THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

G. Thomas Cooper, Jr., Circuit Court Judge

Case No. 2016-CP-10-1629

Appellate Case No. 2017-000024

Senior Ride Connection, f/k/a ITNCharleston Trident, ...Appellant,

v.

ITNAmerica .....Respondent.

APPELLANT'S INITIAL BRIEF

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II. Whether the Circuit Court erred when it allowed ITNAmerica to move to dismiss for improper venue when that defense was not included in ITNAmerica's initial Motion to Transfer Venue or to Dismiss.

STATEMENT OF THE CASE

Appellant Senior Ride Connection, formerly known as ITNCharlestonTrident ("Senior Ride"), initially brought this action in the Court of Common Pleas for the Ninth Judicial Circuit ("Circuit Court") alleging illegal contract, breach of contract, and rescission against ITNAmerica on March 31, 2016. (Record __, Verified Compl. ¶¶ 42–65.) ITNAmerica removed the case to the United States District Court for the District of South Carolina ("District Court") and filed a Motion to Transfer Venue or to Dismiss. (Record __, Mot. to Transfer Venue or to Dismiss.) Senior Ride moved to remand. (Record __, Plaintiff's Mot. for Remand and Memo. in Support). On June 30, 2016, the Honorable Richard M. Gergel issued an Order remanding the case to the Circuit Court, and denying ITNAmerica's Motion to Transfer Venue or to Dismiss. (Record __, June 2016 Order.)

Following remand, ITNAmerica filed a second Motion to Dismiss, this time in the Circuit Court. (Record __, Mot. to Dismiss.) In response, Senior Ride filed a Motion to Strike. (Record __, Mot. to Strike.) On September 6, 2016, the Honorable G. Thomas Cooper, Jr. heard oral arguments regarding the Motion to Dismiss and the Motion to Strike. (Record __, September 6, 2016 Hrg. Tr.) On September 26, 2016, Judge Cooper issued an Order Partially Denying ITNAmerica's Motion to Dismiss. (Record __, Sept. 2016 Order.) The Order granted the portion of ITNAmerica's Motion to Dismiss seeking to dismiss Senior Ride's breach of contract claim. (*Id.* at 1–2.) However, it denied ITNAmerica's attempt to have the remainder of the case dismissed for improper venue. (*Id.* at 1.)

Following Judge Cooper's Order, ITNAmerica filed a Motion for Partial Reconsideration. (Record __, Mot. for Partial Reconsid.) On December 2, 2016, Judge Cooper issued an Order granting that Motion and dismissing the case under the doctrine of *forum non*

conveniens, on the grounds that the parties' forum selection clause required the dispute be litigated in Maine. (Record __, Dec. 2016 Order.) On January 5, 2017, Senior Ride served the Notice of Appeal on ITNAmerica.

STATEMENT OF THE FACTS

Appellant Senior Ride is a non-profit corporation organized and existing under the laws of the State of South Carolina and registered with the South Carolina Secretary of State on December 28, 2004. (Record __, Verifed Compl. ¶ 1.) Respondent ITNAmerica is a non-profit corporation organized and existing under the laws of the State of Maine and registered with the Maine Secretary of State on February 2, 2004. (*Id.* ¶ 2.) Appellant and Respondent are parties to an ITNAmerica Affiliate Agreement ("Affiliate Agreement") that is the subject of this lawsuit. (*Id.* ¶ 3.)

Senior Ride began operating in 2004 and learned of ITNAmerica shortly thereafter at a "Best Practices" program. (*Id.* ¶ 8.) At the time ITNAmerica was beginning to recruit affiliates, and the parties began discussions regarding Senior Ride becoming an affiliate of ITNAmerica. (Record __, Mot. to Strike at 3.) Believing ITNAmerica could offer it benefits, Senior Ride entered into an Affiliate Agreement with ITNAmerica. (*Id.*) Soon after becoming an Affiliate, Senior Ride quickly became dissatisfied with the services and technology offered by ITNAmerica and the ever-increasing fees requested by ITNAmerica for these services and technology. (*Id.*) Senior Ride worked with ITNAmerica to resolve these issues before ultimately making the decision to disassociate from ITNAmerica. (*Id.*)

Having seen how ITNAmerica had resisted efforts by other affiliates to disassociate, Senior Ride initially filed an action against ITNAmerica on December 8, 2015 in the South Carolina Court of Common Pleas for the Ninth Judicial Circuit in order to terminate the Affiliate

Agreement. (Record __, Compl.) ITNAmerica removed the case to the District Court and sought have the case dismissed, or in the alternative, transferred to the United States District Court for the District of Maine. (Record __, Defendant ITNAmerica's Mot. to Dismiss or in the Alternative Transfer.) Senior Ride voluntarily dismissed that action without prejudice before filing the present action. (Record __, Plaintiff's Notice of Dismissal without Prejudice.)

After dismissing the first action, Senior Ride filed this action on March 31, 2016. (Record __, Verified Compl.) ITNAmerica removed the case to the District Court and filed a Motion to Transfer Venue or to Dismiss. (Record __, Mot. to Transfer Venue or to Dismiss.) The portion of the Motion seeking transfer of venue was based upon 28 USC § 1404(a). (*Id.* at 3.) In contrast, the part of the Motion seeking dismissal was brought pursuant to Rule 12(b)(6), SCRCP, and only attacked one of three causes of action. (*Id.* at 6.) Specifically, the portion of the Motion to Dismiss under Rule 12(b)(6) was premised upon ITNAmercia's argument that Senior Ride's breach of contract claim was unsupportable because there were no damages. (*Id.* ("In addition to being filed in an improper forum, Senior Ride Connection's claim for breach of contract should be dismissed pursuant to Rule 12(b)(6) because it has specifically disavowed any claim for contract damages.").) There was no motion to dismiss brought under any other part of Rule 12(b).

During the pendency of the Motion, Senior Ride moved to remand. (Record __, Plaintiff's Mot. for Remand and Memo. in Support.) Senior Ride's Motion for Remand was premised on a lack of subject matter jurisdiction because of an insufficient amount-in-controversy. (*Id.* at 1.) On June 30, 2016, the Honorable Richard M. Gergel issued an order remanding the case to the Circuit Court, holding that the amount-in-controversy did not meet the

$75,000 threshold. (Record __, June 2016 Order at 11.) In that same order, Judge Gergel denied ITNAmerica's Motion to Transfer Venue or to Dismiss. (*Id.*)

Following remand and denial of its Motion to Transfer Venue or to Dismiss, ITNAmerica filed a Motion to Dismiss on July 21, 2016. (Record __, Mot. to Dismiss.) Although the original Motion to Transfer Venue or to Dismiss only sought 1) transfer under 28 USC § 1404(a) and 2) dismissal of Senior Ride's breach of contract claim under Rule 12(b)(6), the subsequent Motion to Dismiss sought relief under the whole of Rule 12(b) and the doctrine of *forum non conveniens*. (*See* Record __, Mot. to Transfer or to Dismiss; Record __, Mot. to Dismiss.) Because ITNAmerica's Motion to Dismiss attempted to expand the scope of the original Motion to Transfer Venue or to Dismiss, Senior Ride brought a Motion to Strike. (Mot. to Strike at 1.) Judge Cooper heard oral arguments on both Motions on September 6, 2016. (Record __, September 6, 2016 Hearing Transcript.) On September 28, 2016, Judge Cooper issued an Order partially granting and partially denying ITNAmerica's Motion to Dismiss. (Record __, September 2016 Order at 1.) The order granted ITNAmerica's Motion to Dismiss Senior Ride's breach of contract claim pursuant to Rule 12(b)(6). (*Id.* at 1–2.) However, the Order denied ITNAmerica's Motion to Dismiss on other Rule 12(b) grounds. (*Id.* at 1.)

In response to the September 2016 Order, ITNAmerica filed a Motion for Partial Reconsideration. (Record __, Mot. for Partial Reconsideration at 1.) In that Motion, ITNAmerica argued that the entire case should be dismissed pursuant to the doctrine of *forum non conveniens* because of the forum selection clause found in the Affiliate Agreement. (*Id.* at 1–2.) That Motion was followed by additional briefing from both parties. Then, on December 28, 2016, Judge Cooper reversed his September 2016 Order and granted ITNAmerica's Motion for Partial Reconsideration. (Record __, Dec. 2016 Order at 1.) Consequently, the December

2016 Order dismissed the remainder of this action pursuant to the doctrine of *forum non conveniens*. (*Id.*)

ARGUMENT

I. The Circuit Court Erred When It Allowed ITNAmerica to File its Motion to Dismiss After the Deadline to File a Responsive Pleading Had Expired.

This first issue on appeal is whether the Circuit Court erred when it allowed ITNAmerica to file its Motion to Dismiss, despite the fact that the time period for ITNAmerica to file a motion or a responsive pleading had already passed. The South Carolina Rules of Civil Procedure provide clear guidelines for when a defendant in a civil action must either answer a complaint or assert a defense by motion. Because ITNAmerica failed to do either within the allotted time--and only filed its Motion to Dismiss after time had expired--Senior Ride sought to have ITNAmerica's Motion to Dismiss struck. The Circuit Court therefore erred when it granted the Motion to Dismiss and denied Senior Ride's Motion to Strike.

The South Carolina Rules of Civil Procedure (the "Rules") establish a series of timelines for filing motions and responsive pleadings in a civil action. Under Rule 12(a), SCRCP, a defendant has 30 days after service of the complaint to serve his answer. Since Rule 12(b) requires a defendant to assert any one of eight defenses by motion before serving a responsive pleading, any such motion must also be filed before the 30-day window expires. However, the Rules also allow for some extensions of this 30-day window. Rule 6(a), SCRCP, provides that

> In computing any period of time prescribed or allowed by these rules, by order of court, or by any applicable statute, the day of the act, event, or default after which the designated period of time begins to run is not to be included. The last day of the period so computed is to be included, unless it is a Saturday, Sunday or a State or Federal holiday, in which event the period runs until the end of the next day which is neither a Saturday, Sunday nor such holiday.

Additionally, Rule 6(e) allows for a five day extension when "the notice or paper is served upon him by mail or upon a person designated by statute to accept service." Therefore, the 30-day period can be extended by five days if service is by mail, and by three days if the period would then end on a federal holiday that is also a Friday, or a Saturday followed by a federal holiday on Monday, for a total of 38 days.

However, if the defendant removes the case to federal court, and then the case is remanded back to the South Carolina court, the deadline also changes. As our own Supreme Court has made clear, removal to a federal court acts as a "suspension" of the state court's jurisdiction, rather than "divesting" the state court of jurisdiction during the removal process. *Limehouse v. Hulsey*, 404 S.C. 93, 105, 744 S.E.2d 566, 573 (2013). Because the state court's jurisdiction never lapses, this suspension merely "tolls the time period for filing responsive pleadings." *Id.* at 112–13, 744 S.E.2d 576–77. Thus, "once the case [i]s removed to federal court, the state court's jurisdiction [i]s suspended or held in abeyance until the case was properly remanded. When the state court resumed jurisdiction, it ha[s] a duty to proceed as though no removal had been attempted." *Id.* at 112, 744 S.E.2d 577 (quoting *State v. Columbia Ry., Gas & Elec. Co.*, 112 S.C. 528, 537, 100 S.E. 355, 357 (1919)) (internal quotations omitted).

Additionally, the *Limehouse* Court held that "the federal court is not divested of jurisdiction until the remand order, citing the proper basis under § 1447(c), is certified and mailed by the clerk of the district court." *Id.* at 108, 744 S.E.2d 574. Therefore, although the time period required for answering or filing a Rule 12(b) motion is tolled once the case is removed to federal court, that period resumes once the certified copy of the remand order is mailed. *Limehouse* makes clear that there is "no authority in this state to support [the] position that a removing party is entitled to a fresh thirty days to answer a Complaint upon remand." *Id.* 112,

744 S.E.2d 576. In other words, although removal and remand toll the time requirement of Rule 12, the defendant gets no additional time to file his motion or responsive pleading once the state court's jurisdiction resumes.[1]

Here Senior Ride's Complaint was served on March 31, 2016. (Record __, Aff. of Service.) ITNAmerica removed the case to the District Court on April 29, 2016. (Record __, Notice of Removal). The certified copy of the Remand Order was mailed on July 1, 2016. (Record __, June 2016 Order). ITNAmerica removed the case to the District Court twenty-nine days after the Complaint was served. Since the case was removed, the deadline for filing the Answer was tolled. Thus, when the certified copy of the Remand Order was mailed on July 1, 2016, the 30-day period resumed. Since the Remand Order was mailed, the time period was extended by five days, and as a result, ITNAmerica had until July 7, 2016.[2] ITNAmerica failed to

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[1] In the proceedings below, ITNAmerica argued that after remand, the deadline to file a motion to dismiss was extended to July 26, 2016, and therefore the Motion to Dismiss was timely when filed on July 21, 2016. (Record __, ITNAmerica's Opp. to Mot. to Strike at 2.) ITNAmerica based this conclusion on the 15 day extension that Rule 12(a)(1) provides after a motion is resolved and the five day mailing extension in Rule 6(e). (*Id.*) Rule 12(a)(1) reads as follows: "if the Court denies the motion or postpones its disposition until the trial on the merits, the responsive pleading shall be served within 15 days after notice of the Court's action." Rule 12(a)(1) creates the situation that when a party's Rule 12 motion is denied, the party gets an additional 15 days after the court denies the motion to file an answer. *See Beckham v. Durant*, 300 S.C. 329, 334, 387 S.E.2d 701, 704 (Ct. App. 1989) (holding that if the defendant had actually filed a Rule 12(b) motion "prior to expiration of the thirty day answering period, she would have had fifteen days from the date of notice of the court's ruling on the matter" to file an answer). Under ITNAmerica's reading, after a motion to dismiss is denied, Rule 12(a)(1) grants the party that filed the motion a 15 day extension to file another, successive motion to dismiss, *ab infinitum*. The Rules do not allow for such an absurd result. As will be discussed more fully below, such a result would also be in direct conflict with the requirement that all Rule 12 motions be consolidated into one. After this case was remanded to state court, Rule 12(a)(1) granted ITNAmerica additional time to file an answer. However, per the text of Rule 12 and the holding in *Limehouse*, if ITNAmerica wanted to refile its Motion to Transfer Venue or to Dismiss with the Circuit Court, it had to do so within the original time limits, with the only modification being that the filing deadline was tolled until the state court's jurisdiction resumed after remand.

[2] The Remand Order was mailed on July 1, 2016, but it was not filed until July 6, 2016. In *Limehouse*, the Court holds 1) state court jurisdiction resumes when the district court clerk mails the certified remand order, 404 S.C. 108, 744 S.E.2d 574; and 2) and time limits are tolled while the state court's jurisdiction is suspended, *Id.* at 112–13, 744 S.E.2d 576–77. This would imply that tolling ends when the certified copy is mailed. However in *Limehouse*, the lower court calculated the deadline from date when the remand order was filed, not when it was mailed. *Id.* at 115, 744 S.E.2d 578, note 10. The Supreme Court does not directly address which calculation method is correct. The Court in *Limehouse* also raises the question of whether the 5-day extension is warranted but fails to decide either way. *Id.* at 115, 744 S.E.2d 578. Depending on how *Limehouse* is applied, the deadline could be calculated in three additional ways: 1) if tolling ends on the day the remand order is mailed, with no five day mailing extension, then

file anything with the Circuit Court until July 21, 2016, a total of 14 days after the deadline had expired.

Since ITNAmerica's Motion to Dismiss was not filed until July 21, 2016, the Motion to Dismiss should have been struck as directly in violation of the deadlines imposed by Rules 6 and 12. As a result, the Circuit Court erred when it instead granted ITNAmerica's Motion to Dismiss and dismissed this case in its entirety.

II. The Circuit Court Erred When It Allowed ITNAmerica to Move to Dismiss for Improper Venue When That Defense Was Not Included in ITNAmerica's Initial Motion to Transfer Venue or to Dismiss.

The next issue in this appeal is whether the Circuit Court erred when it allowed ITNAmerica to move to dismiss for improper venue, pursuant to Rule 12(b) and the doctrine of *forum non conveniens*, despite the fact that ITNAmerica did not include that defense in its initial Motion to Transfer Venue or to Dismiss. If this Court were to find that ITNAmerica's time to file a motion or responsive pleading had not expired before July 21, 2016, ITNAmerica was nonetheless limited in the content of its Motion to Dismiss. Because Rule 12 requires that all Rule 12 defenses be consolidated into one motion or otherwise be waived, ITNAmerica waived its right to bring a Rule 12(b)(3) motion to dismiss for improper venue when it failed to include that defense in its Motion to Transfer Venue or to Dismiss. Therefore, the Circuit Court erred when it permitted ITNAmerica to add the defense of improper venue to its Motion to Dismiss.

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the deadline would be July 2, which would then be moved to July 5 because of the weekend and the July 4 holiday; 2) if tolling ends on the day the remand order is filed, with no 5-day mailing extension, then the deadline would be July 6; or 3) if tolling ends on the day the remand order is filed, with a 5-day mailing extension, then the deadline would be July 11. No matter how the deadline is calculated, ITNAmerica failed to file a responsive pleading before the deadline.

Rule 12, SCRCP, governs how and when defenses and objections are presented in pleadings and motions.[3] Rule 12(b) provides for a series of defenses that may be asserted by motion prior to filing a responsive pleading. Among those defenses, Rule 12(b)(3) permits a party to bring a motion to dismiss for "improper venue." Rule 12(b)(6) permits a party to bring a motion to dismiss for "failure to state facts sufficient to constitute a cause of action."

Rule 12(g) makes clear that multiple defenses, including all defenses under Rule 12(b), may be combined in a single motion. Rule 12(g) expressly states that "a party who makes a motion under this rule may join with it any other motions herein provided for and then available to him." However, the next sentence provides the following:

> If a party makes a motion under this rule but omits therefrom any defense or objection then available to him which this rule permits to be raised by motion, *he shall not thereafter make a motion based on the defense or objection omitted*, except a motion as provided in subdivision (h)(2) hereof on any of the grounds there stated.

Rule 12(g), SCRCP (emphasis added). Thus Rule 12(g) has two components: 1) it permits a party to bring all its Rule 12 defenses together as one motion, and 2) absent certain exceptions, it prevents any defense that is omitted from the initial Rule 12 from being brought at a later time. *See Glenn v. Sch. Dist. No. Five of Anderson Cty.,* 294 S.C. 530, 534, 366 S.E.2d 47, 49 (Ct. App. 1988) (holding that Rule 12(g) requires all Rule 12(b) defenses be brought in one motion, but that defendant was not barred from amending its answer to include a statute of limitations defense that was not included in its Rule 12 Motion because that defenses is not listed in Rule 12(b)).

[3] Although there was some question below whether the South Carolina Rules of Civil Procedure or the Federal Rules of Civil Procedure govern this situation, the answer does not affect the outcome. For both Rules, the relevant provisions are substantively identical. In either Rule 12, subsection (b) provides the same seven defenses that may be asserted by motion. For both Federal Rule 12(g) and South Carolina Rule 12(g), any defense asserted by motion must be joined in a single motion. Finally, either Rule 12(h) provides that the defenses of lack of personal jurisdiction, improper venue, insufficient process and insufficient service of process, if not raised in the consolidated Rule 12 motion, are waived.

Rule 12(h)(1) echoes Rule 12(g) and makes clear that a party that omits a the defense of improper venue from its initial Rule 12 motion to dismiss waives its right to raise that defense in a subsequent motion. Specifically, Rule 12(h)(1) provides the following:

> A defense of lack of jurisdiction over the person, *improper venue*, insufficiency of process, insufficiency of service of process, or that another action is pending between the same parties, is waived (a) if omitted from a motion in the circumstances described in subdivision (g) or (b) if it is neither made by motion under this rule nor included in a responsive pleading or an amendment thereof permitted by Rule 15(a) to be made as a matter of course.

Rule 12(h)(1), SCRCP (emphasis added). Thus a party that omits the defense of improper venue from its initial Rule 12 motion has waived that defense.

Finally, Rule 12(h)(2) provides exceptions to the general rule that all defenses must be included in the original Rule 12 motion. These exceptions are limited to "[a] defense of failure to state a cause of action upon which relief can be granted, a defense of failure to join a party indispensable under Rule 19, and an objection of failure to state a legal defense to a claim." Rule 12(h)(2), SCRCP. For these exceptions only, a defense or objection "may be made in any pleading permitted or ordered under Rule 7(a), or by motion for judgment on the pleadings, or at the trial on the merits." *Id.* Outside of those limited exceptions, per the clear text of Rules 12(g) and 12(h)(1), any other Rule 12 defense not brought in a the initial Rule 12 motion is waived. When read together, Rule 12(g) requires that all Rule 12 defenses to be raised in one motion, Rule 12(h)(1) clarifies that any defense not raised in the initial Rule 12 motion is waived, and Rule 12(h)(2) provides a few limited exceptions to those restrictions.

Since ITNAmerica failed to include a Rule 12(b)(3) motion in its initial Motion to Transfer or to Dismiss, ITNAmerica waived the defense of improper venue. The Circuit Court, therefore, erred when it permitted ITNAmerica raise that defense in its Motion to Dismiss. Per

the text of Rule 12, the Circuit Court should have struck the defense of improper venue from ITNAmerica's Motion to Dismiss.

ITNAmerica's initial Motion to Transfer Venue or to Dismiss filed in the District Court sought only two discrete forms of relief: 1) to transfer the case under 28 U.S.C. § 1404(a) and 2) to dismiss Senior Ride's breach of contract claim (one of three causes of action asserted) pursuant to Rule 12(b)(6). (Record __, Mot. to Transfer Venue or to Dismiss at 3–6.) When ITNAmerica filed its Motion to Dismiss in the Circuit Court, however, it attempted to expand the narrow relief sought in the Motion to Transfer or to Dismiss in order to assert the defense of improper venue. ITNAmerica's second Motion to Dismiss consisted of one paragraph, with ITNAmerica's initial Motion to Transfer Venue or to Dismiss attached as it was filed in the District Court. (Record __, Mot. to Dismiss at 1.) Because of its brevity, the text of the entire Motion to Dismiss is produced below:

> Pursuant to Rule 12(b), SCRCP, and the doctrine of *forum non conveniens*, ITNAmerica moves to dismiss this matter for reasons stated in the attached motion, which was pending before the United States District Court for the District of South Carolina prior to being remanded to this Court. Copies of all briefing filed by either party with the federal court are attached. ITNAmerica reserves the right to submit additional briefing, exhibits, and arguments of counsel in support of this motion, as permitted by the Court.

(*Id.*) Although ITNAmerica's Motion to Dismiss incorporates the entire text of the Motion to Transfer Venue or to Dismiss, it expands the scope of relief sought to a motion to dismiss for improper venue "[p]usuant to Rule of 12(b) and the doctrine of *forum non conveniens*." (*Id.*)

While ITNAmerica's Motion to Dismiss is phrased as a motion "[p]ursuant to Rule 12(b) and the doctrine of *forum non conveniens*," it is actually a motion to dismiss the action for improper venue under Rule 12(b)(3). (*See* Record __, Mot. to Dismiss.) In the Motion to Dismiss, ITNAmerica sought to have the case dismissed pursuant to the forum selection clause

that was contained in the Affiliate Agreement. (*Id.*) Such an action would necessarily be premised upon a Rule 12(b)(3) motion. *See* Rule 12(b)(3), SCRCP ("Every defense, in law or fact, to a cause of action in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: . . . improper venue."). However, as stated above, in the Motion to Transfer Venue or to Dismiss, ITNAmerica made *no* motion to dismiss for improper venue, under Rule 12(b)(3) or otherwise.

Because ITNAmerica's Motion to Transfer Venue or to Dismiss included at least one Rule 12(b) defense, Rules 12(g) and 12(h)(1) make clear that ITNAmerica had to include all other 12(b) defenses in the Motion to Transfer Venue or to Dismiss, or those defenses would be waived. In the Motion to Transfer Venue or to Dismiss, ITNAmerica made a motion only pursuant to Rule 12(b)(6) to dismiss one of Senior Ride's breach of contract claim, alleging that it was "facially defective." (Record __, Mot. to Transfer Venue or to Dismiss at 6.) Although ITNAmerica could have also moved at that time to dismiss the complaint under Rule 12(b)(3), it did not do so. Instead, the only effort ITNAmerica made to dispute this action's venue was to move for a transfer of venue pursuant to 28 U.S.C. § 1404(a) from the District Court of the District of South Carolina to the District Court for the District of Maine. (*See id.* at 3.) Accordingly, if ITNAmerica wanted to move to have the action dismissed for improper venue, it was required to do so when it filed the Motion to Transfer Venue or to Dismiss. Despite this requirement, nothing in ITNAmerica's initial Motion to Transfer Venue or to Dismiss made any mention of Rule 12(b)(3) or sought to have the action dismissed for improper venue.

The Rules unambiguously require that a party move to dismiss for improper venue in its first responsive pleading. Therefore, ITNAmerica waived its right to assert the defense of

improper venue in a subsequent motion. Rule 12 prohibits the filing of serial motions to dismiss with the hope that one of them will resonate with the court. That is exactly what ITNAmerica attempted in this case. As a result, ITNAmerica's Motion should have been struck, and the Circuit Court erred when it failed to do so.

ITNAmerica argues that it was not required to file a Rule 12(b)(3) motion, and that it could instead file a motion pursuant to the doctrine of *forum non conveniens* according to *Atlantic Marine*.. (Record __, September 6, 2016 Hrg. Tr. 23:21–24:5.) In *Atlantic Marine*, the Court held that

> the appropriate way to enforce a forum-selection clause pointing to a state or foreign forum is through the doctrine of *forum non conveniens*. Section 1404(a) is merely a codification of the doctrine of *forum non conveniens* for the subset of cases in which the transferee forum is within the federal court system; in such cases, Congress has replaced the traditional remedy of outright dismissal with transfer. For the remaining set of cases calling for a nonfederal forum, § 1404(a) has no application, but the residual doctrine of *forum non conveniens* has continuing application in federal courts.

Atl. Marine Const. Co. v. U.S. Dist. Court for W. Dist. of Texas, 134 S. Ct. 568, 580 (2013) (citations omitted) (internal quotations omitted). As the *Atlantic Marine* Court makes clear, the rule that a court enforce a forum selection clause through *forum non conveniens* only applies to *federal courts*. *Atlantic Marine's forum non conveniens* rule has no application in state court. *Atlantic Marine* is strictly concerned with the treatment of forum selection clauses in *federal* court, under the *Federal* Rules of Civil Procedure and the *federal* transfer of venue laws. Therefore, while *Atlantic Marine* was applicable while the case was pending in the District Court, it does not shield *ITNAmerica* from the requirements of the South Carolina Rules of Civil Procedure, including the requirement that motions under Rule 12 must be combined together, and that any defense not included in the initial motion is waived. Consequently, *Atlantic Marine*

does not save ITNAmerica from the fact that it waived its right to have this action dismissed for improper venue.

ITNAmerica's argument regarding the Rule 12(b)(3) motion is also the exact opposite of ITNAmerica's position when it attempted to have Senior Ride's first action dismissed. When ITNAmerica filed its Motion to Dismiss or in the Alternative Transfer in the case that Senior Ride voluntarily dismissed without prejudice, ITNAmerica sought two forms of relief: 1) dismissal under Rule 12(b)(3) for improper venue or 2) transfer under 28 U.S.C. § 1404(a) to the United States District Court for the District of Maine. (Record __, Defendants's Memo. of Law in Support of Defendant ITNAmerica's Mot. to Dismiss or in the Alternative Transfer.) In its Memorandum, ITNAmerica spent three pages arguing that the District Court should dismiss the action under Rule 12(b)(3) because the Affiliate Agreement's forum selection clause required the case be litigated in Maine. (*Id.* at 2–4.) ITNAmerica explicitly stated that a "'motion to dismiss based upon a forum selection clause should be properly treated under Rule 12(b)(3) as a motion to dismiss based upon improper venue.'" (*Id.* at 2 (citing *Sucampo Pharmaceuticals Inc. v. Astellas Pharma, Inc.*, 471 F.3d 544, 550 (4th Cir. 2006).) This argument completely contradicts the arguments ITNAmerica subsequently made in the Circuit Court. This Court should not permit ITNAmerica to change its position so easily.

Even if the Court finds that ITNAmerica was not required to move to dismiss this case under Rule 12(b)(3), Rule 12(g) makes clear that all defenses must be brought in the initial motion to dismiss. This means that, at a minimum, ITNAmerica was required to include its motion pursuant to Rule 12(b) and the doctrine of *forum non conveniens* in its first Rule 12 motion. Despite that fact, ITNAmerica's Motion to Transfer Venue or to Dismiss did not include *one single reference* to the term *forum non conveniens*, and its only Rule 12(b) motion was

brought under Rule 12(b)(6). (*See generally*, Record __, Mot. to Transfer Venue or to Dismiss.) ITNAmerica only added the portion of the Motion "[p]ursuant to Rule 12(b) and the doctrine of *forum non conveniens*" when it filed the Motion to Dismiss in the Circuit Court. (Record __, Mot. to Dimiss at 1.)

The South Carolina Rules of Civil Procedure require that, outside of a few limited exceptions not applicable here, all defenses under Rule 12 must be raised in one consolidated motion and that any defense that is omitted has been waived. Because ITNAmerica omitted a motion to dismiss for improper venue--whether under Rule 12(b)(3) or the doctrine of *forum non conveniens*--from its Motion to Transfer or to Dismiss, it waived the right to raise that defense when it filed the Motion to Dismiss in the Circuit Court. Therefore, the Circuit Court should have struck ITNAmerica's attempt to have this action dismissed pursuant to Rule 12(b) and the doctrine of *forum non conveniens* from the Motion to Dismiss. The Circuit Court's failure to do so was in error.

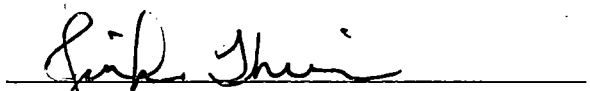
CONCLUSION

For the foregoing reasons, Appellant respectfully requests that the Circuit Court's order dismissing this action be reversed.

-SIGNATURE ON FOLLOWING PAGE-

Respectfully submitted,

K&L GATES, LLP



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April 26, 2017

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

G. Thomas Cooper, Jr., Circuit Court Judge

Case No. 2016-CP-10-1629

Appellate Case No. 2017-000024

Senior Ride Connection, f/k/a ITNCharleston Trident, ...Appellant,

v.

ITNAmerica .....Respondent.

PROOF OF SERVICE

I hereby certify that on the 26th day of April, 2017, I served a copy of the Appellant's Initial Brief on counsel for the Respondent *via* U.S. Mail with sufficient postage, correctly addressed as follows:

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April 26, 2017

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MAY 01 2017

SC Court of Appeals

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
P. O. Box 11629
Columbia, SC 29211

Re: Senior Ride Connection, f/k/a ITNCharleston Trident v. ITNAmerica
Appellate Case No. 2017-000024

Dear Ms. Kitchings:

Enclosed for filing is Appellant's Initial Brief in connection with the above case. Also enclosed are the following:

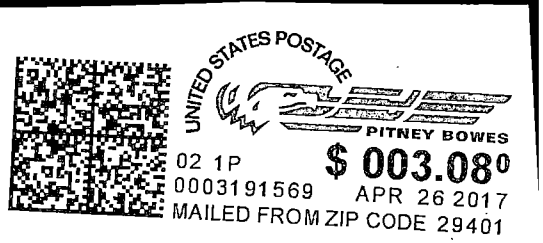
1. Proof of Service of Appellant's Initial Brief;
2. Appellant's Designation of Matter to be Included in the Record on Appeal;
3. Proof of Service of Designation of Matter; and
4. Self-addressed stamped envelope for returning filed copies.

Thank you for your assistance in this matter.

Very truly yours,

Jennifer H. Thiem

JHT/kbt
Enclosures
cc: M. Todd Carroll, Esq. *(via U.S. Mail, w/ encl.)*
Kevin A. Hall, Esq. *(via U.S. Mail w/ encl.)*



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