id.*; also see Defendant's Memorandum in Opposition to Plaintiff's Emergency Motion for Preliminary Injunction, a true and correct copy of which is attached hereto as Exhibit 15) ("Here, MBA has no trade secrets. There is no special 'formula' for selling mattresses."). Yet somehow in December 2015, now employed by RSS, Conrad nevertheless testified in the 2013 Litigation at a hearing on December 16, 2015 that PMD's business model is unique, that he knew it belonged to PMD, and that it was wrong to use it or provide it to anyone else. (Exhibit 9).

Conrad's ever contradicting testimony, parts of which were utilized by RSS in support of its claims in the 2013 Litigation, confirms that RSS's use of offensive collateral estoppel in this matter would constitute an egregious assault on equity and justice. For these reasons, this Court should grant Intervenor's Motion, as it is necessary not only to protect Intervenor's substantial legal interests in this matter, but also to reaffirm Ohio's longstanding policy of protecting defendants from inequitable application of offensive collateral.

(3) In the absence of intervention, Intervenor's ability to protect their interest will be substantially impaired.

The third element necessary to establish a right to intervene is an impairment of the applicant's ability to protect its interests absent intervention. The Sixth Circuit has held that this is a minimal burden. *Michigan State*, 103 F.3d at 1247. Denial of Intervenor's Motion to Intervene and Stay could prevent Intervenor from having the opportunity to dispute the successor liability issues in the 2015 Litigation. The only manner in which Intervenor can adequately protect their interests in the 2013 Litigation is through the within Motion.

(4) There has been inadequate representation of Intervenor's interest by the parties involved in the 2013 Litigation.

The fourth and final element necessary to establish a right to intervene is that Intervenor's interests will not be adequately protected by the existing parties to the action. The Sixth Circuit has also held that this is a minimal burden. *Michigan State*, 103 F.3d at 1247. The movant need only show that the representation may be inadequate, not that the representation will in fact be inadequate. *Id.* For example, a party can establish this element by showing "that the existing party...will not make all of the prospective intervenor's arguments." *Id.*

The 2013 Litigation was apparently purposefully brought against a dissolved entity and a non-operational entity over which Intervenor had no control or ownership interests. Intervenor Shoffner bought only Carolina Bedding Direct of Florida, which RSS repeatedly asserted was not a party to the 2013 Litigation and refused to add as a defendant, and whom this Court confirmed was not a party. Intervenor did not participate in that action and a default judgment was entered against the parties to that action solely because those

defendants failed to file a responsive pleading. The lack of representation of Intervenor's interests in the 2013 Litigation to date was based on this Court's determination that Intervenor were not parties to that action. Intervenor can only protect their interests by intervening in and staying the 2013 Litigation until the parties have had a meaningful opportunity to litigate the claims on the merits that are being asserted by RSS in the 2015 Litigation, namely whether a trade secret exists, whether a trade secret has been misappropriated by Intervenor individually or as successors to the defendants in the 2013 Litigation and whether Intervenor can be held responsible for the default judgment obtained against the defendants in the 2013 Litigation.

B. Fed. R. Civ. P. 24(b)(1)(B)

Fed. R. Civ. P. 24(b)(1)(B) allows for permissive intervention when the party seeking to intervene can establish that (1) the motion was timely filed, and (2) one or more of the applicant's claims or defenses share a common question of law or fact with the main action. *Purnell v. Akron*, 925 F.2d 941, 950 (6th Cir. 1991) (citations omitted). The Sixth Circuit has repeatedly held that Rule 24 is to be "broadly construed in favor of potential Intervenor." *Stupak-Thrall v. Glickman*, 226 F.3d 467, 472 (6th Cir. 2000); *Purnell*, 925 F.2d at 950. Intervenor's motion is timely for the same reasons outlined above.

Furthermore, Intervenor have established that one or more of their claims or defenses share a common question of law or fact with the main action; *i.e.*, whether Intervenor are successors-in-interest to the parties in the 2013 Litigation and whether RSS can hold Intervenor liable for the judgment obtained in that action. Additionally, both the 2013 Litigation and the 2015 Litigation concern RSS's claims that defendants in the 2013 Litigation and Intervenor violated the Ohio Uniform Trade Secrets Act.

RSS knowingly pursued the 2013 Litigation against a dissolved entity and a non-operational entity which it knew or should have known would be incapable of paying any judgment obtained in that case. This Court acknowledged and refused RSS's attempts to hold Intervenor responsible for the judgment in the 2013 Litigation; however, those rulings have yet to thwart RSS's efforts to obtain payment of that default judgment from Intervenor. One or more of Intervenor's claims or defenses share a common question of law and fact with the 2013 Litigation. Therefore, Intervenor should properly be permitted to intervene in and stay the 2013 Litigation, pending the outcome of the 2015 Litigation.

IV. CONCLUSION

As a result of the foregoing, Intervenor respectfully request that this Court grant their motion to intervene as interested third parties, and that this Court stay all proceedings in the 2013 Litigation until a determination has been made by the Court in the 2015 Litigation on the issue of successor liability.

Respectfully submitted,

/s/ Jessica A. Reese

Date: May 3, 2016

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CERTIFICATE OF SERVICE

I, Jessica R. Reese, hereby certify that the foregoing *Motion to Intervene and Stay* was filed electronically on this 3rd day of May, 2016. Notice of this filing will be sent to all parties listed below by operation of the Court's filing system. Parties may access this filing through the Court's filing system.

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This document has been electronically filed and is available for viewing and downloading from the ECF system.

EXHIBIT 2

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

RETAIL SERVICE SYSTEMS, INC.,	)	
	)	
Plaintiff,	)	Case No. 2:13-CV-00994
	)	
v.	)	
	)	
CAROLINA BEDDING DIRECT, LLC,	)	Judge Sargus
<i>et al.,</i>	)	
	)	Magistrate Deavers
Defendants.	)	
	)	

**PLAINTIFF RETAIL SERVICE SYSTEMS, INC.’S MEMORANDUM IN OPPOSITION
TO PROPOSED INTERVENORS MATTRESS BY APPOINTMENT, LLC,
MATTRESS BY APPOINTMENT, LLC, AND EDWIN SHOFFNER’S
MOTION TO INTERVENE AND STAY PROCEEDINGS¹**

I. Introduction

Now faced with the prospect that Plaintiff Retail Service Systems (“RSS”) can establish successor liability against them in a related case, Proposed Intervenorors (“Intervenorors”) have become ever more brazen and seemingly will stop at nothing to delay this case, even if it means changing their story and attempting to rewrite history. Intervenorors admit their deliberate and strategic decision to not intervene earlier or continue to defend the Defendants in this case was a mistake and now seek an eleventh-hour reversal of that error. The Court should reject Intervenorors’ attempt to reconsider their ill-advised legal strategy.

Intervenorors want the Court to believe that they had no idea until March of 2016 that RSS would pursue successor liability against them—despite the fact that RSS filed a related case in

¹ Not only did Intervenorors file a 24-page Memorandum in Support without the accompanying table of contents (per Local Rule 7.2(a)(3)), they failed to properly authenticate many of their exhibits. As such, the Court need not consider any of the arguments beyond page 20 of Intervenorors’ Memorandum in Support, nor Exhibits 6, 11, 12, 14, or 15 to their motion. Nevertheless, RSS has responded to the entirety of Intervenorors’ motion, to the extent the Court considers their entire filing and all of their filed exhibits.

August 2015 with a claim for “Successor Liability.” But even before that successor lawsuit was filed, one Intervenor sued its former attorney for legal malpractice in June 2015 and seeks to hold him liable for any damages *in this case*—despite its claim of recent surprise. Moreover, multiple filings by Defendants and Intervenor establish that they knew no later than *mid-2014* that RSS would pursue damages for misappropriation of its trade secrets by the Defendants *and* their successors. Intervenor’s motion, *filed two years later*, can be denied on this ground alone.

Even if Intervenor’s motion was timely, it would still fail, as RSS is not attempting to use offensive collateral estoppel in any way. Rather, RSS intends to pursue judgment in this matter and then seek to collect from Intervenor if and when the Court makes a finding of successor liability in the related case, *Retail Service Systems, Inc. v. Mattress By Appointment, LLC, et al.*, Case No. 2:15-cv-002769 (S.D. Ohio) (“Related Case”). In the Related Case, Intervenor have denied that they are successors, and will have every opportunity to litigate that issue in the Related Case. If the Court determines that Intervenor are in fact successors to Defendants (a conclusion that has to be established in the Related Case), RSS can only then seek to collect any judgment in this matter against them. As such, Intervenor have no right to intervene here, and should not be permitted to do so given their assertions that they are not successors.

Moreover, Intervenor’s request to stay this case pending the outcome of the Related Case should be denied, as RSS would be severely prejudiced by such a ruling. Not only has RSS toiled for two and a half years to obtain judgment in this matter, it has incurred substantial attorneys’ fees and expended tremendous resources fighting Defendants’ largely frivolous attempts to slow this case down. Staying the case now—when the only remaining step is the Court’s ruling following the default judgment hearing—would be a tremendous waste of both the parties’ resources and the Court’s time invested in this case since 2013. Defendants cannot

benefit from what Judge Smith held to be an “intent to thwart judicial proceedings.” While Intervenor’s call their motion one to “intervene,” what they are actually seeking is to erase the effect of the defaults as to Defendants and re-litigate every aspect of this case. The Court should reject their attempt to do so and levy all appropriate sanctions for Intervenor’s latest attempts at delay and deception.

II. Identification of Relevant Entities

The proliferation of similarly-named entities was caused by Defendants’ and Intervenor’s attempts to avoid liability in this matter. RSS believes that Defendants and Intervenor are one continuous company, and intends to prove as much in the Related Case. However, for purposes of clarification, RSS identifies the relevant entities as follows:

1. Carolina Bedding Direct, LLC of North Carolina (“**CBD (NC)**”);
2. Mattress By Appointment, LLC of Florida (“**MBA(FL) I**”).
3. Carolina Bedding Direct, LLC of Florida (hereinafter “**MBA(FL) II**” because it changed its name from “Carolina Bedding Direct, LLC” to “Mattress By Appointment, LLC” after RSS filed this case and obtained defaults);
4. Mattress By Appointment, LLC of South Carolina (“**MBA (SC)**”); and
5. Charles Edwin Shoffner (“**Shoffner**”), who now owns all of the relevant entities.

CBD (NC) and MBA (FL) I (entities 1 and 2 identified above) are the relevant Defendants in this action. Intervenor’s are entities 3, 4, and 5 identified above. A timeline identifying the relevant entities and timeframes is also attached for the Court’s convenience. *See* Ex. 1.

III. Factual Background

RSS filed this lawsuit in 2013 against what it believed to be all operative entities using RSS’s proprietary system for establishing dealers to sell mattresses via one-on-one appointments

(the “RSS System”). At that time, RSS believed there were only two operative entities: (1) a company called “Carolina Bedding Direct, LLC” that was formed in North Carolina and was also registered in Florida, which had an Employer Identification Number (“EIN”) of 45-3622490 (*see* Complaint at ¶¶ 6-7); and (2) a company called “Mattress By Appointment, LLC” with an EIN of 46-2062381, which was the only “Mattress By Appointment” entity in existence at that time. RSS sought monetary damages for Defendants’ past and “ongoing violations” of the RSS System, as well as permanent injunctions against Defendants’ continued use of those trade secrets. *See* Complaint at ¶¶ 4, 47. Defendants failed to answer, and the Clerk entered default against both Defendants. *See* ECF Nos. 8, 16.

Defendants retained counsel and vigorously fought the defaults, claiming there were in fact *three* operative entities and RSS had only served two of them. *See* ECF Nos. 18, 27. Magistrate Abel determined there was some ambiguity in the names and entities of the Defendants, and held that a third alleged entity—MBA(FL) II, which shares the same EIN as CBD (NC)—had not been served. Accordingly, Magistrate Abel set aside CBD (NC)’s default, but left MBA(FL) I’s default in place, as he found that MBA(FL) I expressed an “intent to thwart judicial proceedings.” *See* ECF No. 89 (R&R); ECF No. 102 (Order adopting R&R) at 11.

On July 3, 2014, Defendants’ co-owner, Darren Conrad, filed for personal bankruptcy. When Shoffner, Defendants’ other co-owner, offered to purchase Mr. Conrad’s 55% interest in MBA(FL) II in the bankruptcy court, this case was stayed temporarily pending that sale. *See* ECF No. 103. In October 2014, shortly after the stay was lifted, Defendants’ counsel moved to withdraw. *See* ECF Nos. 105-106. Magistrate Judge Abel granted the motion but ordered Defendants to retain new counsel within 30 days, on pain of default. *See* ECF No. 107.

When new counsel failed to appear, RSS sought a second default against CBD (NC) (since MBA(FL) I's default remained in place). *See* ECF Nos. 112, 114. Judge Smith accordingly entered default judgment against CBD (NC), permanently enjoined CBD (NC) from using "RSS's trade secrets and proprietary materials," and held that RSS is entitled to damages "in an amount to be determined at a damages hearing." ECF No. 117.

The damages hearing occurred in December 2015, at which RSS presented considerable evidence that Defendants improperly used the RSS System and caused RSS substantial damages, both in the form of testimony from Darren Conrad (Defendants' former owner) and Carleton Andrew (RSS's President). *See* ECF No. 137, RSS's Post-Hearing Brief. In particular, RSS sought the following damages: (1) monetary damages for misappropriation of RSS's trade secrets against (a) CBD (NC) from October 18, 2011 through April 26, 2012; and (b) MBA(FL) I from November 30, 2013 – January 20, 2014; and (2) a permanent injunction barring both Defendants from using the RSS System. *Id.* The only remaining action to be entered in this case is the issuance of the Court's final decision on liability and damages, based on the evidence and testimony presented at the December 2015 damages hearing and RSS's Post-Hearing Brief.

On August 31, 2015, in order to pursue liability against all possibly related entities (which included yet another newly formed MBA entity), RSS filed the Related Case against three entities: (1) MBA(FL) II (*i.e.*, an entity that Magistrate Abel determined was not a party to this matter and had since changed its name from "Carolina Bedding Direct" to "Mattress By Appointment" and kept the same EIN as CBD (NC)); (2) MBA (SC) (*i.e.*, another company called "Mattress By Appointment" but registered and newly created in South Carolina by Shoffner); and (3) Charles Edwin Shoffner—the owner of all successor entities.

RSS's Complaint in the Related Case asserts two counts: (1) Successor Liability; and (2) Violation of Ohio's Uniform Trade Secrets Act. Related Case ECF No. 1. Specifically, Paragraph 56 of that Complaint asserts that Intervenor is "present successors-in-interest, and are liable to Plaintiff RSS for damages caused by their predecessors' misappropriation of RSS's trade secrets." *Id.* Paragraph 57 asserts that Intervenor "are also subject to the permanent injunction entered against CBD (NC) by the Federal District Court of the Southern District of Ohio." *Id.* Thus, the Complaint in the Related Case made it abundantly clear that RSS was seeking successor liability against Intervenor for the judgment to be issued in the instant matter.

The purpose of filing the Related Case was twofold: (1) to prove the ever-shifting "CBD / MBA" entities in the Related Case were successors to CBD (NC) and MBA(FL) I, and thus liable for any judgment issued in this matter; and (2) to obtain additional damages (and an injunction) against Intervenor for the improper use of the RSS System from April 2012 to the present. The Related Case damages are completely exclusive of the damages being sought in the instant matter, as they cover a different timeframe and (allegedly) different entities. As such, RSS intends to proceed to judgment in the current matter and then pursue successor liability in the Related Case to collect on the judgment issued in this matter.

IV. Law and Argument

A. Intervenor is Not Entitled To Intervene As a Matter of Right.

Federal Rule of Civil Procedure 24(a)(2) provides for intervention where that party "claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest." *Id.* The Sixth Circuit has established a four-pronged test to determine whether Rule 24's standard is

satisfied: (1) the application for intervention is timely; (2) the applicant has a substantial legal interest in the action; (3) the applicant's ability to protect that interest may be impaired in the absence of intervention; and (4) the existing parties do not adequately represent the applicant's interest. *See, e.g., Johnson v. City of Memphis*, 73 F. App'x 123, 131 (6th Cir.2003), citing *United States v. Tennessee*, 260 F.3d 587, 591 (6th Cir.2001). "The applicant has the burden of demonstrating the four prongs, and the failure to satisfy any of the four prongs prevents the applicant from intervening as of right." *Id.* Intervenor fail to satisfy any of these prongs.

1. Intervenor's Motion Is Untimely.

Whether a motion to intervene is timely filed depends on a five-factor test: (1) the point to which the suit has progressed; (2) the purpose for which intervention is sought; (3) the length of time preceding the application during which Intervenor knew or should have known of their interest in the case; (4) prejudice to the original parties due to Intervenor's failure to promptly intervene after they knew or reasonably should have known of their interest in the case; and (5) the existence of unusual circumstances militating against or in favor of intervention. *See, e.g., Johnson v. City of Memphis*, 73 F. App'x 123, 131 (6th Cir. 2003). These factors each support the conclusion that Intervenor's motion is untimely.

a. The Suit Has Progressed Nearly to a Final Judgment.

Intervenor admit that this suit has progressed "to the point of final judgment." Motion to Intervene at 12. Indeed, the suit has been pending for two and a half years, more than 140 documents have been filed, discovery exchanged, a thorough damages hearing held and all evidence submitted. They cannot intervene now.

Intervenor cite *Taylor v. KeyCorp*, 680 F.3d 609 (6th Cir.2012) and *United Airlines, Inc. v. McDonald*, 432 U.S. 385 (1977), for the proposition that intervention can and should be

granted, even after final judgment. Both cases are inapplicable. In *KeyCorp*, the court actually denied a motion to intervene, noting that the trial court lost jurisdiction over the motion once a notice of appeal was filed. 680 F.3d at 607. The *McDonald* court, on the other hand, allowed a putative class member to intervene on behalf of the class (rather than her individual interests) after final judgment, but only because she moved “promptly” and “as soon as it became clear to the respondent that the interests of the unnamed class members would no longer be protected by the named class representatives.” 432 U.S. at 394. In contrast, Intervenor here sat on their rights for years before moving to intervene, and their motion is untimely.

b. The Purpose for Which Intervention is Sought Is Improper.

Intervenors’ claimed reason for seeking intervention is that RSS “intends to . . . improperly” execute a judgment in this matter. Motion to Intervene at 12-13. They essentially seek a stay of execution of the forthcoming judgment until the Court rules in the Related Case whether Intervenor are Defendants’ successors. Intervenor are wrong for at least three reasons.

First, RSS has *never* indicated that it will improperly attempt to collect a judgment in this matter from Intervenor, and has no intention of doing so. Second, a request to stay execution of a forthcoming judgment is not yet ripe, given that the Court has not issued a judgment entry. Third, RSS should at least be permitted to take post-judgment discovery from the named Defendants to determine whether they are in fact dissolved entities with no assets (as Intervenor assert on Defendants’ behalf), or whether they can otherwise satisfy a judgment in this matter.

c. Intervenor Knew of Their Purported Interest in the Case Since its Inception, But Did Nothing But Wait on the Sidelines.

Intervenors’ two-year delay in seeking intervention is fatal to their attempt to do so now. *See, e.g., Stupak-Thrall v. Glickman*, 226 F.3d 467, 472 (6th Cir. 2000) (motion to intervene filed

seven months after case initiated and party knew of its potential interest in case was untimely); *Johnson v. City of Memphis*, 73 F. App'x 123, 132 (6th Cir. 2003) (motion to intervene filed seven months after party knew or should have known of interest in case was untimely); *Anglers of the AU Sable v. U.S. Forest Serv.*, 590 F. Supp. 2d 877, 880 (E.D. Mich. 2008) (motion to intervene filed shortly after final judgment not timely because party had known of its potential interest in case for years).

Intervenors make the remarkable (and false) claim that they only became aware of RSS's intent to "hold Intervenors responsible for the judgment obtained" in this matter on **March 22, 2016**, seven months after RSS filed the Complaint in the Related Case in August 2015.² Motion to Intervene at 13. Is this Court to assume they did not read the Complaint in the Related Case, which expressly and specifically asserts a claim of "Successor Liability"? *See* ECF No. 1 in Related Case. Regardless, and tellingly, Intervenors never actually identify the specific language in the March 22 letter from Plaintiff's counsel that allegedly made them aware of this so-called secret strategy, nor can they. That letter reveals no "new" information that would have suddenly given Intervenors knowledge of RSS's already-obvious intent to impose successor liability.

The following undisputed facts establish that Intervenors have known of RSS's intent to pursue successor liability for years:

- **October 4, 2013**: RSS filed its Complaint in the instant matter referring to a number of related entities, including MBA(FL) II. ECF No. 1 at ¶¶ 6-7.
- **October 4, 2013 (or shortly thereafter)**: Defendants *and* Intervenor MBA(FL) II retained counsel to defend this action. *See* Complaint in *Mattress By Appointment, LLC f/k/a Carolina Bedding Direct, LLC, et al. v. The Penuel Firm*,

² Intervenors falsely state that the Related Case was filed in **October** 2015, thus appearing to make their realization in March 2016 timelier than it was. They are incorrect, as the docket clearly reflects that the Complaint in the Related Case was filed in **August** 2015. *See* ECF No. 1 in Related Case.

LLC, Duval County Circuit Court Case No. 16-2015-CA-003955, at ¶¶'s 9, 30, 40, 45 (June 19, 2015), attached hereto as Ex. 2.

- **January 30, 2014**: Defendants *and* Intervenor MBA(FL) II (which still called itself "Carolina Bedding Direct, LLC") filed a motion to set aside the defaults against them. ECF No. 18.
- **August 26, 2014**: Intervenor Shoffner filed a motion jointly with RSS in the bankruptcy of Darren Conrad which *twice* acknowledged his agreement that RSS would seek successor liability against Intervenor. In the filing, Shoffner affirms that "RSS will, at some point seek to establish that the Defendant Entities are the alter ego of the Debtor and/or that [MBA(FL) II] is liable to RSS under a successor liability or some other legal theory." Ex. 3 at ¶ 22 (emphasis added). The motion further stated that "the parties agree that RSS is seeking to impose some liability upon [MBA(FL) II] for the prior acts of [Conrad], [CBD (NC), and MBA(FL) I] and their relationship, if any, to [MBA(FL) II]." *Id.* at ¶ 23 (emphasis added).
- **September 8, 2014**: The Court stayed this action so Shoffner could purchase Mr. Conrad's shares in MBA(FL) II. *See* ECF No. 103.
- **September 26, 2014**: Shoffner wrote an email to the President of RSS seeking to resolve any claims in this *and any related matters* in which RSS would seek successor liability.³ *See* Ex. 4.
- **January 20, 2015**: RSS filed its Response to Order to Show Cause in this matter indicating the difficulty in distinguishing between Defendants and Intervenor, and noting that Darren Conrad had admitted that Defendants and Intervenor were the same entity. *See* ECF No. 115 at 2 (citing Resp. to Motion for Temporary Restraining Order at ¶ 11, *Mattress By Appointment, LLC v. Conrad*, 16-2014-CV-007243 (4th Cir. Duval County Fla. Jan. 8, 2015)). This filing was served on Intervenor. *Id.* at 6.
- **August 31, 2015**: RSS filed its Complaint in the Related Case, specifically referring to the instant matter and pursuing a claim for "Successor Liability." *See* ECF No. 1 of Related Case.

³ Intervenor may argue that this email is not admissible as "settlement communications" under Fed.R.Evid. 408. They would be wrong, however, because the email is admissible under Rule 408's exception for "another purpose," such as to prove that Intervenor knew RSS's strategy in 2014. *See, e.g., Breuer Elec. Mfg. Co. v. Toronado Sys. of Am., Inc.*, 687 F.2d 182, 185 (7th Cir. 1982) ("Rule 408 controls when evidence of settlement attempts is offered 'to prove liability,' but it 'does not require exclusion when the evidence is offered for another purpose....' In this case, the 'settlement' evidence was properly presented below to rebut defendants' assertion that they had not been aware of the issues until the suit was filed").

- **September 24, 2015**: Intervenor filed a motion to dismiss the Related Case and argued that RSS was alleging that “these Defendants are liable as successors-in-interest for the misappropriation of Plaintiff RSS’ trade secrets” based initially on the instant case and arguing that “none of the Defendants in the present matter were parties to that case.” *See* ECF No. 4 of Related Case at 2, 15.
- **January 26, 2016**: Intervenor’s motion references a hearing in a South Carolina state court lawsuit (filed by Intervenor against RSS after RSS initiated the Related Case) during which Intervenor was again informed of RSS’s intent to impose successor liability. *See* Motion to Intervene at 17. Despite allegedly learning RSS’s strategy at that time, Intervenor did nothing to intervene here until May 3, 2016.

These filings all demonstrate that Intervenor has known for years that RSS has intended to pursue a claim of successor liability against them. Their feigned cries of recent surprise should be rejected.

Even more troubling is what Intervenor desperately want this Court to ignore. Intervenor MBA(FL) II filed a legal malpractice action against its Florida attorney in June 2015—even before RSS filed the Related Case. In that malpractice action, MBA(FL) II specifically requested damages relating to any default judgment issued in this matter. Ex. 2 at ¶ 43 (“As a direct and proximate result of Defendants’ breach of reasonable duty of care, Plaintiffs were damaged in that Defaults were entered against Plaintiffs in the underlying litigation”). In other words, Intervenor are telling a Florida state court that any judgment issued in this matter is good against them and that they should recover such damages against their former attorney. Yet they argue in *this* Court that a judgment issued in this matter would *not* issue as to them. This inconsistent conduct cannot be reconciled and potentially constitutes a fraud on this Court. At the very least, it establishes that Intervenor have known RSS’s strategy all along and failed to timely intervene.

d. RSS Is Significantly Prejudiced Due to Intervenor's Failure to Promptly Intervene.

RSS expended considerable resources preparing for and presenting evidence at the damages hearing, all of which could have been prevented if Intervenor had moved to intervene earlier. As the Sixth Circuit has noted, “[i]nterested parties should not be able to join at a late stage and re-litigate issues that they watched from the sidelines.” *United States v. City of Detroit*, 712 F.3d 925, 932 (6th Cir. 2013). Moreover, Intervenor prevented RSS from taking “party” discovery from them, instead insisting that any discovery take place pursuant to subpoenas, of which RSS would be required to seek compliance in Florida. *See, e.g.* ECF No 78 at 11-12 (Order from Magistrate Abel requiring RSS to compel discovery compliance in Florida). Not only did this significantly increase the time and expense incurred by RSS, it largely prevented RSS from seeking discoverable information from Intervenor, such as by way of Interrogatories or Requests for Admissions. In addition, by taking the “wait and see” approach, Intervenor obtained the benefit of discovering RSS’s trial strategy during the December 2015 damages hearing before deciding whether to seek leave to intervene.

e. There Are No Unusual Circumstances Supporting Intervention; In Fact, the Opposite.

In support of this factor, Intervenor accuses RSS of employing a secretive strategy to improperly sue “a dissolved entity and a non-operational entity which it knew or should have known would be incapable of paying any judgment obtained in that case.” *See, e.g.*, Motion to Intervene at 26.⁴ If this was true, why would RSS have pursued damages and a permanent injunction for Defendants’ “ongoing violations”? *See* Complaint at ¶¶ 4, 47. Indeed, virtually

⁴ Intervenor fails to mention that MBA(FL) I was an operative company—and the only “Mattress By Appointment” entity at the time this lawsuit was filed—and was only dissolved after RSS obtained a default against MBA(FL) I. *See, e.g.*, Ex. 1; *see also* ECF Nos. 8, 16 (entering default as to both Defendants).

every filing by RSS disproves Intervenor's claim, and there can be no doubt that RSS intended to serve all possible operative entities and believed that it had done so. *See, e.g.*, ECF No. 1 at ¶¶ 6-7 (referring to MBA(FL) II); ECF No. 20, February 7, 2014 Order at 3 ("RSS asserts that Carolina Bedding Direct of Florida, LLC and/or Mattress By Appointment, LLC are successor limited liability companies of Carolina Bedding Direct of North Carolina, LLC. A judgment against Carolina Bedding Direct of North Carolina, LLC would be good against them").

It was only through Defendants' (and Intervenor's) attempts to obfuscate the truth that Magistrate Abel concluded that MBA(FL) II was not a party to this action. *See* ECF No. 89 at 7. RSS thereafter initiated the Related Case to ensure that all possible related entities were sued, and indicated that the cases were "related" on the Civil Cover Sheet. *See* ECF No. 1-6 of Related Case. The Court thereafter agreed that the cases were "related" and assigned Judge Sargus to oversee them both. *See* ECF No. 128. The necessity of filing the Related Case was hardly a secret and was brought about only because Defendants and Intervenor made it an issue. And to the extent Intervenor complains that RSS has not adjudicated the case on the merits, the Court has already indicated that RSS is required to prove liability by a *prima facie* showing and damages upon a preponderance of the evidence. *See, e.g.*, ECF No. 13. RSS presented sufficient documentary evidence and testimony at the damages hearing to meet these burdens.⁵

Second, Intervenor repeatedly and falsely assert that the Court has already held that Intervenor is not successors to Defendants. *See, e.g.*, Motion to Intervene at 26. They are incorrect, as the only issue before the Court was whether Intervenor MBA(FL) II was a *party* to

⁵ Intervenor attacks the credibility of Darren Conrad throughout their motion, claiming that he has testified inconsistently regarding RSS's trade secrets. What Intervenor ignores is that Mr. Conrad lost those legal arguments in the Franklin County Common Pleas case in 2009, a fact that he fully acknowledged in the 2015 damages hearing. *See* ECF No. 137 at 3-4. Nevertheless, had Intervenor wanted to argue issues of credibility, they should have moved to intervene in this case prior to the 2015 damages hearing, but they did not.

this action—and Magistrate Abel determined it was not. *See, e.g.*, ECF No. 89 at 7. Indeed, a primary purpose of the Related Case is to have the Court hear evidence and decide whether Intervenorors are successors to Defendants. *See* Count I of Complaint in Related Case (alleging “Successor Liability”).

Third, Intervenorors had every incentive to litigate this case—and apparently incurred more than \$270,000 in attorneys’ fees defending themselves. *See* Ex. 2 at ¶ 29 (claiming that MBA(FL) I and MBA(FL) II “incurred and paid \$270,166.51 in legal fees and costs” in this action). Their motion nevertheless argues that they were “repeatedly assured that they were not parties to the 2013 Litigation” and thus “had no incentive to litigate that lawsuit.” Motion to Intervene at 21. RSS has never disguised the fact that regardless of whether or not Intervenorors were deemed “parties” to this lawsuit, RSS intended to pursue a claim of successor liability. *See, e.g.*, ECF No. 20 at 3 (noting RSS’s argument that a “judgment against [CBD (NC)] would be good against [Intervenorors]”); and ECF No. 115 at 2 (noting the shell games being played by Defendants and their successors, and serving a copy of the filing on Intervenorors). Their decision to terminate legal representation of the Defendants and default after spending \$270,000 in legal fees is simply inexplicable, particularly when RSS consistently alleged that Intervenorors would be responsible for any judgment in this matter. Defendants (and Intervenorors) thus had every incentive to litigate this matter, and they should be forced to deal with the natural outcome of their strategic decision to watch from the sidelines.

Fourth, Intervenorors falsely accuse RSS of failing to alert a Florida state court (which they call a “sister court”) of the procedural status of this matter. Motion to Intervene at 18. What they fail to mention is that RSS is not a party to that action, has never been a party to that action,

and has never been served with any of the filings in that matter. How could RSS have a duty to a court overseeing a case in which it is not even a party?

Intervenors also cite a South Carolina state court case they filed against RSS after RSS filed the Related Case, but they fail to mention that their use of multiple entities led to the trial judge issuing an order requiring them to identify all of their successor and predecessor entities, and to file all future pleadings with verification by the highest ranking corporate officer and their attorneys (which they have appealed). *See* Ex. 5, Order from Judge McIntosh

Fifth, Intervenors accuse RSS President Carleton Scott Andrew of taking a position in an earlier lawsuit that the RSS System was not a trade secret. *Id.* at 22. As Mr. Andrew testified in the damages hearing—and as further affirmed in the attached affidavit—the earlier lawsuit related only to a breach of Mr. Andrew’s contract and deceptive information used to fraudulently induce potential dealers, not the proprietary methodologies for establishing and training dealers (which Mr. Andrew and RSS have always asserted is a trade secret). *See* Transcript of Default Judgment Hearing, Ex. 9 to Motion to Intervene, at 50:11 – 51:19 (filed under seal per ECF No. 141); *see also* Ex. 7, Affidavit of Carleton Scott Andrew.

Also alarming is Intervenors’ attempt to destroy evidence showing they are successors. After RSS pointed out that Intervenors’ website contained a timeline tracing their roots back to Defendants (*see* Related Case ECF No. 8-3), Intervenors: (1) deleted the webpage; (2) denied that any changes were made; and (3) subsequently refused to provide any substantive response to the discovery request even after RSS informed Intervenors of the falsity of their discovery responses. *See* Ex. 6, Intervenor MBA(FL) II’s Original and Supplemental Responses to Interrogatory No. 7.

Finally, the Court has already determined that MBA(FL) I has displayed an “*intent to thwart judicial proceedings.*” ECF No. 102 at 11 (emphasis added). Neither MBA(FL) I nor its alleged successors should benefit from that contumacious conduct by further delaying the issuance of a judgment in this matter.

2. Intervenor Do Not Have a Substantial Legal Interest in this Action.

Intervenors cite two reasons why they allegedly have a substantial legal interest in this case, both of which are incorrect. First, they claim RSS will improperly use any judgment issued in this matter against Intervenor. Motion to Intervene at 19. They are wrong. RSS has never indicated an intention to execute a judgment issued in this matter on Intervenor unless and until the Court in the Related Case determines that they are successors. And in any event, if Intervenor is to be taken at their word, they have no relationship to Defendants, are not successors to Defendants, and cannot be held liable for any judgment issued in this matter. By their own argument, they have no substantial legal interest in this case.

Second, Intervenor argues that public policy disfavors using offensive collateral estoppel. See Motion to Intervene at 20. RSS is not using estoppel, and the Sixth Circuit has already determined that the approach used by RSS is permissible. See, e.g., *Gen. Star Nat. Ins. Co. v. Administratia Asigurarilor de Stat*, 289 F.3d 434, 441 (6th Cir.2002) (default judgment against predecessor entity can be collected from successor entity upon a finding that the alleged successor is a legal successor); see also *In re Mullins*, 449 B.R. 299, 303 (Bankr.S.D.Ohio 2011) (giving preclusive effect to a default judgment and enforcing the judgment as to a successor entity).

Moreover, Intervenor’s own citation to *O’Nesti v. Debartolo Realty Corp.*, 113 Ohio St.3d 59 (2007), proves exactly why they should not be permitted to intervene now, given that a

party cannot “wait and see whether the outcome will be in their favor while not running the risk of being bound by an adverse judgment.” *Id.* at ¶ 22. In any event, the Court in *O’Nesti* made the unremarkable holding that a plaintiff not in privity with a former plaintiff cannot use collateral estoppel offensively on issues that were not actually litigated in the former lawsuit. *Id.* at ¶ 1. Regardless, any claim that RSS is using offensive estoppel is an issue for the Related Case, not here. Nothing precludes the Intervenor from fully litigating those issues in that case.

3. Intervenor’s Interests Are Not Impaired in the Absence of Intervention.

Intervenor’s interests will not be impaired if the Court denies the request to intervene. RSS will not execute a judgment in this matter against Intervenor unless and until the Court in the Related Case determines Intervenor are successors of Defendants. Moreover, given that this case has proceeded almost to the point of final judgment, there is nothing for Intervenor to do to protect their alleged interests in this matter. Thus, intervention would be futile and should be denied. *See, e.g., Indiana State Dist. Council of Laborers & Hod Carriers Pension & Welfare Fund v. Omnicare, Inc.*, 583 F.3d 935, 942 (6th Cir. 2009) (affirming denial of motion to intervene as futile).

4. Intervenor’s Interests Have Been Adequately Represented.

RSS acknowledges that neither Defendant currently has counsel and that neither Defendant was represented at the December 2015 damages hearing. However, both Defendants and Intervenor *MBA(FL) II* had counsel from December 2013 until October 2014, when Magistrate Abel permitted counsel to withdraw. *See* ECF No. 107. Notably, the Court had previously vacated CBD (NC)’s default in July 2014—three months before counsel withdrew—giving CBD (NC) (or a potentially interested third party, such as *MBA(FL) II*) every opportunity to argue the merits of the case at that point. *See* ECF No. 89. CBD (NC) chose not to defend

itself, and MBA(FL) II chose not to seek leave to intervene on CBD (NC)'s behalf. It cannot complain of inadequate representation now, having had an opportunity to protect its potential interest in July 2014.

Moreover, any suggestion that Defendants' counsel withdrew for mistaken reasons several months later (thus resulting in inadequate representation) is simply false. *See* Motion to Intervene at 18 (alleging that the "only" reason RSS obtained defaults was because of Darren Conrad's testimony that allegedly led counsel to withdraw). As stated in the affidavit of Daniel Clark, former counsel for Defendants and Intervenor MBA(FL) II, counsel only moved to withdraw after his representation was *voluntarily terminated* by Defendants. *See* ECF No. 106-1 at ¶ 8 ("Defendants [CBD (NC)] and [MBA(FL) I] have terminated Vorys in this matter and agreed it should seek to withdraw[]"). Magistrate Abel then ordered Defendants to retain new counsel or risk default. *See* ECF No. 107 at 1 (each Defendant "will be in default if it fails to retain new counsel who enters an appearance on its behalf within 30 days"). It was Defendants' voluntary termination of counsel that led counsel to withdraw, and Defendants' decision not to retain new counsel that led to default. Intervenor cannot argue lack of adequate representation when they freely chose—*at least twice*—not to represent their potential interests in this matter.

B. Alternatively, Intervenor Cannot Seek Permissive Intervention.

Likewise, Intervenor cannot seek permissive intervention. Federal Rule 24(b)(1)(B) allows a party to seek permissive intervention if it proves (1) the motion was timely filed; and (2) one or more of the applicant's claims or defenses share a common question of law or fact with the main action. Intervenor's motion fails as to both elements.

First, as noted above, Intervenor's motion was filed more than two years after they knew of RSS's intent to seek successor liability and a year and a half after Intervenor's counsel withdrew. Thus, they cannot satisfy the test for permissive intervention.

Second, this case and the Related Case do not currently share common questions of law or fact, but even if they did, Intervenor has waived any such claim by taking a "wait and see" approach. The only potential common issue identified by Intervenor is whether they are successors to Defendants (and thus liable for any judgment issued in this matter). The Court has not made any decision as to whether Intervenor are successors to Defendants (nor has it been asked to make such a decision in this case); rather, that issue will be decided by the Court in the Related Case. Because the question of successor liability will arise only in one case, it cannot be "common" to both cases.

Moreover, the fact that RSS is seeking damages for the misappropriation of its trade secrets against Defendants in this case and Intervenor in the Related Case is not a "common question of law or fact." First, RSS is seeking separate damages in each case, covering different time periods against what Intervenor claim are different entities. Second, nothing is preventing Intervenor from arguing in the Related Case that: (1) they are not successors to Defendants (as they have claimed); and (2) they did not use the RSS System from April 2012 – present. As such, the issues are entirely distinct and the cases do not contain common issues of law or fact. Intervenor's attempt to seek permissive intervention should thus be denied.

C. The Court Should Not Stay This Case.

Finally, the Court should deny Intervenor's request to stay this case. In requesting a stay, Intervenor essentially invite the Court to take the same erroneous "wait and see" approach used by Intervenor after they told their attorneys to withdraw in 2014. This request ignores the

procedural posture of this case, unfairly trivializes the Court's and RSS's substantial investment of time in this case, and would cause RSS substantial prejudice.

First, of course, Intervenor has no standing to request a stay until or unless they are granted leave to Intervene. Second, there is virtually nothing to stay, given that the only remaining action in this case is the Court's issuance of the default judgment decision. And to the extent Intervenor is actually asking the Court to stay execution of any forthcoming judgment, such relief is not proper because RSS will not seek to execute a judgment issued in this matter against Intervenor unless and until the Court in the Related Case deems them successors to Defendants.

Third, staying the case now saves no judicial resources and would mean that RSS's efforts to prosecute this case for the last two and a half years have been entirely fruitless. Indeed, the request for stay ignores the fact that RSS filed this case nearly two years *before* it filed the Related Case, yet Intervenor wants the newer-filed action to proceed to judgment first (which is curious in light of their attempt to dismiss the Related Case on jurisdictional grounds). *See* Related Case ECF No. 4. RSS has gone to great lengths to segregate any damages sought in this matter to ensure that it is not seeking double recovery of any damages in the Related Case, and has committed tremendous resources to bringing this matter to a conclusion. RSS therefore respectfully requests that the Court deny Intervenor's motion in full and issue a final judgment holding Defendants liable for the damages requested at the December 2015 hearing.

V. Conclusion

For the foregoing reasons, the Court should deny Intervenor's Motion to Intervene and levy all appropriate sanctions against Intervenor for their latest attempt to delay this case.

Respectfully submitted,

/s/ James E. Arnold

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CERTIFICATE OF SERVICE

The undersigned certifies that on the 23rd day of May 2016, a true and correct copy of the foregoing Plaintiff Retail Service Systems, Inc.'s Memorandum in Opposition to Proposed Intervenor's Mattress By Appointment, LLC, Mattress By Appointment, LLC, and Edwin Shoffner's Motion to Intervene and Stay Proceedings was filed with the Court using the Clerk of Court's cm/ecf filing system, which will send notice of this filing to all parties that have entered an appearance in this matter:

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