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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

R. Lawton McIntosh, Circuit Court Judge

Opinion No. 2016-000662 (S.C. Ct. App. filed Aug. 22, 2016)

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

v.

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

PETITION FOR A WRIT OF CERTIORARI

Adam C. Bach (SC Bar # 74885)
R. Hudson Smith (SC Bar # 101369)
ELLER TONNSEN BACH, LLC
1306 South Church Street
Greenville, SC 29605
Telephone: (864) 236-5013
Facsimile: (864) 312-4191
abach@etblawfirm.com
Attorneys for Petitioner

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

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CERTIFICATE OF COUNSEL

Counsel for the Petitioner Mattress by Appointment, LLC ("MBA") certifies that the Petition for Rehearing was made and finally ruled upon by the Court of Appeals on August 22, 2016.

QUESTIONS PRESENTED

1. Is an order requiring an attorney to verify his clients' pleadings, motions, filings, and discovery responses compatible with an attorneys' duties under the Rules of Professional Conduct?
2. Can the circuit court order verification of all pleadings, motions, filings, and discovery responses by a corporation's highest ranking corporate officer under the Rules of Civil Procedure?
3. Does an order compelling attorney verification and verification by the highest ranking corporate officer of a company affect substantial rights within the meaning of S.C. Code Ann. § 14-3-330?

STATEMENT OF THE CASE

On September 15, 2015, MBA filed its summons and complaint in the Anderson County Court of Common Pleas. Appendix ("App.") at 236-46. MBA alleges that Darren Conrad, its former owner and officer, violated his non-compete agreement with MBA, was enjoined by a Florida court from competing with MBA, was ordered not to act in concert with any third parties in continued violation of his non-compete agreement, and was ordered to report to prison in Duvall County, Florida as a sanction for his continued violations of the Florida court's order. Id. MBA alleges that despite knowing of Conrad's non-compete and the Florida orders, the respondents Retail Service Systems, Inc. ("RSS"), Carlton Scott Andrews, and Boxdrop Furniture, Inc.

("Boxdrop"), hired Darren Conrad as their agent to solicit third-parties to violate their contracts and non-competes with MBA. MBA further alleges that following their hiring of Conrad, RSS, Andrews, and Conrad engaged in a conspiracy to force MBA to merge with RSS by threatening MBA with litigation supported by testimony purchased from Conrad.

In response to MBA's complaint, the respondents moved to dismiss. Id. at 250-57. Boxdrop also moved for a more definite statement pursuant to Rule 12(e) because it claimed it was unclear what allegations were made as to Boxdrop. Id. at 259-61. Even though Conrad never denied that MBA was a party to the non-compete during the nearly year-long litigation prior to the Florida court's injunction, the respondents' motion to dismiss alleges that MBA was not a party to the non-compete. Id. at 250-257. The respondents also moved to dismiss because jurisdiction and venue were more properly placed in Duvall County, Florida. Id. at 116. On January 25, 2016, MBA filed an amended complaint in advance of the hearing seeking to clarify its allegations in response to the respondents' motions to dismiss. Id. at 119-29.

A hearing was held on the respondents' motions on January 26, 2016. Id. at 486-519. On January 27, 2016, the Circuit Court entered a *sua sponte* order – the order that is the subject of this appeal – requiring MBA to provide a more definite and certain statement. Id. at 1-3. The Circuit Court also required that (1) MBA's amended pleading be verified by MBA's attorneys and highest ranking corporate officer; (2) all future pleadings, motions, filings, and discovery responses be verified by the parties' highest ranking corporate officer and their respective attorneys; and (3) MBA identify all predecessors and successors. Id.

On January 29, 2016, MBA filed a motion to reconsider, alter, or amend judgment. Id. at 4-129. In its motion to reconsider, MBA asked the Circuit Court to clarify whether its requirement that all filings and discovery responses be verified by its attorneys referred to verification as

provided for by Rule 11(c) or to the attorney's certification as required by Rule 11(a). Id. at 23-24. MBA also asked the Court to amend or clarify its order requiring verification of all documents by its highest ranking corporate officer. Id. MBA asked the Court to stay its order pending amendment or clarification. Id. The Court denied MBA's motion to stay its order. On February 5, 2016, MBA filed its verified second amended complaint as ordered by the Court. Id. at 311-32.

On February 24, 2016, the Circuit Court entered a form order denying MBA's motion to reconsider. Id. at 130-31. On March 24, 2016, MBA filed its notice of appeal appealing the Circuit Court's orders issued January 27, 2016 and February 24, 2016. Id. at 132-39. On April 4, 2016, the Clerk of the Court of Appeals sent a letter to the parties asking all parties to submit a memorandum addressing whether the Circuit Court's January 27, 2016 order is immediately appealable. Id. at 140-41. On April 14, 2016, MBA and the respondents submitted the required memoranda. Id. at 142-369.

On June 9, 2016, the Court of Appeals dismissed the appeal, finding that the Circuit Court's order is interlocutory and not immediately appealable. Id. at 370. In support the order cites to two authorities: (i) S.C. Code Ann. § 14-3-330, providing that interlocutory orders are immediately appealable only if they involve the merits of the case or affect a substantial right and (ii) *Weldon v. Southern Ry. Co.*, 167 S.C. 526, 166 S.E. 723 (1932), a Supreme Court case finding that an order requiring a plaintiff to make a more definite and certain statement is not immediately appealable. Id. On June 21, 2016, MBA filed a petition for rehearing, and the respondents filed their return to the petition on June 30, 2016. Id. at 371-484. On August 22, 2016, the Court of Appeals denied the petition for rehearing. Id. at 485.

ARGUMENT

The primary legal issues presented by this appeal concern to what extent a trial court may require both a party's attorney and its highest officer to verify pleadings, motions, filings, and discovery responses. As MBA contends, such an order is incompatible with an attorney's duties to his client under the Rules of Professional Conduct and deprives a corporation of its substantial right to assistance of counsel and its ability prosecute its case consistent with the Rules of Civil Procedure.

1. THE ORDER COMPELLING ATTORNEY VERIFICATION OF ALL PLEADINGS, MOTIONS, FILINGS, AND DISCOVERY RESPONSES IS NOT COMPATIBLE WITH MBA'S ATTORNEYS' DUTIES TO THEIR CLIENT UNDER THE RULES OF PROFESSIONAL CONDUCT

a) MBA's Attorneys Cannot Comply with Both the Order and the Rules of Professional Conduct

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

Diligence specifically requires presentation of facts and evidence gathered from a lawyer's client about which the lawyer has no personal knowledge. A lawyer is "not required to have personal knowledge of matters asserted in [pleadings and other documents], for litigation

documents ordinarily present assertions by the client, or by someone on the client's behalf, and not assertions by the lawyer." Rule 3.3, RCP, Rule 407, SCACR at cmt. 3. Instead, a lawyer is required to present evidence helpful to his client even where the lawyer may not believe the evidence so long as he does not know that the evidence is false. Id. at cmt. 8 ("The prohibition against offering false evidence only applies if the lawyer knows that the evidence is false. A lawyer's reasonable belief that evidence is false does not preclude its presentation to the trier of act."). A lawyer is required to move and act even where facts have not yet been fully substantiated, where the lawyer expects to develop evidence during discovery, or where he has relied on the veracity of his client's statements concerning a case. See Rule 3.1, RPC, Rule 407, SCACR, cmt. 2; Rule 3.3 cmt. 8. A lawyer is required to rely on information obtained from his client and that is not within his personal knowledge. Id.

The Rules of Civil Procedure explain that verification requires that a person swear "before an officer authorized to administer oaths, that the affiant knows the facts stated be true of his own knowledge, except as to those matters stated on information and belief and as to those matters that he believes them to be true." Rule 11(c), SCRCP. Although it appears no South Carolina court has considered what must be provided by an attorney to comply with verification under the current Rule 11, under prior practice an attorney could only verify where the information was within his personal knowledge or where he specifically set forth the grounds that supported his belief. See Boykins v. Buggy Co. v. Lightsey, 102 S.C. 283, 86 S.E. 639 (1915). The Court of Appeals has held that where a statute uses the term "verify" it means that the verifier must attest to the information contained in the document under oath. See Searcy v. S. Carolina Dep't of Educ., Transp. Div., 303 S.C. 544, 547, 402 S.E.2d 486, 488 (Ct. App. 1991) (quoting Black's Law

Dictionary (5th ed. 1979)); Pollard v. County of Florence, 314 S.C. 397, 444 S.E.2d 534, 536 (Ct. App. 1994).

The challenged order, however, commands MBA's attorneys to swear to facts and evidence about which it is impossible for them to have personal knowledge or attest to truth, for example having to identify "predecessor entities" of MBA, "facts to support Plaintiff's contention...that Mattress by Appointment, LLC 1 never conducted business [and] was dissolved on February 6, 2014," to describe the "nature and matter by which Mattress by Appointment, LLC of Florida...are legal successors to Carolina Bedding Direct," and "facts to support Plaintiff's contention that 'contracts existed between MBA and Conrad.'" App. at 1-3. Each of these commands seeks information about actions that long predate MBA's attorneys' involvement and about which they have no personal knowledge. Neither MBA nor the Respondents' attorneys were present at the time or have any first-hand knowledge about Conrad's entry into a contract with MBA, about Mattress by Appointment, LLC 1's operations and dissolution in 2014, or about the nature of the relationship between MBA and any other entity. Similarly, the allegations made by both MBA and the respondents concern actions that occurred years before any party retained a lawyer in this case and about which no attorney can swear to personal knowledge or give an oath as to the allegations' truth. See e.g., App. 312-329 (alleging actions that occurred as early as 2012, more than three years before current MBA counsel was retained); see also App. 250-257 (pointing to actions that occurred as early as 2011, more than four years before this action).

Additionally, under the "advocate-witness" rule, a lawyer is prohibited from acting as both an advocate and a witness where his personal knowledge may become a material issue. See Rule 3.7, RPC, Rule 407, SCACR. This rule has several purposes: (1) it eliminates the possibility that the attorney will not be a fully objective witness; (2) it reduces the risk that the trier of fact will

confuse the roles of advocate and witness and erroneously grant testimonial weight to an attorney's arguments; and (3) it avoids the appearance of impropriety. See U.S. v. Morris, 714 F.2d 669, 671 (7th Cir.1983). "The roles of an advocate and of a witness are inconsistent; the function of an advocate is to advance or argue the cause of another, while that of a witness is to state facts objectively." Collins Ent., Inc. v. White, 611 S.E.2d 262, 271 (S.C. App. 2005). As such, a lawyer must withdraw from representation in any matters in which his testimony may be required. See In re Westmoreland, 353, S.C. 44, 577 S.E.2d 209, 210 (2003).

Because verification is a person's testimony under oath, courts in other jurisdictions have held that attorney verification effects a waiver of the "attorney-client privilege concerning the identity of the sources of information contained in the response." See Melendrez v. Superior Court of the State of California, 215 Cal. App. 4th 1343, 1351, 156 Cal. Rptr. 3d 335, 342 (2013). "The reason for this waiver should be obvious...when an individual verifies discovery response, further discovery can be directed to that individual to determine the sources for the initial responses." Id. Thus, no privilege can be asserted by an attorney when an opposing party "tries to explore the sources of the information used by the attorney in preparing the responses." Id.

Where verification by attorneys is permitted, the practice of verification by an attorney rather than his client is generally disfavored. See Giambra v. Commr. of Motor Vehicles, 386 N.E.2d 251, 252 (N.Y. 1978) ("Verification of a pleading by an attorney rather than a party is not normally permissible, and is usually not an advisable practice."). Attorneys lack first-hand knowledge of the facts of the case, and verification by attorneys blurs the lines between advocate and witness. See, e.g, Rd. Dawgs Motorcycle Club of the U.S., Inc. v. Cuse Rd. Dawgs, Inc., 679 F. Supp. 2d 259, 282 (N.D.N.Y. 2009) (finding that defense counsel could not have personal knowledge of facts giving rise to lawsuit, so as to tender affidavit, without becoming witness to

lawsuit pursuant to Rules 3.4 and 3.7 of Professional Conduct); Young v. Meyer & Njus, P.A., 96 C 4809, 1997 WL 452685, at *1 (N.D. Ill. Aug. 6, 1997) ("By her verification, [the creditor's attorney] has placed herself in the position of being a potential witness in this case if she, in fact, has personal knowledge of facts that are admissible in evidence.").

The order prevents MBA's attorneys from providing diligent and competent representation as defined and required by the Rules of Professional Conduct; the order raises the specter of whether successive verifications increasingly change an attorney's role from advocate to witness; and the order forces attorneys to weigh whether they can provide verification without waiving privilege or where their client will not consent to waiver of privilege. The order's requirements are not compatible with the Rules of Professional Conduct.

b) The Order Requiring Attorney Verification Affects MBA's Substantial Rights and Is Immediately Appealable

S.C. Code Ann. § 14-3-330 permits review of an interlocutory order "when such order (a) in effect determines the action and prevents judgment from which an appeal might be taken or discontinues the action." An interlocutory order is immediately appealable where it "removes a material issue from the case, thereby preventing the party from seeking to correct any errors in the order during or after trial." See Thornton v. S.C. Elec. & Gas Corp., 391 S.C. 297, 304, 705 S.E.2d 475, 479 (Ct. App. 2011). To determine whether an order affects a substantial right and is immediately appealable, the court must look to the orders effect rather than its title. See id. ("[A]n appellate court should look to the effect of an interlocutory order to determine its appealability.").

The impossibility of compliance with the order by MBA's attorneys effectively determines this action. MBA possesses a constitutional right to retain an attorney to act on its behalf in civil proceedings. See, e.g., Potashnik v. Port City Constr. Co., 609 F.2d 1101, 1117 (5th Cir.1980) ("the right to retain counsel in civil litigation is implicit in the concept of fifth amendment due

process."); Melton v. State, 56 So.3d 868, 871 (Fla. 1st DCA 2011) (recognizing the right to retain counsel in civil proceedings). As a limited liability company, MBA is required by South Carolina law to retain counsel to appear before circuit and appellate courts in this state. See Renaissance Enterp., Inc. v. Summit Teleservices, Inc., 334 S.C. 649, 651, 515 S.E.2d 257, 258 (1999); Travelers Ins. Co. v. Roof Doctor, Inc., 325 S.C. 614, 481 S.E.2d 451 (Ct. App. 1997).

Required to have counsel, MBA has the right to diligent and competent representation within the meaning of the Rules of Professional Conduct. See Rules 1.1 and 1.3, RPC, Rule 407, SCACR; Alex Sanders & John S. Nichols, Trial Handbook for South Carolina Lawyers, § 1.53 (5th ed. 2012) ("[E]very client has a right to competent counsel."). But it is also axiomatic that an attorney may not deliberately violate an order of the court. See Rule 3.4(c), RCP, SCACR ("A lawyer shall not...knowingly disobey an obligation under the rules of a tribunal."). Thus, the Circuit Court's order leaves MBA's lawyers with an impossible choice – fulfill their duties to their client under the Rules of Professional Conduct by (a) relying on MBA (Rule 3.3, cmt. 8, RCP, SCACR); (b) zealously acting within the Rules of Professional Conduct (Rule 3.1 cmt. 1, RCP, SCACR); (c) acting where facts or evidence have not been fully developed or substantiated (Rule 3.1, cmt. 2, RCP, SCACR); (d) preparing documents, pleadings, motions and other filings on behalf of MBA where they do not have personal knowledge of matters asserted therein (Rule 3.3 cmt. 3, RCP, SCACR); (e) presenting evidence in pleadings, motions and other filings even where they may doubt that evidence (Rule 3.3, cmt. 8, RCP, SCACR); (f) presenting evidence or statements on behalf of MBA that they cannot "vouch" for (Rule 3.3, cmt. 2, RCP, SCACR); (g) avoiding becoming a witness in the action (Rule 3.7, RPC, Rule 407, SCACR); or, alternatively, complying with the Circuit Court's order.

Because MBA's attorneys cannot both comply with the Circuit Court's order and provide zealous, diligent, and competent representation to MBA as defined by the Rules of Professional Conduct, MBA faces stark consequences in this litigation. Specifically, MBA's attorneys may be required to withdraw from representation in this matter. See Rule 1.16(a)(1), RCP, Rule 407, SCACR ("a lawyer...shall withdraw from the representation of a client if...the representation will result in violation of the Rules of Professional Conduct or other law."). However, the withdrawal of MBA's current counsel would not solve the ethical dilemma because the order would impair future counsel's ability to provide representation as well. Thus, current counsel's withdrawal could not be "accomplished without material adverse effect on the interests of the client" because MBA would be unable to find counsel without conflict. See 1.16(b)(1), RCP, Rule 407, SCACR. Effectively, because the trial court's order imposes a continuing ethical conundrum on both present counsel and any future counsel, MBA is effectively denied its constitutional right to representation in this matter, which will end the case. See Travelers Ins. Co., 481 S.E.2d at 451.

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

The impact of the Circuit Court's order here is more extreme than disqualification of counsel. Although the appellant in Hagood could not proceed with the counsel of his choice, he could still retain new counsel who could zealously and diligently represent him within the full

scope of the Rules of Professional Conduct and the Rules of Civil Procedure. The Circuit Court has foreclosed that right for MBA.

Additionally, the Circuit Court's order "removes...material issue[s] from the case, thereby preventing the party from seeking to correct any errors in the order during or after trial." Thornton, 705 S.E.2d at 479. It is not clear from the Circuit Court's order how MBA could even preserve evidentiary issues for appeal. Under the order, MBA will be forced to withhold otherwise competent evidence from its filings and discovery responses because its attorneys cannot verify the information. But no mechanism for the presentation of evidence is left untouched by the verification requirement. See App. at 2-3. "Pleadings, motions, filings, and discovery responses" encompasses all of the pre-trial tools lawyers use to present evidence, but no evidence can be presented in these documents unless verified.

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

The ethical dilemmas the Circuit Court's order creates deprives MBA of its substantial right to assistance of counsel. MBA's attorneys cannot comply both with their duties under the Rules of Professional Conduct and their obligation to verify as required by the order. The order precludes appellate review as no mechanism for presentation of unverified evidence is available for MBA to preserve appellate review and appellate review would be impossible in any event. Therefore, the order is immediately appealable under S.C. Code § 14-3-330.

2. THE ORDER COMPELLING VERIFICATION BY MBA'S HIGHEST RANKING COPORATE OFFICR UNREASONABLY RESTRICTS ITS ABILITY TO PROVE ITS CASE UNDER THE RULES OF CIVIL PROCEDURE AND AFFECTS ITS SUBSTANTIAL RIGHTS

The order also requires verification from MBA's "highest ranking corporate officer." App. at 3. This requirement is inconsistent with the Rules of Civil Procedure and affects MBA's substantial rights.

MBA has a substantial right to prosecute its case consistent with the Rules of Civil Procedure. See In re Couture Hotel Corp., 536 B.R. 712 (Bankr. N.D. Tex. 2015) ("the [United States] Supreme Court acknowledged the general rule that a party has the right to prosecute its case as it sees fit") (citing Old Chief v. United States, 519 US 172 (1997)). South Carolina's legislature specifically chose not to require parties to verify their pleadings or other documents. See Rule 11, SCRCP ("Except when otherwise specifically provided by rule or statute pleadings need not be verified or accompanied by an affidavit."); off. cmt. ("Important as this change is, it is not as significant as the Rule itself, which eliminates the verification of pleadings..."). Thus, while MBA is permitted to verify its pleadings if it so chooses, it cannot be required to do so. *See* Rule 81, SCRCP ("[t]hese rules, or any of them, shall apply to every trial court of civil jurisdiction within this state, within the limits of the jurisdiction and powers of the court provided by law, and the procedure therein shall conform to these rules insofar as practicable."); see Ross v. Med. Univ.

of S. Carolina, 312 S.C. 532, 534, 435 S.E.2d 877, 878 (Ct. App. 1993), rev'd, 317 S.C. 377, 453 S.E.2d 880 (1994) ("The South Carolina Rules of Civil Procedure govern actions brought in the courts of South Carolina in all suits of a civil nature."). Accordingly, as mandated by Rule 81, SCRPCP, the procedure in Circuit Court must conform to the Rules of Civil Procedure, which make clear that verification is not necessary.

If MBA elects to verify its filings, subsection (c) prescribes a flexible approach for verification by a corporation, allowing that "the verifications may be made by any officer or agent thereof." Rule 11(c), SCRCP. In contrast to the flexible approach chosen by the legislature in drafting Rule 11(c), the Circuit Court's order restricts verification to one individual, the "highest ranking corporate officer." App. at 3. Because verification under Rule 11(c), SCRCP, requires "that the affiant knows the facts stated to be true of his own knowledge," MBA's highest ranking corporate officer must have personal knowledge of any and all matters that MBA wishes to address in any pleading, motion, or discovery response. Generally, the chief executive officer of a corporation lacks personal knowledge of every aspect of the corporation's business as he is responsible for the overarching managerial decisions affecting the direction of the enterprise.

Most concerning is the dilemma created by precluding facts that do not reside within the knowledge of the companies' highest ranking corporate officer. Other current MBA employees have personal knowledge of facts and evidence directly relevant to the case. Information known to these employees is known to MBA as a matter of law. Palmer v. Sovereign Camp, W. O. W., 197 S.C. 379, 15 S.E.2d 655, 660 (1941) ("[I]t is an elementary principle of law that the knowledge of an agent with reference to matters occurring within the scope of such agent's duty is imputable to the principal, and the principal is bound by the knowledge of such agent."). But knowledge obtained from other sources is not appropriate for a person's verification. Rule 602, SCRE ("A

witness may not testify to a matter unless...the witness has personal knowledge of the matter."). Therefore, for example, in responding to discovery requests, if MBA fails to include responsive, relevant information because it is not within the knowledge of its highest ranking officer, has MBA violated its duties in responding to discovery under the Rules of Civil Procedure? If it does include this information, has MBA violated the order?

MBA has a substantial right to prosecute its case consistent with the Rules of Civil Procedure. The Circuit Court's order creates contradictions with the Rules and leaves MBA unable to present facts and evidence in support of its case that are otherwise relevant and admissible. For these reasons, and for the reasons stated in Section 1(b), supra, the order affects MBA's substantial rights and is immediately appealable.

3. SPECIAL AND IMPORTANT REASONS EXIST FOR THIS COURT TO GRANT A WRIT OF CERTORARI

The issues raised by this appeal are uniquely appropriate for this Court's review. First, the Circuit Court's order raises a novel issue of law, both in South Carolina and, in the research of MBA's counsel, nationally. Nationwide, MBA was unable to locate any similar case where a court commands a party's attorneys' to verify all documents submitted in a case. Instead, verification has only been required of attorneys in very limited circumstances and where the information is directly within the attorneys' knowledge – for example requiring verification of billing records in support of a request for an award of attorney's fees.

Under prior South Carolina practice, an attorney could verify only under certain limited circumstances and only where the attorney could set forth his personal knowledge or "the grounds of his belief in the subject." See Bray Clothing Co. v. Shealy, 53 S.C. 12; 30 S.E. 620, 620-621 (1898); Boykins, 86 S.E. 639. Similarly, courts nationally have frowned on attorney verification and limited it to specific circumstances. See Giambra, 386 N.E.2d at 252; Cantu v. Holiday Inns,

Inc., 910 S.W.2d 113, 116 (Tex. App. 1995) ("A party's attorney may verify the pleading where he has knowledge of the facts, but does not have authority to verify based merely on his status as counsel."); DeCamp v. First Kensington Corp., 83 Cal. App. 3d 268, 275, 147 Cal. Rptr. 869, 873 (Ct. App. 1978) ("The practice of attorneys verifying for their clients should be discouraged...") (quoting Silcox v. Lang, 78 Cal. 118, 122, 20 P. 297, 300 (1889)).

Second, this Court has exclusive jurisdiction over the rules governing the practice and procedure in the courts and the Rules of Professional Conduct. S.C. Const. art. V, 4. In all circumstances, whether done voluntarily or to comply with an order, verification of facts and evidence by an attorney implicates numerous Rules of Professional Conduct. Supra. Similarly, requiring a person to swear an oath about allegations that may not rest within his personal knowledge contradicts the legislature's express choice not to require verification and infringes on a party's right to prosecute its case consistent with the Rules of Civil Procedure.

Although Respondents have consistently opposed this appeal, and will likely oppose this Petition as well, they have also revealed their extreme discomfort with the Circuit Court's order. In their Return to Petition for a Rehearing, Respondents argued that the order does not actually require verification as defined by the Rules of Civil Procedure. Instead, the Respondents argue that the Circuit Court "merely uses the term verify." App. at 423. But the Respondents never explain what they believe is meant by "verify" or how the verb "verify" could have two different meanings in the same clause depending on the acting subject. Id., 3 ("shall be verified by the highest ranking corporate officer of each entity...and their respective attorneys"). Respondents point to the "verification" provided by their attorneys in response to MBA's motion to reconsider as an example of what they think the Circuit Court meant. App. at 423. But this "verification" is not a verification under South Carolina law and no support is offered for their interpretation of the

order. See Rule 11(c), SCRCP; Hecht v. Freisleben, 28 SC 181, 5 S.E. 475, 477 (1888); Searcy, 402 S.E.2d at 488. Respondents concede that the order cannot be complied with consistent with an attorney's duties under the Rules of Professional Conduct.

CONCLUSION

For the reasons stated above, Petitioner asks the Court to grant the petition for a writ of certiorari.

September 21, 2016

Respectfully submitted,

Adam C. Bach (SC Bar # 74885)
R. Hudson Smith (SC Bar # 101369)
ELLER TONNSEN BACH, LLC
1306 South Church Street
Greenville, SC 29605
Telephone: (864) 236-5013
Facsimile: (864) 312-4191
abach@etblawfirm.com

Attorneys for Petitioner

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PROOF OF SERVICE

I certify that I have filed the Petition for Writ of Certiorari and Appendix and served these documents on the Respondents Retail Service System, Inc., Boxdrop Furniture, Inc., Carlton Scott Andrew, and Darren Conrad by depositing a copy of same in the United States Mail, postage prepaid, on September 21, 2016, addressed to the Clerk of the Supreme Court, the Clerk of the Court of Appeals, and to Respondents' attorneys of records as follows:

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

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

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

Adam C. Bach (SC Bar # 74885)
R. Hudson Smith (SC Bar # 101369)
ELLER TONNSEN BACH, LLC
1306 South Church Street
Greenville, SC 29605
Telephone: (864) 236-5013
Facsimile: (864) 312-4191
abach@etblawfirm.com
Attorneys for Petitioner

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Greenville, South Carolina