IN THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

R. Lawton McIntosh, Circuit Court Judge

Appellate Case No. 2016-001985

S.C. Ct. App. Case No. 2016-000662 (Order of Dismissal filed June 9, 2016)
Rehearing denied (filed August 22, 2016)

Mattress by Appointment, LLC . . . . . .
Petitioner

v.

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

RETURN TO PETITION FOR A WRIT OF CERTIORARI

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COUNTER-STATEMENT OF THE CASE

Respondent Retail Service Systems, Inc. ("RSS") owns a unique and proprietary system for establishing and operating retail mattress and furniture businesses. *See* App. at 219. RSS's system, which differs substantially from any methodologies used by traditional mattress and furniture retailers, yields higher rates of success at significantly lower operating costs than those found in the traditional mattress and furniture retail industry. *See* Id. RSS's system involves an intense training and management program through which dealers learn RSS's proprietary methodologies for establishing and operating their businesses. *See* App. at 219-20. The training program includes step-by-step instructions so that a dealer's progress can be measured and improved through specific, duplicative actions. *See* Id. By investing significant resources, RSS and its predecessor created and perfected its methodologies, and have tracked results under the system for more than a decade. *See* Id. Mattress by Appointment, in the form of one entity or another, has misappropriated RSS's trade secrets and has been using those trade secrets causing substantial injury to RSS. This lawsuit is one of many related to the theft of RSS's trade secrets.

On October 4, 2013, RSS filed a lawsuit against Carolina Bedding Direct, LLC, Mattress by Appointment, LLC, and Does 1-50 in the District Court for the Southern District of Ohio (Case No. 2:13-cv-00994, "Ohio Case No. 1"). App. at 180-192. RSS asserted that Carolina Bedding Direct, LLC and Mattress by Appointment, LLC obtained and continue to use the trade secrets that belong to RSS. App. at 181, ¶ 2, 189, ¶¶ 37-38. The Ohio Complaint described Mattress by Appointment, LLC as being a Florida Limited Liability Company. App. at 182. It described Carolina Bedding Direct, LLC as a company that represented itself in Ohio secretary of state filings as a North Carolina Limited Liability Company, however the North Carolina secretary of state filings reflected that the company was dissolved as of October 18, 2011, so RSS believed the entity was Carolina Bedding Direct, LLC a Florida Limited Liability Company. App. at 182, ¶ 6.

Both defendants retained counsel in Ohio Federal Case No. 1, and almost a year of litigation ensued between the parties relating to which parties were properly before the court, and whether service was proper on those parties. Ultimately, the court found that both parties were properly served, and entered a default against Carolina Bedding Direct, LLC formed in North Carolina ("CBD (NC)") and Mattress by Appointment, LLC ("MBA (FL) I).[1] App. 194-209. It also entered a permanent injunction against CBD (NC) from using RSS's trade secrets and proprietary materials. App. at 207, Docket Entry No. 117; *see also* App. at 467.

On October 13, 2014, Mattress by Appointment, LLC formerly known as Carolina Bedding Direct, LLC of Florida ("MBA (FL) II") filed a lawsuit in Florida against various mattress dealers.[2] *See* App. at 239, ¶ 19. The Florida case is based on Territory Agreements

[1]These designations are for ease of reference only for the purposes of this Return. The respondents in no way concede that any of the entities discussed herein are distinct.
[2] Respondents RSS and Andrew are not parties in the Florida case.

allegedly breached by various dealers in which MBA (FL) II's alleged business techniques and processes were protected. *See* App. at 240. However, these alleged protected business techniques and processes do not belong to any of the MBA/CBD entities. They belong to RSS. App. at 207, Docket Entry No. 117; *see also* App. at 467. In fact, on December 16, 2015, the court in Ohio Case No. 1 held a damages hearing against MBA (FL) I and CBD (NC) for their use of RSS's trade secrets. App. at 209, Docket Entry No. 132. The court's decision on damages is pending. App. 194-209.

RSS filed a lawsuit on August 31, 2015 against MBA (FL) II, Mattress by Appointment, LLC of South Carolina ("MBA (SC")), and Edwin Shoffner (the owner of both MBA (FL) II and MBA (SC)) in the United States District Court for the Southern District of Ohio (Case No. 2:15-cv-02769, "Ohio Federal Case No. 2"). App. at 211-16. RSS has asserted there that MBA (FL) II, MBA (SC), and CBD (FL) are essentially the same companies or successors in interest to CBD (NC) and MBA (FL) I. App. at 231, ¶¶ 54-57.[3] Ohio Federal Case No. 1 and Ohio Federal Case No. 2 have been designated by the federal courts as related. App. at 194.

On September 15, 2015, the petitioner filed the present case in South Carolina alleging that it was "Mattress by Appointment, LLC of Florida," a Florida limited liability company, and "Mattress by Appointment, LLC of South Carolina," a South Carolina limited liability company, both successors in interest to "Carolina Bedding Direct, LLC," a Florida limited liability company. App. at 236, ¶ 1. In its original Complaint, the petitioner alleged that it became Mattress by Appointment, LLC, a Florida Limited Liability Company, on January 27, 2014, App. at 237, ¶ 8, the same day that RSS obtained the Judgment against Mattress by Appointment, LLC, a Florida Limited Liability Company, in Ohio Federal Case No. 1. The

[3] MBA (SC) has been dismissed from Ohio Case No. 2 for lack of personal jurisdiction.

petitioner asserted that it did not do business as Mattress by Appointment, LLC, a Florida Limited Liability Company, until February 4, 2014. App. at 237-38 ¶ 9. In other words, the petitioner alleged that it was not MBA (FL) I which existed prior to January 27, 2014 and was sued by RSS in Ohio Federal Case No. 1. Rather, it asserted that it was MBA (FL) II which allegedly began to exist on January 27, 2014 and began to do business as Mattress by Appointment, LLC on February 4, 2014, which was not sued by RSS in Ohio Federal Case No. 1.

On November 13, 2015, RSS, Andrew, Boxdrop, and Conrad, through their respective counsel, filed motions to dismiss the Complaint. App. at 250-57, 260-61, 264-65. The respondents' argument, among others, was that the petitioner brought various causes of actions based on duties allegedly owed to MBA (FL) I and damages allegedly suffered by MBA (FL) I. *See* App. 240-41, ¶¶ 22-26, 242, ¶¶ 28, 35, 243, ¶¶ 38, 45, 244, ¶¶ 50-51. Yet, it specifically alleged that it was *not* MBA (FL) I. App. at 237, ¶ 8. The petitioner did not file a response brief to the respondents' motions to dismiss. On January 26, 2016, the court held a motion hearing on the respondents' motions. *See* App. at 267.

The circuit court had concerns as to the South Carolina case, including the motions pending before it. App. at 267. Due to these concerns, the court stated that it would be entering an order requiring verifications. Id. It also told counsel to advise their clients that the court reserved the right to require the named individual defendants, as well as Shoffner and the top corporate officer of the respective corporations to attend any future hearings in this case. Id.

On January 26, 2016, the court entered the interlocutory Order which is subject to this appeal.[4] App. at 269-71. The January 26, 2016 Order directed the petitioner to file an amended complaint (which would be the petitioner's second amended complaint) by February 5, 2016 providing more definite and certain statements.[5] App. at 270-71. The court also ordered all parties verify future pleadings, motions, filings, and discovery responses by the highest ranking corporate officer of each entity, the individual parties, and their respective attorneys. App. at 271. The court stated that after the petitioner filed an amended complaint it would rule on the various motions to dismiss. App. at 267.

On January 29, 2016, the petitioner filed a "Verified Notice of Motion, Motion and Memorandum in Support of Motion to Reconsider, Amend or Alter Judgment." App. at 274-93. However, as discussed in detail below, this motion did not stay the time limits for the petitioner to serve its Notice of Appeal. On February 8, 2016, respondents RSS and Andrew filed a response to the petitioner's Motion. App. at 295-98. Thereafter, the petitioner filed a "Verified Reply in Support of Motion to Amend." App. at 302-08.

On February 5, 2016, the petitioner filed a Verified Second Amended Complaint, which the petitioner asserted was being filed pursuant to the Order entered on January 26, 2016. App. at 311.

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[4] The petitioner stated that it mailed a copy of an Amended Complaint to the clerk for filing prior to the hearing on the respondents' motions. However, at the time of the hearing, the court did not have the Amended Complaint in its file, thus based the Order off the original Complaint. *See* App. at 267.

[5] The petitioner argued before the Court of Appeals that the Order affects a substantial right by requiring it to identify its predecessors and successors. App. at 151, 380. However, as argued by the respondents, this is a requirement for more definite and certain statements and is not immediately appealable. App. at 431. The petitioner is not seeking this Court's review of this issue.

On February 19, 2016, respondents RSS and Andrew served a Motion to Dismiss the Second Amended Complaint. App. at 334-52. Among other reasons supporting dismissal, the respondents argued that the petitioner did not identify its predecessor entities as required by the Order. App. at 335-44. This motion, along with the previously filed motions to dismiss, are currently pending.

On February 24, 2016, the circuit court filed a form Order denying the petitioner's "Motion to Reconsider." App. at 356-57.

On March 24, 2016, the petitioner served a Notice of Appeal, stating that it is appealing Judge McIntosh's January 26, 2016 Order (hereinafter the "Order"). App. at 132. On April 4, 2016, the Court of Appeals sent a letter to the parties requesting that they file a memorandum addressing whether the Order is immediately appealable. App. at 140. On April 14, 2016, the petitioner and respondents submitted the requested memoranda. App. at 142-366. On June 9, 2016, the Court of Appeals dismissed the appeal, finding that the Order is not immediately appealable. App. at 370. On June 21, 2016, the petitioner filed a Petition for Rehearing, and on June 30, 2016, the respondents filed a Return to the Petition. App. at 371-484. On August 22, 2016, the Court of Appeals denied the Petition for Rehearing. App. at 485. The petitioner's September 22, 2016 Petition for a Writ of Certiorari followed.

ARGUMENT

I. THE NOTICE OF APPEAL WAS NOT TIMELY SERVED

"Service of the notice of intent to appeal is a jurisdictional requirement, and this Court has no authority to extend or expand the time in which the notice of intent to appeal must be served." Mears v. Mears, 287 S.C. 168, 169, 337 S.E.2d 206, 207 (1985) (citations omitted); Vulcan Materials Co. v. Greenville County Bd. of Zoning Appeals, 342 S.C. 480, 489, fn. 7, 536

S.E.2d 892, 896, fn. 7 (Ct. App. 2000) ("the timeliness of an appeal from a zoning board's decision is a jurisdictional requirement and, as such, may be raised at anytime by either party or *sua sponte* by this Court") (citations omitted). The petitioner did not serve its Notice of Appeal until March 24, 2016, well past the 30-day deadline of Rule 203(b)(1), SCACR. In the circuit court, the petitioner filed what it called a "Motion to Reconsider, Amend or Alter Judgment" the interlocutory Order. App. at 5-25. While an interlocutory order can be reconsidered, altered or amended by the circuit court, a motion to reconsider, alter or amend an interlocutory order is not (and could not be) a motion made pursuant to Rule 59(e), SCRCP. This is because Rule 59(e), SCRCP, only applies to final judgments. This distinction is significant because only a Rule 59(e) motion to reconsider, alter or amend will stay the time to file a notice of appeal. *See* Rule 203(b)(1), SCACR. There is no similar rule that stays the time to file a notice of appeal when a party files a motion to reconsider, alter or amend an interlocutory order. As explained below, because the petitioner's Notice of Appeal was served after the 30-day deadline of Rule 203(b)(1), SCACR, this appeal must be dismissed.

Rule 203(b)(1) provides that "[w]hen a timely motion for judgment n.o.v. (Rule 50, SCRCP), motion to alter or amend the judgment (Rules 52 and 59, SCRCP), or a motion for a new trial (Rule 59, SCRCP) has been made, the time for appeals for all parties shall be stayed and shall run from receipt of written notice of entry of the order granting or denying such motion." Rule 203, SCACR. It is clear that the petitioner's "Motion to Reconsider, Amend or Alter Judgment" is not a motion for judgment n.o.v. under Rule 50(b), a motion for a new trial under Rule 59(a), or a motion to amend the court's findings after the action was tried upon the facts without a jury or with an advisory jury under Rule 52(b). Further, it is not a valid motion to

alter or amend the judgment under Rule 59(e). Rule 59(e) applies only to final judgments. The January 26, 2016 Order is a non-final order.

Rule 59(e) states the following:

> **Motion to Alter or Amend a Judgment.** A motion to alter or amend the judgment shall be served not later than 10 days after receipt of written notice of the entry of the order.

59(e), SCRCP.

Courts have recognized that some motions to "reconsider" may be motions to "alter" or "amend" under Rule 59(e). *See, e.g.*, USAA Property and Cas. Ins. Co. v. Clegg, 277 S.C. 543, 649-50, 661 S.E.2d 791, 794 (2008) (determining the timeliness of a Rule 59(e) motion to reconsider). However, to be a Rule 59(e) motion, the motion to "reconsider," "alter," or "amend" must be a motion to reconsider, alter, or amend a final judgment.

By its very terms, Rule 59(e) only applies to final judgments. *See* Rule 59(e), SCRCP ("[a] motion to alter or amend **the judgment** shall be served not later than 10 days . . .") (bold added); Rule 54(a), SCRCP (the term "'[j]udgment' as used in these rules includes any decree or order which dismisses the action as to any party or finally determines the rights of any party"). The Order here is not a "judgment" because it does not dismiss the action as to any party, nor does it finally determine the rights of any party. Despite the title of the petitioner's Motion, it is not a motion under Rule 59(e) because it does not seek to reconsider, alter, or amend a "judgment."

Federal courts also hold that Rule 59, FRCP, applies only to final judgments.[6] *See* Fayetteville Investors v. Commercial Builders, Inc., 936 F.2d 1462, 1472 (4th Cir. 1991) ("The district court correctly held that [the appellant's] motion for reconsideration could not be treated

[6] Rule 59 of the South Carolina Rules of Civil Procedure "is substantially the Federal Rule." (Rule 59, SCRCP, notes).

under Rules 60 or 59, as these rules apply only to final judgments . . ."); Spill the Beans, Inc. v. Sweetreats Inc., 2009 WL 2929434, *1 (D.S.C. 2009) (unpublished) ("Rule 59(e) is an inappropriate vehicle for reconsideration of an interlocutory order"); (Anderson v. Deere & Co., 852 F.2d 1244, 1246 (10th Cir. 1988) ("The ten-day period prescribed by Rule 59(e) begins to run only upon entry of a *final* judgment. Here the August 1985 orders were not final because they did not dispose of all parties and [the defendant's] liability remained undetermined"); Estate of Gaither ex rel. Gaither v. District of Columbia, 771 F. Supp. 2d 5, 8 n. 3 (D.D.C. 2011) ("Defendants also purport to rely upon Rule 59(e) of the Federal Rules of Civil Procedure as a basis for their Motion for Reconsideration . . . but Rule 59(e) does not apply where, as here, the underlying order is non-final"); Galvan v. Norberg, 678 F.3d 581, 587 n. 3 (7th Cir. 2012) ("Although we refer to the motion before Judge Chang as a motion to reconsider, the motion is not a traditional Rule 59(e) motion to reconsider, which can only follow a 'judgment.' . . . Rule 54(b) governs non-final orders and permits the revision at any time prior to the entry of judgment, thereby bestowing sweeping authority upon the district court to reconsider a new trial motion").

Numerous states have reached the same conclusion. *See* Doe v. Sovereign Grace Ministries, Inc., 217 Md. App. 650, 669, 94 A.3d 264, 275, cert. denied sub nom. Doe v. Sovereign Grace Ministries, 440 Md. 116, 99 A.3d 779 (2014) ("Here, the plaintiffs' motion for reconsideration, filed within ten days of the entry of the May 23, 2013 order, had no impact on the time for filing a notice of appeal because the May 23, 2013 order was not a final judgment. The tolling effect of Rule 8–202(c) does not apply to a motion for reconsideration of a non-appealable interlocutory order, and has no bearing on the effectiveness of a notice of appeal filed

while such a motion remains pending")[7]; Lovelace v. Lovelace, 124 So. 3d 447 (Fla. Dist. Ct. App. 2013) ("The law in Florida is well settled that a motion for rehearing or reconsideration does not toll the time for filing an appeal from a non-final order reviewable pursuant to the provisions of Florida Rule of Appellate Procedure 9.130")[8]; Ex parte Troutman Sanders, LLP, 866 So.2d 547, 549 (Ala. 2003) ("A Rule 59 motion may be made only in reference to a final judgment or order. ... Therefore, the tolling effect of Rule 59 is not involved with respect to motions to 'reconsider' interlocutory orders").

Moreover, South Carolina case law makes it clear that Rule 59(e) applies only to final judgments. *See* Pitman v. Republic Leasing Co., Inc., 351 S.C. 429, 432, 570 S.E.2d 187, 189 (Ct. App. 2002) ("[A] trial judge retains jurisdiction pursuant to Rule 59(e), SCRCP, to alter or amend a judgment within ten days of its issuance"); Rutland v. Holler, Dennis, Corbett, Ormond & Garner, 371 S.C. 91, 96, 637 S.E.2d 316, 319 (Ct. App. 2006) ("The established case law is that a trial judge loses jurisdiction over a case when time to file post-trial motions has elapsed"). The circuit court here did not lose jurisdiction within ten days after filing the Order. In fact, until the final judgment, it has the power to reconsider, amend, or alter the Order. PPG Indus., Inc. v. Orangeburg Paint & Decorating Ctr., Inc., 297 S.C. 176, 183, 375 S.E.2d 331, 334 (Ct. App. 1988) ("A trial judge, until final judgment, controls the trial of the case before him, and as a general rule may amend, correct, modify, or otherwise change its findings of fact and conclusions of law before entry of judgment or decree").

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[7] MD Rule Civ. Pro. 8-202(c) states that "[i]n a civil action, when a timely motion is filed pursuant to Rule 2-532 [motion for judgment notwithstanding the verdict], 2-533 [motion for new trial], or 2-534 [motion to alter or amend a judgment], the notice of appeal shall be filed within 30 days after (1) a notice withdrawing the motion or (2) an order denying a motion pursuant to Rule 2-533 or disposing a motion pursuant to 2-532 or 2-534 . . ."

[8] Fla. Rule App. Pro. 9.130 authorizes the appeal of certain non-final orders.

Rule 59(e), SCRCP, is inapplicable to the petitioner's "Motion to Reconsider, Amend or Alter Judgment." While an interlocutory order can be reconsidered, altered or amended by the circuit court, a motion to reconsider, alter or amend an interlocutory order is not (and could not be) a motion made pursuant to Rule 59(e), SCRCP. The petitioner's motion did not stay the time for the petitioner to serve its Notice of Appeal. Because the petitioner's Notice of Appeal was served after the 30-day deadline of Rule 203(b)(1), SCACR, this Court must deny the Petition.

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

"The right to appeal arises from and is controlled by statutory law." North Carolina Federal Sav. and Loan Ass'n v. Twin States Development Corp., 289 S.C. 480, 481, 347 S.E.2d 97 (1986). "Absent some specialized statute, determining if an interlocutory order is immediately appealable depends on whether the order falls within one of the several categories of appealable judgments, decrees, or orders listed in S.C. Code Ann. § 14-3-330 in order to be immediately appealable." Ex parte Capital U-Drive-It, Inc., 369 S.C. 1, 6, 630 S.E.2d 464, 467 (2006) (citations omitted). "The provisions of Section 14-3-330, including subsection (2), 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).

The petitioner argues that the Order is immediately appealable pursuant to S.C. Code Ann. § 14-3-330(2)(a). (Petition at 8-12); *see also* S.C. Code Ann. § 14-3-330(2)(a) (permitting the immediate appeal of an interlocutory order when such order "in effect determines the action

and prevents a judgment from which an appeal might be taken or discontinues the action").[9] The petitioner's argument is based entirely on a false premise: That by use of the term "verification," the Order requires attorneys to submit verifications pursuant to Rule 11(c), SCRCP. (Petition at 5-6). This is not the case. Interestingly, the petitioner has not always construed the Order this way. In the petitioner's "Motion to Reconsider, Amend or Alter Judgment," it sought "to clarify whether verification by an attorney refers to the certificate provided by the attorneys' signature on documents pursuant to Rule 11(a) or to a verification sworn under oath providing that the verifying party knows the facts to be true as provided for in Rule 11(c)." App. at 22.

The attorneys in this case, including those for the petitioner, have submitted verifications in which the attorneys *do not* swear under oath that they have personal knowledge of the facts or assertions contained in the submitted pleading or believe them to be true. These verifications and the pleadings associated therewith have not been struck by the circuit court for failure to comply with its Order. For example, the respondents' attorney submitted the following verification with the respondents' response in opposition to plaintiff's motion to reconsider:

> The undersigned represents that he has reviewed the response to Plaintiff's Motion to Reconsider and all statements contained therein are true and correct to the best of his knowledge and based upon a review of the pleadings and information provided by his client.

App. at 299. The circuit court did not strike this pleading due to non-compliance with its Order. Similarly, the petitioner's attorney submitted the following verification with the petitioner's Verified Reply in Support of Motion to Amend:

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[9]The petitioner argues that the Order "effectively determines this action." (Petition at 8). However, the language of S.C. Code Ann. § 14-3-330(2)(a) is that an order affecting a substantial right is one that "in effect determines the action *and* prevents a judgment from which an appeal might be taken *or* discontinues the action." (italics added). Nevertheless, as explained herein, the Order does not "effectively determine this action" nor does it in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues the action.

> To the extent the Court's January 26, 2016 order requires counsel as attorney for the plaintiff to make a sworn verification as contemplated in Rule 11(c), counsel states that, except for matters of public record or which are obtainable in the public domain, the facts as set forth in this reply are based upon the information and representations provided to him by his client or third parties and that he has acted and moved on that information consistent with his obligations under the Rules of Professional Conduct.

App. at 307. The circuit court did not strike this pleading due to non-compliance with its Order. The petitioner's attorney submitted an identical verification with the petitioner's Second Amended Complaint, which the court did not strike due to non-compliance with its Order. App. at 330.

By way of example, prior to 1988, the federal removal statute 28 U.S.C. § 1446(a) required that the defendant desiring removal "shall file in the United States for the district and division within which such action is pending a **verified** petition containing a short and plain statement of the facts which entitle him or them to removal . . ." 28 U.S.C. § 1446(a) (1973) (bold added). Like the Order here, Section 1446(a) did not define the term "verify." Yet, federal courts held that the "verification" requirement was met "if the attorney merely signs the petition." Border City Sav. & Loan Ass'n v. Kennecorp Mortg. & Equities, Inc., 523 F. Supp. 190, 192 (S.D. Ohio 1981) (citing Jarvis v. Roberts, 489 F. Supp. 924, 926 (W.D. Tex. 1980) (the signing by counsel for one of several removing defendants constitutes verification)). A "verification" requirement has been similarly met in other contexts. *See, e.g.*, Vavadakis v. Commercial Nat. Bank of Chicago, 533 N.E.2d 70, 72-73 (Ct. App. Ill. 1988) (trustee did not breach duty to settlor by accepting allegedly forged assignment of trust property where trustee used "reasonable means to verify the signature" when it compared the signature on the assignment to a sample signature, "even if its conclusion was wrong"); Pohang Iron & Steel Co. v. United States, 23 C.I.T. 778, 1999 WL 970743, *18 (Ct. Intl. Trade 1999) (unpublished) (the

U.S. Department of Commerce may satisfy the verification requirement of 19 U.S.C. § 1677m(i) (requiring the administrative agency "verify all information relied upon in making . . . a final determination in an investigation") by "accepting the credibility of the document at face value" (citing PPG Indus., Inc. v. United States, 15 C.I.T. 615, 620, 781 F. Supp. 781, 787 (Ct. Intl. Trade 1991) ("When [the Department] finds the information submitted by a respondent to be complete and its explanations sound, it may need no further information")). The circuit court here may similarly hold that an attorney can meet the "verification" requirement of its Order by signing a document, accept the facts as stated within the document at face value, or by complying with Rule 11(a), SCRCP. This appeal is entirely premature.

Nevertheless, even assuming that by use of the term "verify," the Order requires the attorneys to submit a verification pursuant to Rule 11(c), SCRCP, the Order does not affect the petitioner's substantial rights. The petitioner's argument is that the Order *may* require its attorneys, *at some time in the future*, to choose between complying with the Order or complying with the Rules of Professional Conduct.

The petitioner argues that, being a limited liability company, it has the right to effective assistance of civil counsel. (Petition at 8-9). The right to effective assistance derives from an individual's Sixth Amendment right to the appointment of counsel in a criminal proceeding. *See* United States v. Rocky Mountain Corp., 746 F. Supp. 2d 790, 800 (W.D. Vir. 2010) (distinguishing a corporation's Sixth Amendment right in a criminal proceeding to retain counsel versus an individual's Sixth Amendment right in a criminal proceeding to have counsel appointed). Corporations do not have the Sixth Amendment right to effective assistance of criminal counsel, let alone effective assistance civil counsel. *See* Rocky Mountain Corp., 746 F. Supp. 2d at 800; Sanchez v. U.S. Postal Service, 785 F.2d 1236, 1237 (5th Cir. 1986) (citing

Wolfolk v. Rivera, 729 F.2d 1114, 1120 (7th Cir. 1984); Allen v. Barnes Hospital, 721 F.2d 643, 644 (8th Cir. 1983); Mekdeci v. Merrell National Laboratories, 711 F.2d 1510, 1522–23 (11th Cir. 1983)). To the extent (if any) that a limited liability company has a due process right to retain counsel in a civil action, *see* Petition at 8-9, this alleged right does not morph into right of effective assistance of civil counsel. *See* Rocky Mountain Corp., 746 F. Supp. 2d at 800. Nevertheless, even assuming that the Order requires "verification" pursuant to 11(c), SCRCP, and even assuming that the petitioner has the right to effective assistance of civil counsel, the Order is not immediately appealable.

Relying on Thorton v. S.C. Elec. & Gas Corp., 391 S.C. 297, 304, 705 S.E.2d 475, 479 (Ct. App. 2011), the petitioner argues that the Order prevents it from preserving evidentiary issues for appeal. (Petition at 11). In Thorton, the respondents brought a motion to strike class action allegations under Rule 12, SCRCP, and argued that the appellant could not meet the elements of class certification under Rule 23, SCRCP. Id. at 300-01. The circuit court granted the respondent's motion to strike. Id. The Court of Appeals analyzed Thorton under Section 14-3-330(2)(c), which grants appellate review when "[a]n order affecting a substantial right made in an action **when such order . . . strikes out an answer or any part thereof or any pleading in any action**." S.C. Code. Ann. § 14-3-330(2)(c) (bold added). The Court of Appeals held that not every order granting a Rule 12(f) motion to strike is immediately appealable under Section 14-3-330(2)(c). Thorton, 391 S.C. at 301, 705 S.E.2d at 478. It reasoned that "[a]n order affects a substantial right **by striking a pleading** if the order removes a material issue from the case, thereby preventing the issue from being litigated on the merits, and preventing the party from seeking to correct any errors in the order during or after trial." Thorton, 391 S.C. at 304, 705 S.E.2d at 479 (bold added). The Court of Appeals held that although the Order stated it was

striking the pleading under Rule 12, SCRCP, its effect was to deny class certification on the merits and therefore was not immediately appealable. Id. at 304-05.

Here, the Order does not "strike[] out an answer or any part thereof or any pleading." *See* S.C. Code. Ann. § 14-3-330(2)(c). The petitioner argues that the Order has the effect of striking out part of a pleading because, in the future, the Order will force it to withhold otherwise competent evidence because its attorneys cannot verify the information. (Petition at 11). However, this is entirely speculative. Again, the court's use of "verify" may simply mean signing the pleading, *see* Border City Sav. & Loan Ass'n, 523 F. Supp. at 192, or complying with Rule 11(a) as the petitioner once envisioned, *see* App. at 22; *see also* Vavadakis, 533 N.E.2d at 72-73; Pohang Iron & Steel Co., 23 C.I.T. 778, 1999 WL 970743, * 18; PPG Indus., Inc., 15 C.I.T. at 620, 781 F. Supp. at 787. The circuit court has not struck any pleading due to non-compliance with the Order. No substantial right has been violated.

Similarly in Hagood, the order at issue was one disqualifying a party's attorney. Hagood, 362 S.C. at 193-94, 607 S.E.2d at 708. The petitioner in Hagood did not make the argument – as the petitioner is making here – that sometime in the future his substantial rights may be violated because his attorney may need to withdraw from the case. The petitioner's attorney in Hagood was disqualified and actually withdrew from the case. Id. Thus, the petitioner in Hagood was denied his substantial right to be represented by an attorney of his own choosing, which could be immediately appealed. Hagood, 362 S.C. at 197-98, 607 S.E.2d at 710. The petitioner's attorney here has not been forced to withdraw and is still actively representing the petitioner. No substantial right has been violated.

The Order does not reach the "merits" of the action and the petitioner has not "arrived at the end of the road." *See* Mid-State Distributors, Inc., 310 S.C. at 334, 426 S.E.2d at 780; *see*

also Ex parte Whetstone, 289 S.C. 580, 580-81, 347 S.E.2d 881, 881-82 (1986) (instead of immediately appealing an order requiring a non-party to participate in discovery, the non-party has two alternatives. He may either comply with the discovery order and waive any right to challenge it on appeal, or refuse to comply with the order and appeal after he is held in contempt for his failure to comply); Patterson v. Spector Broadcasting Corp., 287 S.C. 249, 335 S.E.2d 803 (1985) (Mem. Opinion) (an appeal from an order compelling discovery is interlocutory and not immediately appealable); Knowles v. Standard Sav. and Loan Ass'n, 274 S.C. 58, 59, 261 S.E.2d 49 (1979) (Class certification is essentially procedural in nature and does not reach the "merits" of the underlying cause of action) (citing Ex Parte Ferguson, 82 S.C. 563, 64 S.E. 750 (1909) (an order requiring certain individuals be named as defendants is an administrative act not subject to appeal)). The fact remains that the petitioner has not been aggrieved. *See* S.C. Code Ann. § 18-1-30 (limiting appellate review to parties aggrieved by a judgment or order below); Ex parte Whetstone, 289 S.C. at 581, 347 S.E.2d at 882 ("This Court has defined an aggrieved party as one who is injured in a legal sense or one who has suffered an injury to person or property").

Moreover, the Rules of Civil Procedure do not prohibit circuit courts from ordering that future pleadings, motions, filings, and discovery responses be verified. Courts have the inherent authority to protect themselves from fraud, administer judicial functions, and control the order of business before them. State v. Brantley, 279 S.C. 215, 217, 305 S.E.2d 234, 235 (1983) ("[a] trial court has the inherent power to protect itself from indignities and to enable it effectively to administer its judicial functions"); Crestwood Golf Club, Inc. v. Potter, 328 S.C. 201, 212, 493 S.E.2d 826, 832 (1997) (the power of trial courts to dismiss a case for failure to prosecute is necessarily vested in trial courts to manage their own affairs so as to achieve orderly and expeditious disposition of cases); State v. Langford, 400 S.C. 421, 435, 735 S.E.2d 471, 478

(2012) (a court's power to hear and decide cases carries with it the inherent power to control the order of its business). This is what the circuit court did here.

III. THE CIRCUIT COURT'S REQUIREMENT THAT THE HIGHEST RANKING CORPORATE OFFICER VERIFY ALL FUTURE PLEADINGS, MOTIONS, FILINGS, AND DISCOVERY RESPONSES DOES NOT AFFECT THE PETITIONER'S SUBSTANTIAL RIGHTS

The petitioner again bases its argument on the false premise that by use of the term "verification," the Order requires its highest ranking corporate officer to submit verifications pursuant to Rule 11(c), SCRCP. (Petition at 5-6). As explained above, this is not the case. The circuit court here may hold that a corporate officer can meet the "verification" requirement of its Order by reading and signing a document or accepting the facts as stated within the document at face value. *See* Border City Sav. & Loan Ass'n, 523 F. Supp. at 192; Vavadakis, 533 N.E.2d at 72-73; Pohang Iron & Steel Co., 23 C.I.T. 778, 1999 WL 970743, * 18; PPG Indus., Inc., 15 C.I.T. at 620, 781 F. Supp. at 787. This appeal is premature.

The petitioner argues that the Order's corporate officer verification requirement for all future pleadings, motions, filings, and discovery responses violates its "substantial right to prosecute its case consistent with the Rules of Civil Procedure." (Petition at 12). The alleged "right" to prosecute a case consistent with the Rules of Civil Procedure is not a "substantial right" within the meaning of S.C. Code Ann. § 14-3-330. The Rules of Civil Procedure are procedural rules and do "not involve substantial or essential legal rights which require attention prior to final judgment." Knowles v. Standard Sav. and Loan Ass'n, 274 S.C. 58, 59, 261 S.E.2d 49 (1979) (holding that class certification is "essentially procedural in nature [and] does not involve substantial or essential legal rights which require attention prior to final judgment") (citing Ex Parte Ferguson, 82 S.C. 563, 64 S.E. 750 (1909) ("wherein an order requiring certain

individuals be named as defendants was held merely an administrative act, not subject to appeal")).

It is common for parties to disagree about the meaning or the application of the Rules of Civil Procedure. It would have a debilitating effect on judicial administration if parties were permitted to appeal every interlocutory order they believed violated their "rights" under the Rules of Civil Procedure. *See* Knowles, 274 S.C. at 59, 261 S.E.2d at 49 (approving the rational of the U.S. Supreme Court in Coopers and Lybrand v. Livesay, 437 U.S. 463, 98 S.Ct. 2434, 57 L.Ed.2d 351 (1978), in restricting appellate review in order to prevent the "debilitating effect on judicial administration caused by piecemeal appeal disposition of what is, in practical consequence, but a single controversy"); *see also* Hagood, 362 S.C. at 196, 607 S.E.2d at 709 ("Piecemeal appeals should be avoided and most errors can be corrected by the remedy of a new trial"); Breland v. Love Chevrolet Olds, Inc., 339 S.C. 89, 93, 529 S.E.2d 11, 13 (2000) (order denying motion for change of venue is not immediately appealable because any error in the order can be corrected by new trial); Senter v. Piggly Wiggly Carolina Co., 341 S.C. 74, 77-78, 533 S.E.2d 575, 577 (2000) (order denying bifurcation of trial on issues of liability and damages in personal injury case is not immediately appealable as affecting a substantial right); Townsend v. Townsend, 323 S.C. 309, 312, 474 S.E.2d 424, 427 (1996) (denial of motions for disqualification of a judge and for a continuance are interlocutory orders not affecting the merits, and thus are reviewable only on appeal from a final order); Collins v. Sigmon, 299 S.C. 464, 466, 385 S.E.2d 835, 836 (1989) (order allowing amendment of a pleading generally is not immediately appealable); Ex parte Whetstone, 289 S.C. 580, 347 S.E.2d 881 (1986) (order directing a party or a non-party to submit to discovery is not immediately appealable; instead, the party or non-party must be held in contempt before an appeal may be taken challenging the validity of the discovery

order); Tatnall v. Gardner, 350 S.C. 135, 138, 564 S.E.2d 377, 379 (Ct. App. 2002) (order denying motion to amend pleadings to assert third party claims was not immediately appealable because the order did not affect a substantial right).

Moreover, petitioner has not been aggrieved. *See* S.C. Code Ann. § 18-1-30; Ex parte Whetstone, 289 S.C. at 581, 347 S.E.2d at 882. The petitioner submitted pleadings with a verification from its highest ranking corporate officer, and the circuit court has not struck those pleadings for failure to comply with the verification requirement. App. at 26, 308; *see also* Thorton, 391 S.C. at 304, 705 S.E.2d at 479. Further, the petitioner has not refused to comply with the Order and appeal any contempt ruling. *See* Ex parte Whetstone, 289 S.C. at 581, 347 S.E.2d at 882.

The verification requirements do not reach the "merits" of the action and the petitioner has not "arrived at the end of the road." *See* Mid-State Distributors, Inc., 310 S.C. at 334, 426 S.E.2d at 780; Patterson, 287 S.C. 249, 335 S.E.2d 803 (Mem. Opinion); Ex parte Whetstone, 289 S.C. at 580, 347 S.E.2d at 881; Knowles, 274 S.C. at 59, 261 S.E.2d 49 (citing Ex Parte Ferguson, 82 S.C. 563, 64 S.E. 750).

Moreover, despite the petitioner's contention, the circuit court can require the highest ranking corporate officer to verify pleadings. The circuit court here had "concerns" about this case. App. at 267. The Court therefore imposed verification requirements. There is nothing improper about the Order. *See* Brantley, 279 S.C. at 217, 305 S.E.2d at 235; Crestwood Golf Club, Inc., 328 S.C. at 212, 493 S.E.2d at 832; Langford, 400 S.C. at 435, 735 S.E.2d at 478.

IV. THERE ARE NO SPECIAL OR IMPORTANT REASONS TO GRANT THE PETITION

As explained in Section I, *supra*, the notice of appeal was not timely served. The Court therefore must dismiss the Petition. Nevertheless, even if the petitioner had timely served the

notice, there are no special or important reasons to grant the Petition. *See* Rule 242(b), SCACR. Far from issuing an expansive or novel decision, the Court of Appeals dismissed the appeal for procedural reasons. App. at 370.

The petitioner is appealing the Order claiming that it *may* cause the petitioner to become aggrieved *at some point in the future*. The petitioner's arguments are based on speculation and how the petitioner – not the circuit court – is defining the term "verify." The petitioner wrongfully claims that the respondents concede that the parties cannot comply with both the Order and the Rules of Professional Conduct. (*See* Petition at 16). In fact, the respondents have submitted verifications that comply with both the Order and the Rules. App. at 299.

Nevertheless, the meaning of "verification" as used in the Order is inconsequential to the appeal here. As stated by the Court of Appeals, the Order does not involve the merits of the case or affect a substantial right. App. at 370. The petitioner's attorney has not been forced to withdraw. *See* Hagood, 362 S.C. at 193-94, 607 S.E.2d at 708. The Court has not struck the petitioner's pleading for failure to comply with the verification requirements. *See* Thorton, 391 S.C. at 301, 705 S.E.2d at 478. And neither the petitioner nor its attorney has been held in contempt for failure to comply with the verification requirements. *See* Ex parte Whetstone, 289 S.C. at 580-81, 347 S.E.2d at 881-82. The verification requirements do not fall into one of the "narrowly construed" categories listed in S.C. Code Ann. § 14-3-330. *See* Hagood, 362 S.C. at 196, 607 S.E.2d at 709. The Order does not reach the "merits" of the action and the petitioner has not "arrived at the end of the road." *See* Mid-State Distributors, Inc., 310 S.C. at 334, 426 S.E.2d at 780; Patterson, 287 S.C. 249, 335 S.E.2d 803 (Mem. Opinion); Ex parte Whetstone, 289 S.C. at 580, 347 S.E.2d at 881; Knowles, 274 S.C. at 59, 261 S.E.2d 49 (citing Ex Parte Ferguson, 82 S.C. 563, 64 S.E. 750).

CONCLUSION

For these reasons, the Petition for a Writ of Certiorari should be denied.

This 21st day of October, 2016

Respectfully submitted,

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IN THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

R. Lawton McIntosh, Circuit Court Judge

Appellate Case No. 2016-001985

S.C. Ct. App. Case No. 2016-000662 (Order of Dismissal filed June 9, 2016)
Rehearing denied (filed August 22, 2016)

Mattress by Appointment, LLC . . . . . .
Petitioner

v.

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

PROOF OF SERVICE

I certify that I have filed the Return to Petition for a Writ of Certiorari and served the same on Mattress by Appointment, LLC, Boxdrop Furniture, Inc., and Darren Conrad, by depositing a copy of the same in the United States Mail, first class postage prepaid, on October 21, 2016, addressed as follows:

Hon. Daniel E. Shearouse
Clerk of Court
Supreme Court of South Carolina
P.O. Box 11330
Columbia, SC 29211

Hon. Jenny Abbot Kitchings
Clerk of Court
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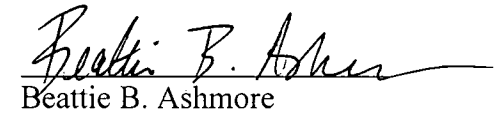
This 21st day of October, 2016
Greenville, South Carolina



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