THE STATE OF SOUTH CAROLINA
In the Court of Appeals
No. 2016-001105

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SC Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas
Letitia H. Verdin, Circuit Court Judge

EMDI, LLC and FLASR, Inc. .................................................... Appellants,

v.

InMotion Consulting Group, Inc. ................................................ Respondent.

# BRIEF OF THE RESPONDENT

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## STATEMENT OF ISSUES ON APPEAL

1. Whether the court may consider the Appellants' appeal, where such issues are interlocutory, not subject to immediate appeal, and untimely?

2. Whether the lower court ruled on Appellants' motion to dismiss based on subject matter jurisdiction, where such motion was based on the forum selection clause, and where the lower court issued a specific finding that forum was proper in Greenville County, South Carolina?

3. Whether the lower court correctly ruled that venue was proper in Greenville County, South Carolina, pursuant to the relevant South Carolina Code sections, and pursuant to the permissive language of the contract between the parties?

4. Whether the lower court correctly ruled that personal jurisdiction exists over Appellant FLASR, Inc., where (a) Respondent has sufficiently alleged successor liability, (b) where Respondent has met its pleading requirements, (c) where the South Carolina long-arm statute applies, and (d) where the evidence shows that due process has been met?

5. Whether the lower court correctly ruled that Respondent sufficiently alleged breach of contract against Appellant FLASR, Inc., where Respondent has sufficiently alleged successor liability?

STATEMENT OF THE CASE

The Complaint in this matter was originally filed on November 24, 2015, and arises from monies owed Respondent by Appellants pursuant to an engagement and consulting services agreement entered into on or about December 12, 2012 (the "Agreement"), which provided for payment to Respondent in exchange for various services performed by Respondent in connection with the development of a portable spittoon product. Complaint ¶¶ 6; 9.

As a consequence of the services provided by Respondent, Appellant EMDI, LLC ("Appellant EMDI") chose the name "Flasr" for its portable spittoon product, after which it changed its email addresses to reflect a domain name of "@Flasr.com." Complaint ¶ 11. Appellant FLASR, Inc. ("Appellant FLASR") was thereafter incorporated to substitute and/or succeed Appellant EMDI as the relevant entity in connection with the Agreement. Complaint ¶ 12. When Appellant FLASR was incorporated on February 13, 2013, Everett Dickson owned all of the stock of Appellant FLASR and was the President, Chief Executive Officer, Secretary, Treasurer and sole director of Appellant FLASR. Transcript p. 12. Everett Dickson was also Appellant EMDI's President at the time. Mr. Dickson is the individual who originally solicited Respondent and who executed the Agreement. Affidavit of Chad Melnik ¶¶ 6; 8-9.

After Appellant FLASR's incorporation, Respondent began providing services for or on behalf of Appellant FLASR, in addition to and/or in substitution of Appellant EMDI. Complaint ¶ 17. At that time, Mr. Dickson was in South Carolina conducting business as an officer and shareholder of both Appellants. Transcript p. 12.

On January 7, 2016, Appellants filed their original Motions to Dismiss. Appellant EMDI moved to dismiss the Complaint for lack of subject matter jurisdiction and improper venue, pursuant to South Carolina Rules of Civil Procedure 12(b)(1) and 12(b)(3). Appellant FLASR moved to dismiss for lack of personal jurisdiction, lack of subject matter jurisdiction, improper venue and failure to state a claim, pursuant to South Carolina Rules of Civil Procedure 12(b)(1), 12(b)2), 12(b)(3) and 12(b)(6). A hearing was held on the Motions to Dismiss on February 10, 2016.

On March 8, 2016, Judge Letitia H. Verdin entered an Order denying all of Appellants' Motions to Dismiss. On March 31, 2016, Appellants filed a Motion for Clarification and Reconsideration. On May 6, 2016, Judge Verdin entered an Order denying the Appellants' Motion for Clarification and Reconsideration.

Appellants filed their Notice of Appeal on May 18, 2016. On June 2, 2016, in response to inquiry by the South Carolina Court of Appeals Clerk of Court, Appellants filed the Form 4 Judgments that they are challenging in this appeal. This appeal concerns Judge Verdin's denial of Appellants' 12(b) Motions to Dismiss and subsequent denial of Appellants' Motion for Clarification and Reconsideration.

## ARGUMENT

### I. The Issues Presented in Appellants' Appeal Are Interlocutory in Nature, Not Subject to Immediate Appeal, and Untimely.

On or around August 5, 2016, Respondent filed a Motion to Dismiss Appellants' Appeal on the grounds that all of the issues presented in the appeal are interlocutory, not subject to immediate appeal, and therefore untimely. Respondent also filed an accompanying Memorandum in Support of Respondent's Motion to Dismiss Appeal, which is incorporated herein by reference.

S.C. Code § 14-3-330 sets forth those orders for which appellate jurisdiction exists. Generally, S.C. Code § 14-3-330 limits the appellate court's ability to hear appeals: "Only final judgments and certain interlocutory orders are appealable." Burkey v. Noce, 398 S.C. 35, 37, 726 S.E.2d 229, 230 (Ct.App.2012). "The provisions of Section 14-3-330 … have been narrowly construed and immediate appeal of various orders issued before or during trial generally has not been allowed." Hagood v. Sommerville, 362 S.C. 191, 196, 607 S.E.2d 707, 709 (2005). "Currently, this Court does not allow immediate appellate review of the denial of any Rule 12(b), SCRCP motion." Breland v. Love Chevrolet Olds, Inc., 339 S.C. 89, 93, 529 S.E.2d 11, 13 (2000). "The basic policy behind denying immediate review of pretrial motions is avoidance of piecemeal litigation where the rights of the parties have not been substantially impacted." Id. at 94, 529 S.E.2d at 13.

In their appellate brief, Appellants, too, acknowledge the interlocutory nature of their 12(b) Motions to Dismiss: "Although venue, personal jurisdiction, and a 12(b)(6) challenge are not traditionally subject to interlocutory appeal, they may nonetheless become appealable." Brief of the Appellant p. 2.

Appellants attempt to argue that, because there is at least one appealable issue before this Court, this Court may also consider the remaining (interlocutory) issues of venue, personal jurisdiction, and failure to state a claim. See Brief of the Appellant p. 2 ("In South Carolina, "[a]n order that is not directly appealable will be considered if there is an appealable issue before the court." (citations omitted)). In support of this argument, Appellants claim that "[s]ubject matter jurisdiction is immediately appealable." Brief of the Appellant p. 2.

Appellants' argument, however, is based on outdated law which has since been overruled and/or vacated. The sole case Appellants provide in support of their proposition that subject matter jurisdiction is immediately appealable is Chew v. Newsome Chevrolet, Inc., 315 S.C. 102, 104 (Ct.App.1993). While Chew does provide that "[a]n interlocutory order denying a motion to dismiss for lack of subject matter jurisdiction is immediately appealable," this statement relies on two cases which are no longer good law: (a) Carter v. Florentine Corp. Inc., 310 S.C. 228, 423 S.E.2d 112 (1992) and (b) Woodard v. Westvaco Corp., 315 S.C. 329, 433 S.E.2d 890 (Ct.App.1993).

Both Carter and Woodard have been overruled and/or vacated by Woodard v. Westvaco Corp., 319 S.C. 240, 460 S.E.2d 393 (1995), which specifically holds and states that the denial of a Rule 12(b)(1) motion to dismiss based on subject matter jurisdiction is an interlocutory order which is not immediately appealable. See Woodard v. Westvaco Corp., 319 S.C. 240, 242-43, 460 S.E.2d 393, 393-94 (1995), overruled in part on other grounds, Sabb v. South Carolina State University, 350 S.C. 416, 567 S.E.2d 231 (2002). The 2011 case of Allison v. W.L. Gore & Associates, 394 S.C. 185, 714 S.E.2d 547 (2011), reaches the same holding: the denial of a Rule 12(b)(1) motion to dismiss based on subject matter jurisdiction is an interlocutory order which is not immediately appealable. Id. at 188, 714 S.E.2d at 549.

As for the remaining 12(b) motions at issue in Appellants' Motions to Dismiss, South Carolina courts have clearly held that the denial of such motions are interlocutory and not immediately or directly appealable. See Huntley v. Young, 319 S.C. 559, 560, 462 S.E.2d 860, 861 (1995) (denial of a Rule 12(b)(6) motion to dismiss is an interlocutory order which is not immediately appealable); Moyd v. Johnson, 289 S.C.

482, 482, 347 S.E.2d 97, 98 (1986) (same); OZO, Inc. v. Moyer, 358 S.C. 246, 252, 594 S.E.2d 541, 545 (Ct.App.2004) (denial of a motion to dismiss based on personal jurisdiction is not usually immediately appealable); Breland v. Love Chevrolet Olds, Inc., 339 S.C. 89, 94, 529 S.E.2d 11, 14 (2000) ("Even though proper venue is a substantial right, we have previously found the avoidance of a trial is not a sufficient reason to justify immediate appellate review. [. . .] [W]e find the right of proper venue has not been affected such that the order would be immediately appealable.").

Therefore, because the two orders challenged by the Appellants concern only interlocutory 12(b) issues which are not immediately appealable, Appellants' appeal is untimely, and the Court should not consider any portion of it, as further analysis is unnecessary.

## II. The Lower Court Ruled on Appellants' Motion to Dismiss for Lack of Subject Matter Jurisdiction, as Such Motion Was Based Solely on the Forum Selection Clause, and the Lower Court Issued a Ruling That Forum Was Proper in Greenville County, South Carolina.

The crux of Appellants' Motions to Dismiss based on subject matter jurisdiction is the forum selection provision in the Agreement between the parties. See EMDI, LLC's Memorandum in Support of Its Motion to Dismiss p. 1 & Section III; FLASR, Inc.'s Memorandum in Support of its Motion to Dismiss p. 2; FLASR, Inc. and EMDI, LLC's Motion for Clarification and Reconsideration Section III.B & p. 2 ("EMDI's motion to dismiss for improper venue and lack of jurisdiction, both based on the forum selection clause in Plaintiff's own contract, should be granted.").

The original order on the Motions to Dismiss, dated March 8, 2016, clearly provides, "Defendant's Motion to Dismiss is denied." March 8, 2016 Order p. 2. The original order also provides, "South Carolina law under S.C. Code 15-7-20 and 15-7-30

permits Plaintiff to bring action in Greenville County." Id. In response to Appellants' Motion for Clarification and Reconsideration, the lower court's May 6th Order clearly provides, "Defendant's motion for reconsideration is denied." May 6, 2016 Order p. 1.

The lower court therefore specifically ruled on the issue of subject matter jurisdiction by finding Greenville County to be a proper forum. In addition, the lower court generally ruled that all of the 12(b) motions were denied – both at the time of the original Motions to Dismiss and at the time of the Motion for Clarification and Reconsideration.

Appellants are attempting to argue that the lower court's failure to explicitly issue a finding using the term "subject matter jurisdiction" means that the lower court did not rule on the issue of subject matter jurisdiction. A reading of the lower court's two orders in their totalities, however, reveals that the lower court did in fact issue a ruling, and that its ruling was to deny Appellants' Motions.

## III. The Lower Court Correctly Ruled that Venue Was Proper in Greenville County, South Carolina, Pursuant to the South Carolina Code, and Pursuant to Permissive Language of the Agreement.

At the outset, it should be noted that the two cases primarily relied upon by Appellants for their argument that the Agreement's forum selection provision is valid and enforceable do not apply to this case. Minorplanet Systems USA Ltd. v. American Aire, Inc., 368 S.C. 146 (2006), the first case relied upon by Appellants, relies upon and cites only Texas state law, not South Carolina law. Atlantic Floor Services, Inc. v. Wal-Mart Stores, Inc., 334 F.Supp.2d 875 (D.S.C. 2004), the second case relied upon by Appellants, is a federal case which specifically deferred to governing federal law in

analyzing whether the forum selection clause at issue was valid and enforceable. See id. at 877. Neither of these cases is controlling or applicable to the facts of this action.[1]

Regardless of Appellants' reliance on other jurisdictions' law, there are several reasons for which the forum selection clause does not require this action to be brought in Delaware. S.C. Code § 15-7-120 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 Respondent 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, Appellant EMDI's principal place of business, at all relevant times, was in Greenville County, South Carolina. Moreover, Appellants' failure to pay Respondent constitute the wrongful acts giving rise to this action, and such failure occurred by Appellants' representative, who at all relevant times was living and

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[1] In addition, Republic Leasing Company, Inc. v. Haywood, 329 S.C. 562, 495 S.E.2d 804 (1998), also relied upon by Appellants, does not, as Appellants' citation would suggest, provide for the unfettered holding that forum selection provisions are *prima facie* valid and enforceable. The Haywood court cited federal law and stated, "Today, however, they are *prima facie* valid and enforceable when made at arm's length by sophisticated business entities, absent a compelling reason for abrogation. . . . Forum selection clauses will not be enforced if unreasonable or unjust. . . . Courts must scrutinize them for 'fundamental fairness.'" Id. at 566, 495 S.E.2d at 806.

conducting business in Greenville County, South Carolina. This case is properly brought against Appellants in this venue. See also S.C. Code § 15-7-30(B).

Moreover, the Agreement's 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." Agreement p. 5 (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). The use of the terms "may" and "should an action be brought there" are not mandatory.

Finally, there was never any business conducted between the parties in Delaware. To transfer this matter to Delaware would impose upon the Respondent an undue hardship, as Respondent does not reside in and/or visit or conduct business in Delaware, nor do any of Respondent'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

Appellants an undue hardship, as, upon information and belief, neither of the Appellants resides in and/or visits or conducts business in Delaware, nor do any of the Appellants' employees or agents who would need to provide testimony in this matter. See Affidavit of Chad Melnik ¶¶ 13-15.

For these reasons, the lower court correctly held that venue is proper in Greenville County, South Carolina.

## IV. The Lower Court Correctly Ruled that Personal Jurisdiction Exists Over Appellant FLASR, Where Respondent Sufficiently Alleged Successor Liability, Where the Long-Arm Statutes Apply, and Where Due Process Has Not Been Violated.

In Mid-State Distributors, Inc. v. Century Importers, Inc., 310 S.C. 330, 426 S.E.2d 777 (1993), the South Carolina Supreme Court discussed the standard that a plaintiff must meet as it relates to personal 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. [. . .] **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, 426 S.E.2d at 779-80 (citations omitted) (emphasis added).

Respondent has made a *prima facie* showing of personal jurisdiction by sufficiently alleging successor liability in its Complaint. Respondent has alleged that Appellant FLASR is a mere continuation of Appellant EMDI, that Appellant EMDI transferred all or substantially all of its assets and ownership to Appellant FLASR, and that Appellant FLASR remained as the surviving and operating entity of the two Appellants. See Complaint ¶¶ 12-16. As the successor entity to Appellant EMDI,

Appellant FLASR transacted business in South Carolina by soliciting Respondent while Appellants' representative, Mr. Dickson, was in South Carolina, and by executing the Agreement in South Carolina. All subsequent meetings between Appellants' representative and Respondent occurred in South Carolina. Appellants' 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 Appellants were transacting business in South Carolina. The face of the Complaint and the Affidavit of Chad Melnik alleges as such. See Complaint ¶¶ 6-7; Affidavit of Chad Melnik ¶¶ 6-11.

Further, personal jurisdiction over Appellant FLASR is authorized under South Carolina's long-arm statutes. S.C. Code § 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 Co. v. Southern Commerce Bank, 310 S.C. 256, 260, 423 S.E.2d 128, 130 (1992). S.C. Code § 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]."

As alleged and reiterated in the Affidavit of Chad Melnik, Appellant FLASR was transacting business in South Carolina via its representative, Mr. Dickson, and as the successor of Appellant EMDI. The Agreement, which applies equally to Appellant FLASR as Appellant EMDI's successor entity, was to be performed at least in part in South Carolina. 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.

Due process is not violated because Appellant FLASR had minimum contacts with South Carolina, Respondent's claim arises from such contacts, and exercising jurisdiction is reasonable. In Crabb v. Spatholt, 382 S.C. 490, 676 S.E.2d 714 (Ct.App.2009), the Court of Appeals found that minimum contacts were established where the defendant negotiated a contract in South Carolina, and where it was within the defendant's contemplation that at least part of the contract would be performed in the state. Id. at 503, 676 S.E.2d at 721. In addition, it was reasonable to assert jurisdiction over the Crabb defendant because (1) the defendant either came to South Carolina or conducted meetings with South Carolina representatives in performing his contract, (2) the defendant's acts were in furtherance of the contract, (3) it would not significantly inconvenience either party to adjudicate in South Carolina, and (4) South Carolina had an interest in providing redress for its citizens. Id. at 503-04, 676 S.E.2d at 721.

Here, Appellant FLASR transacted business in South Carolina by soliciting Respondent while Appellants' representative, Mr. Dickson, was in South Carolina, and by executing the Agreement in South Carolina. All subsequent meetings between Appellants' representative and Respondent occurred in South Carolina. Appellants' 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 Appellants were transacting business in South Carolina.

Further, Mr. Dickson was acting interchangeably on behalf of both Appellants. Due to the services provided by Respondent, Appellant FLASR was incorporated to substitute and/or succeed Appellant EMDI as the relevant entity in connection with the Agreement. Complaint ¶ 12. When Appellant FLASR was incorporated on February 13,

2013, Mr. Dickson owned all of the stock of Appellant FLASR and was the President, Chief Executive Officer, Secretary, Treasurer and sole director of Appellant FLASR. Transcript p. 12. Mr. Dickson was also Appellant EMDI's President at the time. Affidavit of Chad Melnik ¶¶ 6; 8-9. After Appellant FLASR's incorporation, Respondent began providing services for or on behalf of Appellant FLASR. Complaint ¶ 17. At that time, Mr. Dickson was in South Carolina conducting business as an officer and shareholder of both Appellants. Transcript p. 12. At all times relevant to this litigation, Respondent was providing services for both Appellants.

The facts and circumstances cited above establish Appellant FLASR's minimum contacts with South Carolina, shows that Respondent's claim arises from the same, and renders jurisdiction over Appellant FLASR reasonable. Appellant FLASR, as the successor entity to Appellant EMDI, purposefully availed itself of the privilege of engaging in business in South Carolina. Appellant FLASR, continuing the work of Appellant EMDI, should have reasonably anticipated being haled into court in South Carolina. As such, the lower court correctly found that personal jurisdiction over Appellant FLASR exists.

## V. The Lower Court Correctly Ruled that Respondent Sufficiently Alleged Breach of Contract Against Appellant FLASR, Where Respondent Included the Requisite Allegations for Successor Liability.

In Doe v. Marion, 373 S.C. 390, 645 S.E.2d 245 (2007), the Supreme Court discussed the standard for a 12(b)(6) motion to dismiss:

> 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.

Id. at 395, 645 S.E.2d at 247-48 (citations omitted).

Pursuant to the standard articulated above, Respondent has sufficiently alleged successor liability against Appellant FLASR, thereby exposing Appellant FLASR to liability for breach of contract and the remaining causes of action. Moreover, and again, Appellant FLASR is not entitled to argue the merits of Respondent's claim of successor liability at this time. Respondent has met its burden of pleading successor liability at this stage of litigation.

Further, 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."

Respondent 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. The lower court thus correctly ruled that a cause of action for breach of contract had been sufficiently alleged against Appellant FLASR.

## CONCLUSION

For the foregoing reasons, Respondent respectfully requests that this Court dismiss Appellants' appeal on the grounds that the issues presented therein are

interlocutory, not immediately appealable and untimely, or, in the alternative, that this Court uphold the lower court's orders denying the Appellants' motions to dismiss and remand this matter for further proceedings.

Respectfully submitted, this the 9th day of August, 2016.

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