IN THE SOUTH CAROLINA COURT OF APPEALS
NO. 2016-001105

EMDI, LLC, and FLASR, INC.,

Appellant,

vs.

INMOTION CONSULTING GROUP, LLC

Respondents.

BRIEF OF THE APPELLANT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

QUESTIONS PRESENTED

1. Whether the lower court erred in failing to rule on Appellant's motion challenging subject matter jurisdiction.

2. Whether the lower court erred in denying a motion to dismiss for improper venue when the parties' contract provides that Delaware courts have "exclusive jurisdiction" over the all contract disputes.

3. Whether the lower court erred in denying FLASR's motion to dismiss for lack of personal jurisdiction when FLASR has no contacts whatsoever with South Carolina.

4. Whether the lower court erred in denying a 12(b)(6) motion to dismiss Respondent's breach of contract claim against FLASR when FLASR is neither a party to the contract nor subject to successor liability as a matter of law.

STATEMENT OF THE CASE

In the complaint, Respondent InMotion alleged that it provided consulting services to Appellant EMDI pursuant to a contract between the parties. After EMDI allegedly failed to pay for consulting services that InMotion claims to have provided, InMotion sued for breach of contract, unjust enrichment, and quantum meruit. Compl. ¶¶37, 47, 57. InMotion also sued FLASR, a Texas-based company, and argued that FLASR is a successor to EMDI and liable for the debts owed. *Id.* at ¶16.

This is Respondent's second attempt to forum shop this lawsuit. A North Carolina trial court dismissed an almost identical suit filed by InMotion. See N.C. Compl., May 15. After the North Carolina court dismiss that case in October 2015, Respondent filed suit in the Greenville County Court of Common Pleas. Compl. at 1. In response, Appellants EMDI and FLASR filed motions to dismiss for lack of subject matter jurisdiction, personal jurisdiction, improper venue, and for failure to state a claim upon which relief may be granted. FLASR Memorandum in Support of Motion to Dismiss; EMDI Memorandum in Support of Motion to Dismiss. On February 10, Judge Verdin held a hearing on Appellants' Motion to Dismiss and took the matter under advisement.

On March 8, 2016, Judge Verdin issued a three-sentence order, denying Appellants' motion to dismiss for personal jurisdiction and improper venue. Verdin Order, March 8. Judge Verdin stated in her order that Respondent alleged sufficient facts to establish personal jurisdiction, found that Respondent sufficiently stated a claim for unjust enrichment and quantum meruit, and found that the SC venue statute permits Respondent to bring this suit in Greenville County. *Id.* Judge Verdin, however, failed to render a decision as to subject matter jurisdiction or Appellant FLASR's 12(b)(6) Motion to Dismiss Respondent's breach of contract claim,.

Accordingly, Appellants moved for reconsideration, asking the court to rule on the issues presented and to dismiss Respondent's claims. Def. Motion for Clarification and Reconsideration at 1. On May 6, Judge Verdin filed a two-sentence order, which denied Appellants' motion and stated that the issues have been decided. Verdin Order, May 6. On May 18, thirteen days after Judge Verdin denied the Rule 59 motion for reconsideration, Appellants filed a timely notice of appeal. Not. of Appeal.

ARGUMENT

I. The Lower Court Erred In Failing To Rule On Appellant FLASR's Motion To Dismiss For Lack of Subject Matter Jurisdiction.

Subject matter jurisdiction is defined as "the power [of a court] to hear and determine cases of the general class to which the proceedings in question belong." Dove v. Gold Kist, Inc., 314 S.C. 235, 237–38 (1994). Issues related to subject matter jurisdiction may be raised at any time. Carter v. State, 329 S.C. 355, 362 (1998). "The lack of subject matter jurisdiction may not be waived, even by consent of the parties." In re Nov. 4, 2008 Bluffton Town Council Election, 385 S.C. 632, 637, 686 S.E.2d 683, 686 (2009). "Any action taken by a court without subject matter jurisdiction is void." B. Jurisdiction, SC-MARLIT 10.B. South Carolina courts have held that a finding of subject matter jurisdiction is immediately appealable. Chew v. Newsome Chevrolet, Inc., 315 S.C. 102, 104 (Ct. App. 1993); 15 S.C. Jur. Appeal and Error § 21. A court errs when it fails to rule on a dispositive issue presented before it. See Karriem ex rel. Simmons v. Sumter Cty. Disabilities & Special Needs Bd., 2015 WL 1396438, at *1 (S.C. Mar. 25, 2015).

In this case, Appellants have challenged the lower court's subject matter jurisdiction over this dispute on two occasions, once in its motion to dismiss and again in its motion for reconsideration. Despite these attempts to raise the issue, the lower court did not rule on Appellants' motion. Given that subject matter jurisdiction is vital to a court's authority to render a decision in a matter, the court must rule on issues relating to its inherent authority to render a decision. As the South Carolina Supreme Court noted in its 2015 decision, Karriem, the failure to rule on a dispositive issue constitutes reversible error. See Karriem ex rel. Simmons v. Sumter Cty. Disabilities & Special Needs Bd., 2015 WL 1396438, at *1 (S.C. Mar. 25, 2015). Echoing Appellants' motion to dismiss, the court should find that the lower court erred in refusing the rule on Defendants' motions to dismiss for lack of subject matter jurisdiction.

II. The Court May Consider FLASR and EMDI's Interlocutory Challenge the Lower Court's Decision As to Personal Jurisdiction, Venue, and Failure to State a Claim.

Although venue, personal jurisdiction, and a 12(b)(6) challenge are not traditionally subject to interlocutory appeal, they may nonetheless become appealable. In South Carolina, "[a]n order that is not directly appealable will be considered if there is an appealable issue before the court." Cox v. Woodmen of World Ins. Co., 347 S.C. 460, 469 (Ct. App. 2001); Pruitt v. Bowers, 330 S.C. 483 (Ct.App.1998); see Briggs v. Richardson, 273 S.C. 376 (1979). Subject matter jurisdiction is immediately appealable. Chew v. Newsome Chevrolet, Inc., 315 S.C. 102, 104 (Ct. App. 1993); 15 S.C. Jur. Appeal and Error § 21. Accordingly, the appellate court is empowered to decide these issues in this appeal. For the sake of judicial economy the court should consider appellants' challenges to the lower court's rulings on venue, personal jurisdiction, and failure to state a claim.

III. The Lower Court Erred In Denying Appellants' Motion to Dismiss For Improper Venue.

The lower court erred in denying Appellants' motion to dismiss for improper venue. South Carolina treats forum selection provisions in contracts as being "*prima facie* valid and enforceable." Republic Leasing Company, Inc. v. Haywood, 329 S.C. 562, 566 (1998), vacated because the parties settled, 335 S.C. 207 (1999). Courts in this state have consistently enforced these clauses. See, e.g., Minorplanet Systems USA Ltd. v. American Aire, Inc., 368 S.C. 146, 150 (2006); Atlantic Floor Services, Inc. v. Wal-Mart Stores, Inc., 334 F. Supp. 2d 875, 879 (D. S.C. 2004). Where a litigant selects a forum that conflicts with the parties' forum selection clause, the trial court should dismiss the Respondent's claims for improper venue. Atlantic Floor Services, Inc., 334 F. Supp. 2d at 879 (dismissing claims because the forum selection clause choosing Arkansas was enforceable). A court's failure to enforce a contractual venue provision constitutes reversible error. Stanley Smith & Sons v. D.M.R. Inc., 307 S.C. 413, 418 (Ct. App.

1992) (reversing lower court's denial of a motion to transfer venue based on the parties' contract).

In this case, this court should dismiss Respondent's complaint against FLASR and EMDI for improper venue. The parties' contract provides, in pertinent part:

> **CONSENT TO JURISDICTION: VENUE**
> In the event a Party seeks injunctive or equitable relief, or the Parties fail to resolve a dispute in accordance with the Dispute Resolution provisions set forth herein, **each of the Parties** hereto hereby **irrevocably and unconditionally submits**, for itself and its property **to the exclusive jurisdiction** of **any Delaware state court or federal court** of the United States of America **sitting in Dover, Kenty County Delaware, and any appellate court from any thereof**, in any action or proceeding arising out of or relating to this agreement....

Ex. A, InMotion Contract at 5. (emphasis added). By definition, the term "exclusive" means to the exclusion of all other alternatives. Merriam-Webster, EXCLUSIVE, available at http://www.merriam-webster.com/dictionary/exclusive ("Excluding or not admitting other things"). Thus, when the parties agreed to submit to the exclusive jurisdiction in Delaware, they chose to do so to the exclusion of all other jurisdictions, including South Carolina. By using the words "exclusive jurisdiction," the parties have foreclosed the right to sue in another venue that, while otherwise authorized under state statute, is expressly prohibited by their agreement. The contract clearly and unambiguously supports this interpretation and provides that the only proper venue for a cause of action is in Delaware. To interpret the contract any other way, as the lower court and Respondent have done, ignores the fact that the parties have clearly and unmistakably selected an "exclusive" venue for dispute resolution.

In its brief to the lower court, Respondent has countered this argument with a curious interpretation. Respondent maintains that the phrase "exclusive jurisdiction of any Delaware

[court]" means that the parties *may* sue in Delaware unless they decide to sue somewhere else. See, Ex. B, Plt. Resp. to Def. Motion to Dismiss (emphasis added). In its response to Appellants' motion to dismiss, Respondent stated that the venue provision of the contract is "permissive, not mandatory" and that the exclusive jurisdiction clause merely prohibits the parties from challenging venue of Delaware courts, should a party choose to file suit there. Ex. B. However, Respondent's interpretation reads out the word "exclusive" from the contract provision, *which Respondent authored.*[1] The phrase "exclusive jurisdiction of any Delaware state court or federal court...." is clear.

Appellant also argued that "at the very least, the contract is ambiguous" and therefore the issue should be submitted to the trier of fact for interpretation. Ex. B. Here again, Respondent's position is unavailing. "Whether a contract is ambiguous is a question of law." S. Atl. Fin. Servs., Inc. v. Middleton, 349 S.C. 77, 84, 562 S.E.2d 482, 486 (Ct. App. 2002), aff'd as modified, 356 S.C. 444, 590 S.E.2d 27 (2003). In South Carolina, "[i]t is well settled that ambiguities arising within a contract must be construed against the drafter." *Id.* InMotion drafted the parties' contract, which is evident from the first page of their agreement. Ex. A ("Thank you for selecting InMotion...The following represents the consultation agreement....") InMotion's logo also appears at the top of the first page and on the top of the signature page. Thus, even if this court found that the term "exclusive jurisdiction" is ambiguous, it should be construed against the drafter, InMotion, as a matter of law. See id.

Finally, Respondent further argues that venue is therefore proper in South Carolina because venue is authorized under the state venue statute. Absent a forum selection clause, Respondent would be correct. But Respondent's position ignores the fact that the parties have

[1] In opposing Defendants' motion to dismiss for improper venue, Plaintiff ignores the clause it authored, whereby they promised to submit "unconditionally" to the venue of Delaware courts

contractually overridden the South Carolina venue statute and chosen to limit the venues available to resolving disputes over their contract. See Ex A.

The lower court embraced Respondent's flawed argument. In its brief, three-sentence decision, the court noted that venue was proper under the South Carolina venue statute, S.C. Code 15-7-20 and 15-7-30. Verdin Order, March 8. For the reasons explained above, that decision was in error.

IV. The Lower Court Erred In Denying Appellants' Motion to Dismiss Respondent's Claims Against FLASR For Lack of Personal Jurisdiction.

The lower court erred in finding that it had personal jurisdiction over FLASR, Inc.[2] Personal jurisdiction may be established by meeting either the federal due process standard for specific *in personam* or general *in personam* jurisdiction. Although the lower court did not specify whether FLASR is subject to specific or general jurisdiction, the state lacks both. Exercising jurisdiction over FLASR is constitutionally impermissible and, therefore, dismissal is necessary.

To establish personal jurisdiction, the exercise of jurisdiction must (1) be authorized under the state-long arm statute and (2) comport with Due Process. Courts have interpreted the South Carolina Long Arm statute, codified as S.C. Code § 36-2-803 and § 36-2-802, to allow courts to exercise jurisdiction to the fullest extent permissible under the United States Constitution. Southern Plastics Co. v. Southern Commerce Bank, 310 S.C. 256 (1992). Accordingly, the question of personal jurisdiction collapses into an analysis of the Due Process Clause of the Fourteenth Amendment. Id.

[2] As noted above, while personal jurisdiction is not traditionally subject to interlocutory appeal, it is appealable when there is an appealable issue before the court. Cox v. Woodmen of World Ins. Co., 347 S.C. 460, 469, 556 S.E.2d 397, 402 (Ct. App. 2001) ("An order that is not directly appealable will be considered if there is an appealable issue before the court.") Accordingly, the court may hear Defendant's challenge to personal jurisdiction.

a. The Court Lacks Specific *In Personam* Jurisdiction Over FLASR Because FLASR Has No Contacts In The Forum.

The Due Process analysis for specific in personam jurisdiction is a three-pronged analysis. The court must consider: (1) whether the Appellant has minimum contacts with the forum state, (2) whether Respondent's claim arises from those contacts and (3) whether exercising jurisdiction over the non-resident Appellant is reasonable under the circumstances. Id. at 259. In this case, South Carolina does not have personal jurisdiction because FLASR lacks minimum contacts with the state.

A party establishes "minimum contacts" only by purposefully availing itself of the privileges of conducting activities in the forum state. See id. at 262. The concept of jurisdiction based on minimum contacts "is premised on the concept that a corporation that enjoys the privilege of conducting business within a state bears the reciprocal obligation of answering to legal proceedings there." CFA Institute v. Institute of Chartered Financial Analysts of India, 551 F.3d 285, 293 (4th Cir. 2009). The requirement that minimum contacts be purposeful insures that an Appellant "will not be hauled into a jurisdiction solely as the result of random, fortuitous, or attenuated contacts or the unilateral activity of another party or a third person." Burger King Corp. v. Rudzewicz, 471 U.S. 462, 475 (1985). A single contact with a party in state, such as sending a financial document, is not sufficient to establish personal jurisdiction. Southern Plastics Company, 310 S.C. at 262, 423 S.E.2d at 132.

FLASR has no jurisdictionally significant contacts with the state of South Carolina. As noted in its submissions to the lower court and supported by the Affidavit of Everett Dickson, FLASR has never conducted business in South Carolina, never advertised or solicited business in South Carolina, never contracted to provide business in the state, never obtained a license to perform work in South Carolina, and has never had an employee or office in South Carolina.

Aff. Everett Dickson at 1–2. FLASR has no facility, no people, no business, and no agents in the state of South Carolina. Id. In summary, Appellant FLASR Inc. has no contacts with this state.

In its argument to the lower court, Respondent asserted that FLASR is subject to successor liability and, accordingly, the jurisdictional contacts of its predecessor must be imputed to FLASR. Compl. at ¶16; InMotion Brief In Opposition to MTD at 4. This position is misguided.[3] Even if FLASR were a successor to EMDI, which it is not, successor liability does not confer a forum state with personal jurisdiction. Successor liability is a theory of liability, not a mechanism for subjecting an Appellant to the laws of a foreign forum state. See Simmons v. Mark Lift Indus., Inc., 366 S.C. 308, 312 (2005) (discussing the contours of successor liability). Imputing a predecessor's jurisdictional contacts would undermine the point of requiring purposeful-availment. *See, e.g.*, Burger King Corp. v. Rudzewicz, 471 U.S. 462, 475 (1985). Whether FLASR is liable for EMDI's debts and contractual obligations is immaterial to the question of whether it is subject to personal jurisdiction in South Carolina. Because FLASR has no contacts with South Carolina, it is not subject to personal jurisdiction here.

b. The Lower Court Lacks General *In Personam* Jurisdiction Because FLASR Is Not "Essentially at Home" In South Carolina.

South Carolina may not exercise general jurisdiction over FLASR, either. A court may exercise general jurisdiction over a non-resident Appellant only where the Appellant's affiliations with the State are so "continuous and systematic as to render them essentially at home in the forum State." Goodyear Dunlop Tires Operations, S.A. v. Brown, 131 S.Ct. 2846, 2851 (U.S. 2011) (emphasis added). A corporation is at home, and general jurisdiction is proper,

[3] In addition to these two responses, Plaintiff offers conclusory statements. For example, Plaintiff asserts that FLASR "was doing business in South Carolina." Compl. at ¶3.Plaintiff offers no support whatsoever for this conclusory allegation. Conclusory statements such as this are not sufficient to support a finding of personal jurisdiction. Sullivan v. Hawker Beechcraft Corporation, 397 S.C. 143, 151 (Ct.Ap.2011). Therefore, aside from offering a general denial, FLASR need not address these statements in the instant appeal.

in the state in which the corporation is incorporated and the site of its principal place of business. See Daimler AG v. Bauman, 134 S.Ct. 746, 760 (2014) (finding with respect to a corporation, the place of incorporation and principal place of business are "paradig[m] ... bases for general jurisdiction."). For a foreign corporation to be subject to general personal jurisdiction in a state, its contacts must be so pervasive that it is "comparable to a domestic enterprise in that state." Daimler AG v. Bauman, 134 S.Ct. 746, 758 n.11 (2014).

FLASR was initially incorporated in Delaware and is presently incorporated in Nevada. Its principal place of business is in Atlanta, Georgia. FLASR does not have, and has never had, offices, employees, or agents working in this state. Further, as noted above, FLASR has never contracted to provide services in South Carolina and does not have a license to perform work in the state. In short, FLASR is not "at home" in South Carolina and, therefore, is not subject to personal jurisdiction here.

V. The Lower Court Erred In Denying FLASR's 12(b)(6) Motion to Dismiss Respondent's Breach of Contract Claim Because FLASR Is Not A Party To the Contract Nor Subject to Successor Liability As A Matter of Law.

Respondent's breach of contract claim against FLASR fails to state a claim on which relief may be granted. The lower court erred in denying FLASR's Motion to Dismiss this claim. To recover for breach of contract, the Respondent must prove: "(1) a binding contract entered into by the parties; (2) a breach or unjustifiable failure to perform the contract; and (3) damage suffered by the Respondent as a direct and proximate result of the breach." Tomlinson v. Mixon, 367 S.C. 467, 479 (Ct.App.2006); Fung Lin Wah Enterprises Ltd. v. E. Bay Imp. Co., 465 F. Supp. 2d 536, 542 (D.S.C. 2006).

In the complaint, Respondent sued both FLASR and EMDI for breach of contract. FLASR was not a party to the contract, however. See Ex. A. In fact, Respondent does not allege

that it entered into a contract with FLASR. Therefore, Respondent cannot prevail on a breach of contract claim against FLASR.

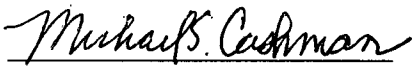
Instead, as a basis for its contract claim against FLASR, Respondent argued that, although it is not a party to the contract, FLASR is nonetheless liable for EMDI's debts because it is as a successor entity to EMDI. Even taking everything in the complaint as true, this claim must fail as a matter of law.

By definition, successor liability is only applicable where there is "a successor or purchasing company" involved. Simmons v. Mark Lift Indus., Inc., 366 S.C. 308, 312 (2005). FLASR has not purchased EMDI (nor has Respondent alleged as much). Nor is FLASR a successor entity. Even if everything in the complaint were true, EMDI cannot have a *successor* entity because EMDI is a still an existing business. Therefore, given that FLASR is neither a successor entity to EMDI nor a party to the contract, FLASR cannot be liable for breach of contract as a matter of law.

CONCLUSION

For the foregoing reasons, Appellants respectfully request that the Court reverse the lower court's order, denying the motion to dismiss.

[SIGNATURE BLOCK ON NEXT PAGE]



Michael S. Cashman (SC Bar No. 79523)
Womble, Carlyle, Sandridge & Rice, LLP
550 South Main Street, Suite 400
Greenville, SC 29601
Telephone: 864.255.5430
MCashman@wcsr.com

Attorney for FLASR Inc. and EMDI, LLC

IN THE SOUTH CAROLINA COURT OF APPEALS
NO. 2016-001105

EMDI, LLC, and FLASR, INC.,	)
	)
Appellants,	)
	)
vs.	)
	)
INMOTION CONSULTING GROUP, LLC	)
	)
Respondent.	)
	)
	)

CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on the 12th day of July, 2016, she mailed a copy of **FLASR, Inc., and EDMI, LLC's Brief of the Appellant** by first-class mail, proper postage affixed, addressed to the person(s) hereinafter named, at the place(s) and address(es) stated below, which is/are the last known address(es):

Allen L. West, Esq.
Hamilton Stephens Steele & Martin, PLLC
201 South College Street, Ste. 2020
Charlotte, NC 28244-2020

Attorney for Plaintiff

Deborah P. Stout
Legal Assistant to Michael S. Cashman, Esq.

EXHIBIT "A"

Engagement Letter

EMDI
Everett M. Dickson
130 Mountain Creek Church Rd.
Greenville, SC 29609
(832) 752-4480

Thank you for selecting InMotion Consulting Group, LLC ("IMCG") as the provider of services for your organization. IMCG is committed to providing quality service. During this engagement we will use professional methods, procedures and personnel to accomplish beneficial results in a timely manner in order to foster a long-term professional relationship providing maximum benefits to EMDI. We recognize the importance of having a clear definition of the goals and objectives for this engagement. A successful relationship requires active and informed involvement on the part of both organizations. The following represents the consultation agreement and understanding between IMCG ("Consultant"), EMDI. ("Client") and all parties employed and/or contracted by EMDI ("Parties").

STATEMENT OF PURPOSE

This Agreement is based on information provided to Consultant during discussions with the Client.

Consultant will provide the following services for Client specific to the Client's consumer product "lil dipper" (working product name):

- EMDI business plan
- Define strategy for product development, go to market strategy and sales
- Define market opportunity. Analyze consumer demographics and geographic targeting
- Build budget model
- Build product presentation and communications collateral
- Build and fulfillment of marketing, promotions and advertising campaigns
- Continuation of sales growth and marketing efforts

Exhibit A

CLIENT RESPONSIBILITIES

Client and Parties will need to fulfill the responsibilities, which include (but are not limited to) the following:

1. Provide Consultant with organizational information and guidance to effectively execute in line with Client's vision and expectations.
2. Provide consultants' with sufficient access to budgets regarding "lil dipper".
3. Provide consultant prior to scheduled services with any advance information pertinent to the project.
4. Ensure all key staff members are available during scheduled times in order to assist w/project.
5. Immediate and complete payment to all approved Consultant contractors for services rendered.

Client acknowledges that a delay or failure by the Client to fulfill the above-described responsibilities, such that the Consultant is prevented from performing in accordance with the engagement Project Plan or Implementation Task List may result in additional costs to the Client and deviations from previously agreed upon work schedules.

PROFESSIONAL FEES

We determine our fees by actual time spent and bill for our services bi-weekly, or at specific project completion points. Payment is due upon invoice receipt. If, during the course of the engagement, we determine circumstances are such that substantially greater work or expenses are required than estimated we will discuss it with you and gain your approval before proceeding.

Cost Estimate

Services will be billed at an hourly rate of $160.00 per hour. Estimated totals are listed in Appendix "A" of this document. Should further services be requested beyond the amount estimated, work will be billed at the same hourly rate. All costs are represented in U.S. dollars. Estimates do not include "out-of-scope" projects. The Scope of Work for this project is outlined but not limited to Appendix "A" of this document.

Travel and other Charges

Travel time (if required) is charged at our hourly rate for one way from Consultant's office to Client's office (not to exceed 8 hours per day).

Out-of-pocket expenses, which may include coach class airfare, hotel, mileage, tolls, parking, etc., are billed on a Client pre-approved, reimbursement basis. Our consultants always search for the best possible airfares and hotel rates. If you have arrangements with air carriers or hotels for special discounts, we are happy to use them.

Retainer

The retainer in the amount of $10,000 will be paid up front to cover initial costs, it will be applied to the billings through the items 1-3 of Appendix A. The retainer will be refreshed in this phase.

The parties agree that completion of the model and business plan will demonstrate the viability of the project. Consideration for the balance the items on Appendix A will be

contingent on the results of the model. Further consideration will be based on a combination of fee's, incentives and an equity interest in EMDI. This will be discussed and agreed to at the appropriate time.

Terms and Conditions

COMMENCEMENT AND TERM
This Agreement will become effective when signed by duly authorized representatives of both parties and will continue in effect, unless terminated as provided below, until completion of services. Either party may terminate this Agreement for any reason at any time upon thirty (30) days prior written notice, provided that no such termination shall affect or modify any rights or obligations either party may have pursuant to this Agreement.

REGARDING 3RD PARTY PRODUCTS
In the event that Client elects to take advantage of a 3rd party or product, Consultant will use commercially reasonable efforts to research, learn and assist Client in the implementation of any and all 3rd parties and products used. However, Consultant cannot be held liable for "fit of purpose", of 3rd parties or products.

INTELLECTUAL PROPERTY RIGHTS
In the course of the consulting engagement, Consultant may use enhancements, discoveries, processes, methods, designs and knowhow, whether or not copyrightable or patentable, which Consultant conceived during the course of other consulting engagements. In addition, Consultant may independently develop enhancements, processes, methods, designs or know-how during the term of this consulting engagement and Client acknowledges that Consultant may use such enhancements, processes, methods, designs and knowhow in its business operations with other clients.

LIMITATION OF LIABILITY
Work under this Agreement shall be performed with the degree of skill and care that is required by current, good and sound professional procedures and practices, and in conformance with generally accepted professional standards prevailing at the time the work is performed; provided, however, that except for liability for personal injury damages caused by gross negligence or willful misconduct, in no event shall Consultant's total cumulative liability to Client or its successors (from all causes of any kind, including contract, tort, or otherwise) arising out of or related to the transactions contemplated by this Agreement exceed the amount actually paid by the Client under this Agreement.

CONFIDENTIALITY
During the course of performing services, the Parties may have access to information that is confidential to one another ("Confidential Information"). Confidential Information

includes business or financial affairs, which may incorporate business methods, marketing strategies, pricing, competitor information, product development strategies and methods, customer lists and financial results. Confidential Information also includes information received from others, both written and oral, that each party is obligated to treat as confidential. Confidential Information shall not include any information that (1) is already known by the recipient party or its affiliates, free of any obligation to keep it confidential, (2) is or becomes publicly known through no wrongful act of the receiving party or its affiliates, (3) is received by the receiving party from a third party without any restriction on confidentiality, (4) is independently developed by the receiving party or its affiliates, (5) is disclosed to third parties by the disclosing party without any obligation of confidentiality, or (6) is approved for release by prior written authorization of the disclosing party. The Parties agree to maintain the confidentiality of the Confidential Information and to protect as a trade secret any portion of the other party's Confidential Information by preventing any unauthorized copying, use, distribution, installation or transfer of possession of such information. Each party agrees to maintain at least the same procedures regarding Confidential Information that it maintains with respect to its own Confidential Information. Each party may use the Confidential Information received from the other party only in connection with fulfilling its obligations under this Agreement. The Parties further agree that expiration or termination of this Agreement, for any reason, shall not relieve either party, nor minimize, their obligations with respect to Confidential Information, as set forth herein.

INDEPENDENT CONTRACTOR

Consultant is an independent contractor. Neither Consultant nor Client are, or shall be deemed for any purpose to be, employee or agents of the other and neither party shall have the power or authority to bind the other party to any contract or obligation. Consultant shall retain the right to perform work for others during the term of this consulting engagement.

REGARDING CONSULTANT EMPLOYEES

Whereas Consultant regards its employees and subcontractors as valuable assets of the organization, it is expected that the client will in no way solicit for hire or for consulting services outside of Consultant contracts without written authorization from a duly authorized representative of Consultant for a period of at least one year following termination or release of contracting of said employee or contractor from Consultant. If authorization is given to client to hire any Consultant employee or contractor, it is expected that satisfactory compensation will be given to Consultant for such privilege, which will be agreed upon by both parties.

WARRANTY

Consultant warrants that it has full power and authority to enter into this Agreement and provide the products and perform the services contemplated herein. Consultant warrants that all services will be performed consistent with generally accepted industry standards and in a good and workmanlike manner by qualified personnel. Consultant disclaims all other warranties, either express or implied, including but not limited to implied warranties of merchantability and fitness for a particular purpose, with respect to

product and services that may be provided herein.

DISPUTE RESOLUTION

In the event of any dispute between the Parties not involving injunctive or equitable relief, the aggrieved party will provide written notice of such dispute to the other party. For a period of 10 days following delivery of written notice, the Parties agree to meet in person to attempt to resolve the dispute via full and frank, good faith discussions. If the Parties are unable to resolve the dispute via full and frank, good faith discussions, the Parties agree to mediate the dispute in good faith before a mutually agreeable mediator within 30 days following the termination of the 10 day discussion period. If the Parties fail to resolve the dispute during the mediation, the Parties may thereafter employ any desired legal remedy.

CONSENT TO JURISDICTION; VENUE

In the event a Party seeks injunctive or equitable relief, or the Parties fail to resolve a dispute in accordance with the Dispute Resolution provisions set forth herein, each of the Parties hereto hereby irrevocably and unconditionally submits, for itself and its property, to the exclusive jurisdiction of any Delaware state court or federal court of the United States of America sitting in Dover, Kent County Delaware, and any appellate court from any thereof, in any action or proceeding arising out of or relating to this Agreement or the transactions contemplated hereunder or for recognition or enforcement of any judgment relating thereto, and each of the Parties hereto hereby irrevocably and unconditionally agrees that all claims in respect of any such action or proceeding may be heard and determined in any such Delaware state court or, to the extent permitted by law, in any such federal court. Each of the Parties hereto agrees that a final judgment in any such action or proceeding shall be conclusive and may be enforced in other jurisdictions by suit on the judgment or in any other manner provided by law. Each of the Parties hereto irrevocably and unconditionally waives, to the fullest extent it or he may legally and effectively do so, any objection that it may now or hereafter have to the laying of venue of any suit, action or proceeding arising out of or relating to this Agreement or the transactions contemplated hereunder in any Delaware state or federal court sitting in Dover, Kent County, Delaware. Each of the Parties hereto irrevocably waives, to the fullest extent permitted by law, the defense of an inconvenient forum to the maintenance of such action or proceeding in any court.

SEVERABILITY

In the event any one or more of the provisions of this Agreement is held to be invalid or otherwise unenforceable, the enforceability of the remaining provisions shall be unimpaired.

ASSIGNMENT

This Agreement, and any right or obligation under this Agreement, may not be assigned, transferred or delegated by either party without the express written consent of the other party, which consent may be withheld by either party at their sole discretion.

FORCE MAJEURE

Consultant shall not be responsible for failure to perform in a timely manner under this Agreement when its failure results from any of the following causes: Acts of God, or public enemies, civil war, insurrection or riot; fire, flood, explosion, earthquake or serious accident; strike, labor trouble or work interruption or any cause beyond its reasonable control; but specifically not including financial issues with respect to Consultant of any nature and extent.

GOVERNING LAW

All issues and questions concerning the construction, validity, interpretation and enforceability of this Agreement shall be governed by, and construed in accordance with, the laws of the State of Delaware, without giving effect to any choice of law or conflict of law rules or provisions (whether of the State of Delaware or any other jurisdiction) that would cause the application of the laws of any jurisdiction other than the State of Delaware. Notwithstanding anything herein to the contrary, each of the Parties' rights and obligations set forth herein are subject to all requirements under laws of the State of Delaware.

ENTIRE AGREEMENT

This Agreement constitutes the entire Agreement between the Parties. Each party agrees that this Agreement is the complete and exclusive statement of the Parties regarding the specific subject matter hereof and supersedes and merges all prior proposals, understandings and agreements, oral or written, between the parties relating to the subject matter hereof. No modification, amendment, supplement to or waiver of this Agreement shall be binding upon the parties unless made in writing and duly signed by both Parties.

[REMAINDER OF PAGE INTENTIONALLY LEFT BLANK. SIGNATURE PAGE FOLLOWS.]

AGREEMENT

By evidence of their signature below, the Parties have entered into this Agreement as of the last date set forth below.

EMDI [Client]	Inmotion Consulting Group, LLC [Consultant]
By:	By:
Title:	Title:
Date:	Date

Appendix A

Services will be billed at an hourly rate of $160.00 per hour. Should further services be requested beyond the amount estimated, work will be billed at the same hourly rate. Estimates do not include "out-of-scope" projects

1. EMDI business plan
   a. Market research & analysis _____ 32 hrs
   b. Budget model _____ 40 hrs
      i. Startup expenses and capitalization
      ii. Projected cash flow
      iii. Balance sheets
      iv. Breakeven analysis
   c. Sales Forecasting _____ 16 hrs
      i. Economics
      ii. Distribution
      iii. Pricing
   d. Operational plan _____ 16 hrs
      i. Production
      ii. Location
      iii. Personnel
      iv. Inventory
      v. Suppliers
2. Overarching strategy, product development, operations, go-to-market, marketing and sales _____ 80 hrs
3. Presentation & communications collateral (sales deck) _____ 80 hrs + costs
4. Ecommerce & infrastructure _____ 24 hrs
5. Distribution & sales pipeline _____ * hrs
   a. Brokers
   b. Direct sales – retail
   c. Direct sales – smokeless tobacco producers
   d. Ecommerce
6. Marketing, promotions & advertising _____ 120 hrs
   a. Web
   b. Trade show
   c. Event
   d. Sponsorship

e. Give-a-ways

7. Implementation of go-to-market strategy 120 hrs

8. Continuation of sales and marketing efforts * hrs

*Notes. (5) Distribution and sales pipeline – Development of distribution and sales channels fall under primarily under the scope of Steve Whitney. IMCG will provide support to these efforts. IMCG will also focus on its current relationships and contacts within the smokeless tobacco industry to secure additional distribution and sales channels. These efforts will be billed at the same rate as above per required time for each engagement. (8) Continuation of sales and marketing efforts – IMCG will continue to manage and advance the product and subsequent products for it's lifespan until such time as EMDI deems service unnecessary per the terms of this Agreement. (General) Hourly billing estimates shown in Appendix A are for planning proposes only. Actual hours may vary from figures listed. Billings based on actuals. Any overages greater than 10% of the estimate per project will be communicated to the Client in writing for approval before fulfilling additional work.

EXHIBIT "B"

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

IN THE COURT OF COMMON PLEAS
THIRTEENTH JUDICIAL DISTRICT
No. 2015-CP-23-07012

INMOTION CONSULTING GROUP, LLC,

Plaintiff,

vs.

EMDI, LLC, and FLASR, INC.,

Defendants.

BRIEF IN OPPOSITION TO MOTIONS TO DISMISS OF DEFENDANTS EMDI, LLC AND FLASR, INC.

COMES NOW Plaintiff InMotion Consulting Group, LLC ("Plaintiff") and respectfully submits the following Brief in Opposition to the Motions to Dismiss of Defendants EMDI, LLC ("EMDI") and Flasr, Inc. ("Flasr") (collectively, EMDI and Flasr are referred to as "Defendants").

INTRODUCTION

This case concerns a business arrangement between Plaintiff and Defendants, whereby Plaintiff agreed to provide services relating to the development and marketing of a portable spittoon for smokeless tobacco users to use in public. After originally being solicited by EMDI's representative who was located and living in Greenville, South Carolina, EMDI and Plaintiff entered into a written agreement in December 2012 in Greenville, South Carolina. As part of the services rendered by Plaintiff, EMDI chose the name "Flasr" for its product, changed its email addresses to reflect a domain name of "@Flasr.com" and incorporated Flasr, Inc., a Defendant in this matter. Plaintiff continued to provide services to EMDI and Flasr, using the @Flasr.com domain name, after Flasr's incorporation. Despite Plaintiff's attempts to recover the outstanding amounts owed to Plaintiff for its work on the product, neither Defendant has paid Plaintiff, either pursuant to the written agreement or in exchange for the services provided.

 Exhibit B

As detailed herein, both Defendants' Motions to Dismiss should be denied for the following reasons: personal jurisdiction exists in South Carolina over both Defendants, due to their solicitation of and communications with Plaintiff while Defendants' representative was living and located in Greenville, South Carolina; due to EMDI having its principal place of business and operations in South Carolina; and due to the execution of the relevant agreement in South Carolina. Venue is proper in Greenville County because the "consent to jurisdiction" clause in the written agreement is permissive, because Flasr, a necessary party, did not consent to jurisdiction in Delaware, and because South Carolina permits a case to be brought in the state despite the existence of a forum selection clause. Finally, Plaintiff has pleaded alternative theories of recovery as permitted under South Carolina, and has sufficiently stated a claim against Flasr for unjust enrichment and *quantum meruit*.

ALLEGATIONS OF THE COMPLAINT

This case arises from an engagement and consulting services agreement entered into between Plaintiff and EMDI on or about December 12, 2012 (the "Agreement"), which provided that, in exchange for the rendering of services by Plaintiff to EMDI, EMDI would provide payment to Plaintiff upon invoice receipt. [Complaint, ¶¶ 6; 9]. Pursuant to the Agreement, Plaintiff provided services to Defendants between November 2012 and June 2013. [Complaint, ¶ 10]. As a consequence of the services provided by Plaintiff, EMDI chose the name "Flasr" for its Product, after which it changed its email addresses to reflect a domain name of "@Flasr.com." [Complaint, ¶ 11]. Flasr was thereafter incorporated to substitute and/or succeed EMDI as the relevant entity in connection with the Agreement. [Complaint, ¶ 12]. After Flasr's incorporation, Plaintiff began providing services for or on behalf of Flasr, in addition to and/or in substitution of EMDI. [Complaint, ¶ 17]. Defendants have failed to pay the outstanding

amounts owing to Plaintiff, despite the Agreement and/or a past history of payments. [*See* Complaint, ¶¶ 21-25].

LEGAL ARGUMENT

I. Standard

"In considering a motion to dismiss a complaint based on a failure to state facts sufficient to constitute a cause of action, the trial court must base its ruling solely on allegations set forth in the complaint. [. . .] If the facts alleged and inferences reasonably deducible therefrom, viewed in the light most favorable to the plaintiff, would entitle the plaintiff to relief on any theory, then dismissal under Rule 12(b)(6) is improper. [. . .] The question is whether, in the light most favorable to the plaintiff, and with every doubt resolved in his behalf, the complaint states any valid claim for relief. [. . .] The complaint should not be dismissed merely because the court doubts the plaintiff will prevail in the action." *Doe v. Marion*, 373 S.C. 390, 395 (2007) (citations omitted).

In *Mid-State Distributors, Inc. v. Century Importers, Inc.*, 310 S.C. 330 (1993), the South Carolina Supreme Court discussed the standard for a Rule 12(b)(6) motion to dismiss in the context of a challenge to jurisdiction:

> South Carolina case law is settled that at the pre-trial stage of the proceedings, the plaintiff need only make a prima facie showing by pleadings and affidavits. [. . .]
>
> There is no 'other evidence' requirement for personal jurisdiction where the complaint itself demonstrates jurisdiction. [. . .] In *Berkeley PG Corp. v. Southbank Inv. Group, Inc.*, 291 S.C. 315, 353 S.E.2d 305 (Ct.App.1987), the Court of Appeals held that it was not necessary for the plaintiff to show a binding contract to be performed within the state, or that the contract was binding between the parties; instead, the court opined that the plaintiff only needed to make a prima facie showing that the trial court should exercise personal jurisdiction. [. . .]
>
> **The prima facie showing of personal jurisdiction at the pre-trial stage is all that is required to continue the civil action. To do otherwise would require a**

much greater degree of specificity in the pleadings than is currently mandated by the South Carolina Rules of Civil Procedure.

Id. at 332-335 (citations omitted) (emphasis added).

II. Personal Jurisdiction Exists Over Flasr

EMDI does not challenge personal jurisdiction. For this reason, this brief only discusses personal jurisdiction as it relates to Flasr. "The determination of whether a court may exercise personal jurisdiction over a nonresident involves a two-step analysis. First, the trial judge must determine that the South Carolina long-arm statute applies. Second, the trial judge must determine that the nonresident's contacts in South Carolina are sufficient to satisfy due process requirements." *Southern Plastics Co. v. Southern Commerce Bank*, 310 S.C. 256, 259 (1992)

A. Statutory Authority For the Exercise of Jurisdiction

S.C. Code Ann. § 36-2-803(A)(1) "gives South Carolina broad powers to exercise personal jurisdiction over a person as to a cause of action arising from the person's transacting any business in this State." *Southern Plastics*, 310 S.C. at 260. Section 36-2-803(A)(7) permits a court to exercise personal jurisdiction over a person who enters into a contract "to be performed in whole or in part by either party in [South Carolina]."

Both of these subsections apply to the facts of this case. Plaintiff has sufficiently pleaded successor liability in its Complaint, by alleging that Flasr is a mere continuation of EMDI, that EMDI transferred all or substantially all of its assets and ownership to Flasr, and that Flasr remained as the surviving and operating entity of the two Defendants. [*See* Complaint, ¶¶ 12-16]. As the successor entity to EMDI, Flasr transacted business in South Carolina by soliciting Plaintiff while Defendants' representative was in South Carolina, and by executing the Agreement in South Carolina. All subsequent meetings between Defendants' representative and Plaintiff occurred in South Carolina. Defendants' representative, at all relevant times, was

located and conducting business in South Carolina. The Agreement was to be performed at least in part in South Carolina, and both Defendants were transacting business in South Carolina. The face of the Complaint and the Affdiavit of Chad Melnik ("Melnik Affidavit") alleges as such. [*See* Complaint, ¶¶ 6-7; Melnik Affidavit, ¶¶ 6-11].

Flasr was transacting business in South Carolina via its representative, Everett Dickson, and as the successor of EMDI. *See* S.C. Code Ann. § 36-2-803(A)(1). The Agreement, which applies equally to Flasr as EMDI's successor entity, was to be performed at least in part in South Carolina. *See* S.C. Code Ann. § 36-2-803(A)(7). Because the actions that form the subject of the Complaint fall under South Carolina's long-arm statutes, personal jurisdiction may exist as long as due process is not violated.

B. Due Process Is Not Violated

"[. . .] [D]ue process requires that there exist minimum contacts between the defendant and the forum state such that maintenance of the suit does not offend traditional notions of fair play and substantial justice." *Southern Plastics Co. v. Southern Commerce Bank*, 310 S.C. 256, 260 (1992). "Further, due process mandates that the defendant possess sufficient minimum contacts with the forum state, so that he could reasonably anticipate being haled into court there." *Cockrell v. Hillerich & Bradsby Co.*, 363 S.C. 485, 492 (2005).

As discussed in the Melnik Affidavit, at all relevant times, Flasr was doing business in South Carolina upon information and belief, and particularly in light of the allegation that Flasr is EMDI's successor entity. [*See* Melnik Affidavit, ¶ 5; Complaint ¶¶ 12-16]. Plaintiff was originally solicited by Defendants' representative, Everett Dickson, while he was located and living in Greenville County, South Carolina. [*See* Melnik Affidavit, ¶ 6]. Moreover, Plaintiff sent the Agreement to Defendants' corporate representative in Greenville County, South

Carolina, pursuant to the representative's request, after which the representative executed the Agreement in Greenville County, South Carolina. [*See* Melnik Affidavit, ¶¶ 8-9]. All subsequent meetings between Plaintiff and Defendants occurred in South Carolina. [*See* Melnik Affidavit, ¶ 10].

Flasr, as the successor entity to EMDI, purposefully availed itself of the privilege of engaging in business in South Carolina. Flasr, continuing the work of EMDI, should have reasonably anticipated being haled into court in South Carolina. Due process is satisfied, and the courts of South Carolina have personal jurisdiction over Flasr.

C. At a Minimum, Plaintiff Is Entitled to a Full Evidentiary Hearing Post-Discovery

If both parties submit dueling affidavits in connection with a lack of personal jurisdiction argument, then the trial court "may hear the matter on affidavits presented by the respective parties, but may direct that the matter be heard wholly or partly on oral testimony or depositions." *See* S.C. Rule Civ. Proc. 43(e). At the very least, should there be dueling affidavits, Plaintiff should be permitted the opportunity to conduct discovery in order to determine the extent and nature of Flasr's contacts with South Carolina. Plaintiff is entitled to use the discovery process in order for the Court to be able to fully consider the jurisdictional issues.

III. Venue Is Proper in Greenville County, South Carolina

Both parties rely upon the consent clause contained in the Agreement in support of their Motions to Dismiss. The clause entitled "Consent to Jurisdiction; Venue" (the "Consent Clause") states that the parties submit to the jurisdiction and venue of any state or federal court in Delaware "in any action or proceeding arising out of or relating to this Agreement or the transactions contemplated hereunder [. . .], and each of the Parties hereto hereby irrevocably and unconditionally agrees that all claims in respect of any such action or proceeding **may be heard**

and determined in any such Delaware state court or, to the extent permitted by law, in any such federal court." [Emphasis added]. The remainder of the Consent Clause discusses the parties' consent to the jurisdiction and venue of the Delaware courts, **should** an action be brought there.

At the outset, review of the plain language of the Consent Clause indicates that it is permissive, not mandatory, and was intended to prevent the parties from challenging the jurisdiction and venue of Delaware courts, rather than to require any litigation to be brought there. *See North American Rescue Products, Inc. v. Richardson*, 411 S.C. 371, 378 (2015) (giving effect to a contract's plain language as the best evidence of the parties' intent). At the very least, the language of the subject forum selection clause is ambiguous and should be submitted to the trier of fact for interpretation. *See Hawkins v. Greenwood Development Corp.*, 328 S.C. 585, 592 (1997).

Moreover, S.C. Code § 15-7-20 provides, "Notwithstanding a provision in a contract requiring a cause of action arising under it to be brought in a location other than as provided in this title and the South Carolina Rules of Civil Procedure for a similar cause of action, the cause of action alternatively may be brought in the manner provided in this title and the South Carolina Rules of Civil Procedure for such causes of action."

South Carolina law therefore permits Plaintiff to bring this action in Greenville County, South Carolina, despite the Consent Clause, should it be enforceable and/or applicable. The venue statutes further authorize this venue. Under S.C. Code § 15-7-30(F) & (G), an action against a foreign corporation must be brought and tried in the county in which the corporation maintained its principal place of business at the time the cause of action arose, or in which the most substantial part of the alleged wrongful acts giving rise to the cause of action occurred.

As alleged, EMDI's principal place of business, at all relevant times, was in Greenville County, South Carolina. Moreover, Defendants' failure to pay Plaintiff constitute the wrongful acts giving rise to this action, and such failure occurred by Defendants' representative, who at all relevant times was living and conducting business in Greenville County, South Carolina. This case is properly brought against Defendants in this venue. *See also* S.C. Code § 15-7-30(B).

Finally, there was never any business conducted between the parties in Delaware. To transfer this matter to Delaware would impose upon the Plaintiff an undue hardship, as Plaintiff does not reside in and/or visit or conduct business in Delaware, nor do any of Plaintiff's employees or agents who would need to provide testimony in this matter. Presumably, to transfer this matter to Delaware would also impose upon the Defendants an undue hardship, as, upon information and belief, neither of the Defendants resides in and/or visits or conducts business in Delaware, nor do any of the Defendants' employees or agents who would need to provide testimony in this matter. [*See* Melnik Affidavit, ¶¶ 13-15].

IV. Plaintiff's Complaint Sufficiently States a Claim Against Flasr

"The elements to recover for unjust enrichment based on quantum meruit, quasi-contract, or implied by law contract, which are equivalent terms for equitable relief, are: '(1) a benefit conferred by the plaintiff upon the defendant; (2) realization of that benefit by the defendant; and (3) retention of the benefit by the defendant under circumstances that make it inequitable for him to retain it without paying its value.'" *Regions Bank v. Wingard Properties, Inc.*, 394 S.C. 241, 257 (2011). In deciding a motion to dismiss brought pursuant to Rule 12(b)(6), the trial court must treat all material factual allegations in the complaint as true.

Here, Plaintiff has alleged the following statements concerning Flasr, all of which must be taken as true:

- Flasr, Inc. was incorporated as the successor entity to EMDI and began to operate as the successor in interest and in lieu of EMDI in connection with the Product.

- EMDI transferred all or substantially all of its assets and ownership to Flasr after Flasr's incorporation.

- Flasr is a mere continuation of EMDI, as Flasr has some of the same shareholders, directors and officers, including without limitation, Everett Dickson; the transfer of assets and shareholders, directors and officers from EMDI to Flasr amounts to a *de facto* merger of the two companies.

- Flasr remained as the surviving and operating entity after the transfer of assets from EMDI to Flasr.

- Flasr is the successor entity to EMDI and is therefore liable for the debts of EMDI.

- After Flasr's incorporation, Plaintiff began providing services for or on behalf of Flasr, in addition to and/or in substitution of EMDI.

- After Flasr's incorporation, Plaintiff's business transactions were with Flasr and Everett Dickson on behalf of Flasr.

- Flasr and EMDI have therefore benefited from the services provided by Plaintiff.

- Defendants have failed to pay the outstanding amounts owing to Plaintiff.

- Plaintiff provided services to Flasr at the request and direction of Flasr for which Plaintiff has not been compensated.

- Flasr has received a benefit from Plaintiff's actions and services.

- Plaintiff expected to be paid for such services and this expectation was reasonable because, among other things, Plaintiff provided the services at the express request and direction of Flasr.

- Flasr knew or should have known that Plaintiff expected to be paid for the services provided.

- Allowing Flasr to retain the benefits of the services provided by Plaintiff without paying for them would result in unjust enrichment.

[*See generally* Complaint].

Plaintiff has therefore sufficiently alleged a claim for unjust enrichment and quantum meruit. Under the standard for Rule 12(b)(6) motions to dismiss, anything asserted by Flasr to the contrary in its Motion to Dismiss cannot and should not be considered at this dismissal stage.

S.C. Rule Civ. Proc. 8(e)(2) provides:

> A party may set forth two or more statements of a claim or defense alternatively or hypothetically, either in one count or defense or in separate counts or defenses. When two or more statements are made in the alternative and one of them if made independently would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements. A party may also state as many separate claims or defenses as he has regardless of consistency and whether based on legal or on equitable grounds or on both.

Plaintiff has pleaded alternative theories of recovery, as it is entitled to, against the parties so to preserve its right to do so and ensure proper recovery.

CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that the Court deny Defendants EMDI and Flasr's respective Motions to Dismiss in their entireties.

THIS the 5th day of February, 2016.

HAMILTON STEPHENS
STEELE + MARTIN, PLLC

By: _____

Allen L. West (SC Bar No. 15674)
201 South College Street, Suite 2020
Charlotte, North Carolina 28244-2020
Telephone: (704) 344-1117
Fax: (704) 344-1483
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served upon all parties and/or counsel of record was served upon all counsel of record via Federal Express, overnight mail, postage prepaid and addressed as follows:

S. Sterling Laney III
Michael S. Cashman
Womble, Carlyle, Sandridge & Rice, LLP
550 South Main Street, Suite 400
Greenville, SC 29601
Facsimile: (864) 239-5862
mcashman@wcsr.com; slaney@wcsr.com
Attorneys for Defendants

This the 5th day of February, 2016.

By: _____
Allen L. West

HAMILTON STEPHENS
STEELE + MARTIN, PLLC
201 South College Street, Suite 2020
Charlotte, North Carolina 28244-2020
Telephone: (704) 344-1117

WOMBLE CARLYLE SANDRIDGE & RICE
A LIMITED LIABILITY PARTNERSHIP

550 South Main Street
Suite 400
Greenville, SC 29601

Mailing Address:
Post Office Box 10208
Greenville, SC 29603
Telephone: (864) 255-5400
Fax: (864) 255-5440
www.wcsr.com

Michael S. Cashman
Direct Dial: (864) 255-5430
Direct Fax: (864) 239-5880
E-mail: mcashman@wcsr.com

July 12, 2016

Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
1220 Senate Street
Columbia, SC 29201

Re: FLASR, Inc. and EDMI, LLC. v. InMotoin Consulting Group, LLC
Appeal from Greenville County Court of Common Pleas
Appellate Case No. 2016-001105

Dear Ms. Kitchings:

Attached please find the original and one copy of the **Brief of the Appellant** in the above-referenced matter. Please return a filed copy to us in the stamped, self-addressed envelope enclosed.

By copy of this letter to Allen L. West, we are serving him a copy of same.

With kind regards, I remain

Sincerely yours,

Michael S. Cashman

Michael S. Cashman

MSC/dps
Enclosure

cc: Allen L. West, Esq.

ORIGIN ID:LQKA (864) 255-5400
DEBORAH STOUT
WOMBLE CARLYLE, LLP
550 SOUTH MAIN STREET SUITE 400

GREENVILLE, SC 29601
UNITED STATES US

SHIP DATE: 12JUL16
ACTWGT: 0.50 LB
CAD: 103494926/WSXI2500

BILL SENDER

TO JENNY ABBOTT KITCHINGS
SOUTH CAROLINA COURT OF APPEALS
1220 SENATE ST

COLUMBIA SC 29201
(803) 734-1890 REF 89170-0001.9/7377
INV
PO DEPT

RECEIVED
JUL 13 2016
SC Court of Appeals

540J1/[illegible]727F

FedEx Express

J151010020501uv

REL#
3785346

WED - 13 JUL 10:30A
PRIORITY OVERNIGHT

TRK# 0201 7835 6542 4450

XH USCA

29201
SC-US CAE

PS|Ship - FedEx Label