

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable G. Thomas Cooper, Jr.
Circuit Court Judge

Appellate Case No. 2017-000024
Circuit Court Case No. 2016-CP-10-1629

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

v.

ITNAmerica,..... Respondent.

RESPONDENT'S INITIAL BRIEF

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STATEMENT OF ISSUES

The parties' Affiliate Agreement unambiguously states that any litigation between them that "concerns" their contract must take place in Portland, Maine. Despite this contractual provision, Senior Ride Connection sued ITNAmerica in Charleston, South Carolina. The circuit court enforced the parties' forum-selection clause and dismissed this case pursuant to the doctrine of *forum non conveniens*. Did the circuit court properly dismiss this case?

STATEMENT OF THE CASE

This appeal asks whether the circuit court properly dismissed a case that the parties agreed would be heard only in Maine, but that Senior Ride Connection improperly filed in South Carolina in violation of the parties' contract. As explained below, Judge Cooper rightly enforced the parties' contract and dismissed this case, and he rightly disregarded Senior Ride Connection's repeated mischaracterization of the case's procedural posture when doing so.

I. ITNAmerica and Senior Ride Connection entered into an Affiliate Agreement to collaboratively provide transportation to seniors, but Senior Ride Connection ceased performing its duties under the contract.

ITNAmerica is a national nonprofit transportation network that serves the aging population. It is headquartered in Maine, and it works with numerous local "affiliate communities" around the country to provide transportation services to seniors.

Senior Ride Connection has been ITNAmerica's affiliate in the Charleston area since August 2007. (Compl. ¶ 12; R. p. ____.) The parties memorialized their relationship through an Affiliate Agreement, which provided that ITNAmerica would provide Senior Ride Connection with certain services and programming help in exchange for annual fees, among other obligations and exchanges of responsibilities. (Affiliate Agreement *passim*; R. pp. ____–____.) The Affiliate Agreement also states that "any suit, action, or proceeding between [the parties] which concerns this Agreement shall be brought and heard in federal or state court in Portland, Maine, and each party hereby consents to the personal jurisdiction of such courts and agrees to waive any objections to such venue, irrespective of their current or future residences." (*Id.* ¶ "Governing Law," at 24; R. p. ____.)

In November and December 2015, Senior Ride Connection ceased performing its obligations under the parties' contract. (Compl. ¶¶ 39–41; R. p. ____.) This litigation followed.

II. After quitting its performance of the Affiliate Agreement, Senior Ride Connection filed suit against ITNAmerica in Charleston, which ITNAmerica timely removed.

On March 31, 2016, Senior Ride Connection filed a complaint against ITNAmerica alleging three claims, all of which arise out of the Affiliate Agreement: (1) “illegal contract,” (2) breach of contract, and (3) rescission. (*Id.* ¶¶ 42–65; R. pp. ___–___.) ITNAmerica removed this case to federal court on April 29, 2016. (Notice of Removal; R. p. ___.)

On May 4, 2016, ITNAmerica moved to transfer this case to the District of Maine, as directed by the Affiliate Agreement’s forum-selection clause, and to dismiss Senior Ride Connection’s breach of contract claim on its merits. (Motion to Transfer Venue or to Dismiss filed with the D.S.C.; R. p. ___.) Senior Ride Connection countered by seeking remand back to the state court in Charleston on May 20, 2016. (Motion for Remand filed with the D.S.C.; R. p. ___.)

On June 30, 2016, Judge Gergel granted Senior Ride Connection’s motion to remand and held that the federal court lacked subject matter jurisdiction over this due to the absence of the requisite amount in controversy. (Order of the D.S.C.; R. p. ___.) In that same order, Judge Gergel “denied as moot” ITNAmerica’s motion to dismiss or transfer and explained that the federal court “cannot reach Plaintiff’s motion to transfer” due to its lack of subject matter jurisdiction. (*Id.* at 11; R. p. ___.)

III. Following remand, ITNAmerica renewed its motion to dismiss, which Judge Cooper ultimately granted following a hearing and extensive briefing.

The Charleston County Clerk of Court mailed notice of entry of the federal court’s remand order to the parties on July 6, 2016. (Notice of Entry of Judgment; R. p. ___.) On July 18, 2016, ITNAmerica renewed its motion to dismiss in the state court. (Motion to Dismiss; R. p. ___.) Because the parties’ arguments remained unchanged, ITNAmerica attached all of the

briefing regarding enforcing the forum-selection clause that had been filed while the case was pending before the federal court. (*Id.*; R. pp. ____–____.)¹

On July 28, 2016, Senior Ride Connection filed a motion to strike ITNAmerica’s motion to dismiss and argued, incredibly, that Judge Gergel’s denial of ITNAmerica’s initial motion was somehow the “law of the case” even though that denial was only due to the federal court’s lack of subject matter jurisdiction. (Motion to Strike at 4; R. p. ____.) ITNAmerica filed a memorandum opposing Senior Ride Connection’s motion on September 2, 2016. (Opposition to Motion to Strike; R. p. ____.)

Judge Cooper heard oral argument on ITNAmerica’s renewed motion to dismiss and Senior Ride Connection’s motion to strike on September 6, 2016. During that hearing, ITNAmerica submitted an additional memorandum addressing Senior Ride Connection’s newfound argument that South Carolina Code § 15-7-120 should preempt enforcement of the parties’ forum-selection clause. (ITNAmerica’s Memorandum Regarding South Carolina Code § 15-7-120; R. p. ____.) Judge Cooper took the issues under advisement and requested that the parties submit competing proposed orders, which each did via email correspondence. (Hr’g Tr. 23:16–17; R. p. ____.)

By order entered on September 28, 2016, Judge Cooper partially granted and partially denied ITNAmerica’s motion to dismiss. In that order, Judge Cooper dismissed Senior Ride Connection’s breach of contract claim due to a lack of damages. (Order at 2 (entered Sept. 28, 2016); R. p. ____.) Without explanation or discussion, Judge Cooper denied the remainder of ITNAmerica’s motion. (*Id.*)

¹ Senior Ride Connection’s opening brief misstates this date. ITNAmerica served its renewed motion to dismiss on July 18, 2016. (Certificate of Service accompanying Motion to Dismiss; R. p. ____.) Senior Ride Connection repeatedly misidentifies this date as July 21, 2016. (Senior Ride Connection’s Br. at 5, 8 n.1, 9.)

On October 11, 2016, ITNAmerica moved for partial reconsideration pursuant to Rule 59(e), SCRCF. (Motion for Partial Reconsideration; R. p. ____.)² Senior Ride Connection filed an opposing memorandum on October 20, 2016. (Memorandum in Opposition to Defendant's Motion for Partial Reconsideration; R. p. ____.)

On December 9, 2016, Judge Cooper entered a Form 4 Order granting ITNAmerica's motion for partial reconsideration. (Form 4 Order; R. p. ____.) He followed that with a comprehensive order granting ITNAmerica's motion, dismissing this case in whole, and enforcing the parties' Maine forum-selection clause. (Order (entered Dec. 28, 2016); R. p. ____.) Senior Ride Connection timely filed a notice of appeal, but only appealed Judge Cooper's second ruling—not his first order dismissing Senior Ride Connection's breach of contract claim. (Notice of Appeal; R. p. ____.)

STANDARD OF REVIEW

Judge Cooper dismissed this case in its entirety pursuant to the doctrine of *forum non conveniens*. That decision is reviewed for an abuse of discretion. *See Braten Apparel Corp. v. Bankers Trust Co.*, 273 S.C. 663, 667, 259 S.E.2d 110, 112 (1979) (reminding that “[t]he decision to invoke the doctrine [of *forum non conveniens*] is one which lies within the discretion of the trial court”).

ARGUMENTS AND AUTHORITIES

Senior Ride Connection has based its entire appellate argument on the suggestion that Judge Gergel decided the issue of *forum non conveniens* adversely to ITNAmerica when he remanded this case back to the state court. This is simply false.

² ITNAmerica received written notice of entry of Judge Cooper's initial ruling on its motion to dismiss on October 5, 2016, rendering its Rule 59(e) motion timely. (Order at 3 n.1 (entered Dec. 28, 2016); R. p. ____.)

Judge Gergel unambiguously denied ITNAmerica’s then-pending motion to dismiss and transfer “as moot” because the federal court did not have subject matter jurisdiction to consider this case. (Order of the D.S.C. at 11; R. p. ____.) As he explained: “Because the Court lacks subject-matter jurisdiction over this matter, it cannot reach Plaintiff’s motion to transfer, which is made moot by remand to state court.” (*Id.*)

Despite the clarity of Judge Gergel’s decision, Senior Ride Connection argues on appeal that ITNAmerica was somehow prohibited from renewing its arguments before the state court once the case was remanded. The Court should reject Senior Ride Connection’s arguments, which are misleading on the facts, incorrect on the law, and not even preserved for appellate review. Instead, it should affirm Judge Cooper’s enforcement of the parties’ forum-selection clause, which is reinforced—and even compelled—by the United States Supreme Court’s recent decision in *Atlantic Marine Construction Co. v. United States District Court*, 134 S. Ct. 568 (2013), as explained below.

I. ITNAmerica timely moved to dismiss Senior Ride Connection’s complaint.

A. Senior Ride Connection’s timeliness argument is barred by the law-of-the-case doctrine because it failed to appeal Judge Cooper’s initial order that dismissed part of this case.

Senior Ride Connection’s lead argument on appeal is that ITNAmerica did not timely renew its motion to dismiss with the state court. This is not so, but the Court does not need to even address this issue because it is not preserved for appellate review.

It is hornbook law that an unappealed ruling is not reviewable and becomes the law of the case. *See, e.g., Ramirez v. State*, 419 S.C. 14, 22 n.7, 795 S.E.2d 841, 845 n.7 (2017) (“Since neither party appealed the court’s holding on this issue, it is the law of the case.”); *Davis v. Parkview Apts.*, 409 S.C. 266, 281, 762 S.E.2d 535, 543 (2014) (explaining that the law-of-the-

case doctrine renders decisions unreviewable, “right or wrong”). As former Chief Justice Toal’s treatise summarizes:

It is a fundamental rule of law that an appellate court will affirm a ruling by a lower court if the offended party does not challenge that ruling. Failure to challenge the ruling is an abandonment of the issue and precludes consideration on appeal. An unappealed order, right or wrong, is considered the law of the case.

Jean Hoefer Toal, *et al.*, *Appellate Practice in South Carolina* 214 (3d ed. 2016) (collecting numerous South Carolina cases; internal citations omitted).

The law-of-the-case doctrine precludes consideration of Senior Ride Connection’s “timeliness” argument because Senior Ride Connection has not appealed Judge Cooper’s first order dismissing its breach of contract claim. That order, entered on September 28, 2016, partially granted ITNAmerica’s motion to dismiss despite Senior Ride Connection’s argument that the motion was untimely and should have been stricken. (Order at 2 (entered Sept. 28, 2016); R. p. ____.)³ But Senior Ride Connection sought neither reconsideration nor appellate review of that order. (Notice of Appeal; R. p. ____.)

Because Judge Cooper’s rejection of Senior Ride Connection’s timeliness argument has not been appealed, it is the law of the case and is not reviewable. *Ramirez*, 419 S.C. at 22 n.7, 795 S.E.2d at 845 n.7. Accordingly, the Court should reject Senior Ride Connection’s core argument and affirm the trial court’s rulings.

³ While Judge Cooper did not expressly deny Senior Ride Connection’s motion to strike in this order, he indisputably rejected the argument because he partially granted ITNAmerica’s motion to dismiss over Senior Ride Connection’s objection that the motion to dismiss was untimely. The law-of-the-case doctrine applies with equal force to such a ruling. *See, e.g., Ross v. Med. Univ. of S.C.*, 328 S.C. 51, 62, 492 S.E.2d 62, 68 (1997) (“The law of the case applies both to those issues explicitly decided and to those issues which were necessarily decided in the former case.”).

B. Regardless of which procedural rules apply, ITNAmerica timely renewed its motion to dismiss following remand to the state court.

Even if the Court finds that Senior Ride Connection's argument is properly preserved for appellate review, it should still reject the suggestion that ITNAmerica untimely renewed its motion to dismiss after the case was remanded back to the state court.

In its opening brief, Senior Ride Connection identifies July 7 or July 11, 2016, as ITNAmerica's deadline for filing its responsive pleading. (*Compare* Senior Ride Connection's Br. at 8 (calculating the deadline to be July 7, 2016) *with id.* at 9 n.2 (calculating the deadline to be July 11, 2016).) Under both of its calculations, Senior Ride Connection ignores the fact that ITNAmerica filed a Rule 12 motion while the case was pending before the federal court. (*Id.* at 6–9.) Indeed, Senior Ride Connection's entire timeliness argument is based on the theory that ITNAmerica's 30-day period to file an answer was suspended when it removed the case to federal court, and that same 30-day period was reactivated from the point of suspension the moment the federal court remanded the case back to state court.⁴

This theory, however, is belied by the facts and the governing procedural rules. There is no dispute that ITNAmerica timely filed a motion to dismiss in the federal court, a filing that eliminated the very 30-day deadline on which Senior Ride Connection has exclusively based its argument. Once the case was remanded to the state court, ITNAmerica timely renewed its motion. The relevant dates and their corresponding procedural rules are detailed in the chart on the following page:

⁴ Contrary to its arguments before this Court, Senior Ride Connection actually acknowledged to the trial court that ITNAmerica had an extended period of time to make its next filing following Judge Gergel's denial of the initial motion to dismiss. (Motion to Strike at 4 n.4; R. p. ____.) This is in direct contrast to Senior Ride Connection's appellate argument that the initial 30-day response period resumed once the case was remanded.

Timeline of Litigation

| <u>Date</u> | <u>Litigation Activity</u> | <u>Legal Authority for Timing of Activity</u> |
|-----------------------|---|--|
| March 31, 2016 | Senior Ride Connection files complaint (R. p. ____) | |
| April 29, 2016 | ITNAmerica files and serves notice of removal (R. p. ____) | 28 U.S.C. § 1446 (allows 30 days from receipt of complaint to remove case) |
| May 4, 2016 | ITNAmerica files and serves motion to dismiss in federal court (R. p. ____) | Federal Rule of Civil Procedure 81(c)(2)(C) (allows 7 days after notice of removal is filed to file responsive pleading/Rule 12 motion); and Rule 12(a)(4) (filing of a Rule 12 motion suspends the time to file an answer) |
| June 30, 2016 | Federal court remands case and denies motion as moot (R. p. ____) | |
| July 1, 2016 | Judge Gergel's chambers emails certified copy of remand order to Charleston County Clerk of Court (R. p. ____) | 28 U.S.C. § 1447(c) (directing the federal court to send a certified copy of the remand order to the state court) |
| July 5, 2016 | Charleston County Clerk of Court enters remand order (R. p. ____) | 28 U.S.C. § 1447(c) (authorizing the state court to proceed with a case after it receives through the mail a certified copy of the remand order) |
| July 6, 2016 | Charleston County Clerk of Court mails notice of entry of remand order to the parties (R. p. ____) | Rule 77(d), SCRCP |
| Monday, July 18, 2016 | ITNAmerica renews its motion to dismiss by filing it in state court and serving it on Senior Ride Connection (R. p. ____) | <p><u>Federal Rules of Civil Procedure:</u> Rule 12(a)(4)(A) (allows 14 days to make an additional filing after a Rule 12 motion has been denied); Rule 6(d) (allows 3 additional days when notice is provided by electronic means); and Rule 6(a)(1)(C) (deadline moves to the next business day if it falls on a weekend or holiday)</p> <p><u>South Carolina Rules of Civil Procedure:</u> Rule 12(a)(1) (allows 15 days to make an additional filing after a Rule 12 motion has been denied); and Rule 6(e) (allows 5 additional days when notice is provided by mail)</p> <p><u>South Carolina E-Filing Policies and Guidelines</u> Section 4(e)(4) (allows 5 additional days when notice is provided by electronic means)</p> |

The federal court's denial as moot of ITNAmerica's initial motion to dismiss altered the timeline for ITNAmerica's next filing. It makes no difference whether the Federal Rules of Civil Procedure or the South Carolina Rules of Civil Procedure governed ITNAmerica's next procedural step because ITNAmerica timely renewed its motion under either set of rules:

- Both the Federal Rules of Civil Procedure and the South Carolina Rules of Civil Procedure provide a period of time for a party to serve its next filing after a Rule 12 motion has been denied: the Federal Rules allow 14 days, and the South Carolina Rules allow 15 days. Fed. R. Civ. P. 12(a)(4) (2017); Rule 12(a), SCRCF.⁵
- Both sets of rules also build in additional time when a party is notified of a ruling by mail, either electronic or hard copy. *See* Fed. R. Civ. P. 6(d) (2016) (allowing three extra days to respond when a party is served via electronic means or United States mail); Rule 6(e), SCRCF (allowing five extra days to respond when a party is served via United States mail); Section 4(e)(4), SCEF (allowing five extra days to respond when a party is served via electronic means).⁶
- And both sets of rules move a deadline to the next business day when the deadline lands on a weekend or holiday. Fed. R. Civ. P. 6(a)(1)(C) (2017); Rule 6(a), SCRCF.

Federal Rules: Assuming that the clock began running on June 30, 2016, when Judge Gergel denied ITNAmerica's initial motion as moot but before the state court's jurisdiction had been reactivated, ITNAmerica's earliest possible time to renew its motion was as follows:

ITNAmerica's Service Deadline Under Federal Rules

| | |
|------------------------------|---------------------------------------|
| June 30, 2016 | Remand Order Entered in Federal Court |
| <u>+ 14 days</u> | Federal Rule 12(a)(4) |
| July 14, 2016 | |
| <u>+ 3 days</u> | Federal Rule 6(d) |
| July 17, 2016 | |
| <u>+1 day</u> | Federal Rule 6(a)(1)(C) |
| Monday, July 18, 2016 | New Deadline |

⁵ Again, when making its arguments to the trial court, Senior Ride Connection acknowledged this additional time for ITNAmerica's next filing. (Motion to Strike at 4 n.4; R. p. ____.)

⁶ Federal Rule 6(d) was amended effective December 1, 2016, to eliminate the additional time when service is affected via electronic means, though this amendment is irrelevant to calculating ITNAmerica's pre-December 1, 2016 deadline here. Section 4(e)(4) of South Carolina's E-Filing Rules still provides five extra days for responding when service is completed electronically.

South Carolina Rules: Assuming, on the other hand, that the clock began running on July 1, 2016, when Judge Gergel’s chambers emailed a copy of his order denying ITNAmerica’s motion to dismiss as moot to the Charleston County Clerk of Court—the first moment that the state court’s jurisdiction could have been reactivated under 28 U.S.C. § 1447(c) and the South Carolina Supreme Court’s construction of that statute in *Limehouse v. Hulsey*, 404 S.C. 93, 744 S.E.2d 566 (2013)⁷—ITNAmerica’s earliest possible time to renew its motion was as follows:

ITNAmerica’s Service Deadline Under South Carolina Rules

| | |
|--|---|
| <p>July 1, 2016 <u>+ 15 days</u> July 16, 2016 <u>+5 days</u> Thursday, July 21, 2016</p> | <p>Remand Order Received by State Court Rule 12(a), SCRCP</p> <p>Rule 6(e), SCRCP/Section 4(e)(4), SCEF New Deadline</p> |
|--|---|

ITNAmerica timely served its renewed motion to dismiss **on Monday, July 18, 2016**, on or before any potential deadline. (Motion to Dismiss at “Certificate of Service”; R. p. ____.)⁸ The Court should reject Senior Ride Connection’s timeliness argument accordingly.

⁷ In *Limehouse*, the Supreme Court stated in *dicta* that the state court’s jurisdiction resumes when it “received the federal court’s certified remand order.” 404 S.C. at 117, 744 S.E.2d at 579. Here, the record is unclear as to when the Charleston County Clerk of Court actually received the remand order, but the record does indicate that the remand order was emailed on July 1, 2016. (Email from Sandra Shealy (July 1, 2016); R. p. ____.) The calculation detailed above assumes without conceding that (1) the Charleston County Clerk of Court received the federal court’s email the same day it was sent, and (2) an email can satisfy the transmission requirements of 28 U.S.C. § 1447(c) to reactivate a state court’s jurisdiction. Notably, the deadline for the defendant’s responsive pleading in *Limehouse* is fundamentally different than ITNAmerica’s here because that defendant never filed anything while the case was before the federal court, but ITNAmerica filed a Rule 12 motion. 404 S.C. at 97–98, 744 S.E.2d at 569.

⁸ Notably, Senior Ride Connection never filed an affidavit of default, a motion for default judgment, or anything else that would preempt ITNAmerica’s ability to renew its motion to dismiss. And, of course, the trial court has discretion to extend deadlines if a doubt ever arises, and there is certainly no suggestion of an abuse of discretion here. *See generally* Rule 6, SCRCP; *Beckham v. Durant*, 300 S.C. 329, 332, 387 S.E.2d 701, 703 (Ct. App. 1989) (reminding that the decision to enlarge a deadline “is within the discretion of the trial judge”).

C. Because the federal court denied ITNAmerica’s initial motion to dismiss as moot, rather than on its merits, ITNAmerica was entitled to renew its motion once the case was remanded to state court.

In a footnote, Senior Ride Connection argues that it would be “absurd” to allow ITNAmerica to “file another, successive motion to dismiss, *ad infinitum*” after the federal court denied ITNAmerica’s initial motion to dismiss. (Senior Ride Connection’s Br. at 8 n.1.) This position assumes that the first motion to dismiss was resolved on its merits, and that ITNAmerica was merely reiterating a motion that had already been conclusively ruled on. This is entirely incorrect.

Judge Gergel could not have been clearer that the federal court took no position regarding ITNAmerica’s motion to dismiss because it did not have jurisdiction to address the motion: “Because the Court lacks subject-matter jurisdiction over this matter, it cannot reach Plaintiff’s motion to transfer, which is made moot by remand to state court.” (Order of the D.S.C. at 11; R. p. ____.) When ITNAmerica renewed its motion before the state court, it was still seeking the first ruling on the merits of its arguments.

In such circumstances, Rule 12 does not prohibit a moving party from renewing a motion to dismiss that was previously denied for reasons other than the merits. If Senior Ride Connection’s argument were adopted, a plaintiff could evade dismissal of a defective case by filing a complaint, baiting a defendant into filing a Rule 12 motion, and then amending the complaint as a matter of right under Rule 15(a). The amended complaint would moot the pending Rule 12 motion, but—under Senior Ride Connection’s argument—the defendant would be helpless to renew its motion and, instead, would be forced into litigating a flawed case without ever having its Rule 12 motion considered on its merits.

This is not the law, and courts have rejected Senior Ride Connection's exact argument. *See, e.g., Kilopass Tech. Inc. v. Sidense Corp.*, Case No. C10-02066 SI, 2010 U.S. Dist. LEXIS 136345, at *5–8 (N.D. Cal. Dec. 13, 2010) (explaining that the defendant properly filed a second motion to dismiss because a prior court order “did not deny defendant’s first motion to dismiss on the merits, but rather dismissed it as moot”); *Crestmont Cleveland P’ship v. Ohio Dep’t of Health*, 746 N.E.2d 222, 226 (Ohio Ct. App. 2000) (“Likewise, Civil Rules 12(G) and (H) do not prohibit the filing of the two motions to dismiss under the circumstances of this case. Civil Rules 12(G) and (H), in general, prohibit the filing of successive motions under Civil Rule 12(B). The trial court’s finding that the initial motion to dismiss was moot and its failure to rule on the merits renders Civil Rules 12(G) and (H) inapplicable.”).

The Court should do the same and reject this final aspect of Senior Ride Connection’s timeliness argument.

II. ITNAmerica properly sought, and Judge Cooper properly granted, dismissal pursuant to the doctrine of *forum non conveniens*.

In its remaining appellate argument, Senior Ride Connection spends eight pages arguing that Rule 12(g), SCRPC, renders ITNAmerica’s motion to dismiss at the state court improper because the doctrine of *forum non conveniens*—the doctrine on which this case was dismissed—was not included within ITNAmerica’s initial motion to dismiss before the federal court. (Senior Ride Connection’s Br. at 9–16.) In Senior Ride Connection’s view, in order to enforce the parties’ Maine forum-selection clause, ITNAmerica was required to move for dismissal under the doctrine of *forum non conveniens* while the case was pending before the federal court, and it was also required to cite Rule 12(b)(3), SCRPC, when renewing its motion to dismiss before the state court. These arguments are incorrect in every respect and expose a fundamental misunderstanding of the law governing this issue.

While this case was pending before the federal court, ITNAmerica filed a motion to dismiss Senior Ride Connection's breach of contract claim pursuant to Rule 12(b)(6), and to transfer the case to the District of Maine pursuant to 28 U.S.C. § 1404 and the parties' forum-selection clause. (Motion to Transfer Venue or to Dismiss filed with the D.S.C.; R. p. ____.) This statute codifies the doctrine of *forum non conveniens* for federal courts. *See Atlantic Marine*, 134 S. Ct. at 580 (explaining that "Section 1404 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"); *Sincochem Int'l Co. v. Malay. Int'l Shipping Corp.*, 549 U.S. 422, 430 (2007) ("For the federal court system, Congress has codified the doctrine and has provided for transfer, rather than dismissal, when a sister federal court is the more convenient place for trial of the action." (citing 28 U.S.C. § 1404)). Accordingly, Senior Ride Connection is wrong when it argues that the doctrine upon which the trial court dismissed this case was somehow a new theory introduced for the first time in ITNAmerica's state-level motion.

Moreover, while the case was pending in the District of South Carolina, enforcement of the parties' forum-selection clause would have taken the form of transfer to the District of Maine because both of those courts are part of a unified federal judicial system. If jurisdiction had been proper in his court, Judge Gergel would have not been able to dismiss this case, but instead would have transferred it to the District of Maine. *See Atlantic Marine*, 134 S. Ct. at 579 (holding that the presence of a forum-selection clause requires federal courts to transfer cases to the agreed-upon forum when the receiving forum is another federal court); *id.* at 580 (explaining that when both the transferring and receiving courts are within the federal system, "Congress has replaced the traditional remedy of outright dismissal with transfer"). Simply put, ITNAmerica made exactly the motion it was required to make while this case was before the federal court.

Once the case was remanded to state court, ITNAmerica renewed its same substantive arguments. However, in its state-level motion, ITNAmerica requested that the parties' forum-selection clause be enforced by way of dismissal pursuant to the common law doctrine of *forum non conveniens*, rather than transfer through statutory *forum non conveniens*, because there is no mechanism that would have allowed a South Carolina state court to transfer this case to either the District of Maine or a state-level court in Maine.⁹ This is precisely how *Atlantic Marine* instructs litigants to enforce a forum-selection clause that points to a "foreign forum," such as a court in a different state or in a different judicial system. *See id.* at 580 ("Instead, the appropriate way to enforce a forum-selection clause pointing to a state or foreign forum is through the doctrine of *forum non conveniens*."); *id.* at 583 n.8 (explaining that "[u]nlike a § 1404(a) motion, a successful motion under *forum non conveniens* requires dismissal of the case").

Senior Ride Connection is also wrong when it argues that ITNAmerica somehow "waived" its ability to enforce the forum-selection clause by not citing Rule 12(b)(3) in either of its motions to dismiss. (Senior Ride Connection's Br. at 11–14.) The *Atlantic Marine* Court specifically held that this rule is inapplicable when a party attempts to enforce a forum-selection clause. *See* 134 S. Ct. at 579 (explaining that "a forum-selection clause does not render venue in a court 'wrong' or 'improper' within the meaning of . . . Rule 12(b)(3)" because whether venue is "proper" is determined by the statutes creating the judicial system, not by a private contract);

⁹ The fact that the forum-selection clause could only result in *transfer*, rather than *dismissal*, while the case was at the federal level voids Senior Ride Connection's argument that ITNAmerica waived its ability seek dismissal because it did not seek to dismiss the case through the forum-selection clause in its motion to the federal court. (Senior Ride Connection's Br. at 9–13.) Rule 12(g), SCRCP, expressly states that a waiver only attaches to defenses that were "then available to" the defendant but that were not asserted in an initial motion to dismiss. Because dismissal via a *forum non conveniens* argument was not "available to" ITNAmerica while the case was pending in federal court, the Court should reject this incorrect waiver argument.

id. at 580 (reiterating its holding that Rule 12(b)(3) is not a “proper mechanism[] to enforce a forum-selection clause”).

In short, every procedural argument that Senior Ride Connection presents on appeal is squarely rebutted by the United States Supreme Court’s ruling in *Atlantic Marine*. It is no surprise, then, that Senior Ride Connection attempts to minimize *Atlantic Marine*’s impact here by arguing that *Atlantic Marine* is “strictly concerned with” federal courts. (Senior Ride Connection’s Br. at 14.) Senior Ride Connection’s efforts to circumvent *Atlantic Marine* miss the mark for two key reasons.

First, Senior Ride Connection never identifies any authority contrary to *Atlantic Marine* that it suggests the Court should follow instead. (*Id. passim.*)

Second, its argument ignores the fundamental fact that the South Carolina Supreme Court has adopted the federal standards for enforcing the doctrine of *forum non conveniens*. See *Braten Apparel*, 273 S.C. at 668–70, 259 S.E.2d at 113–14 (adopting the United States Supreme Court’s factors for enforcing the doctrine of *forum non conveniens* (citing *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947))); see also *Burkey v. Noce*, 398 S.C. 35, 37–38, 726 S.E.2d 229, 230–31 (Ct. App. 2012) (relying on federal authority when determining whether the denial of a motion to dismiss pursuant to the doctrine of *forum non conveniens* is immediately appealable (citing *Van Cauwenberghe v. Biard*, 486 U.S. 517, 527 (1988))).

Accordingly, the Court should reject Senior Ride Connection’s argument that ITNAmerica made a procedural misstep and somehow waived its right to enforce the parties’ forum-selection clause, and it should reject Senior Ride Connection’s attempts to distance this case from *Atlantic Marine*. ITNAmerica properly sought to enforce the parties’ agreement at every step of the litigation process, and Judge Cooper rightly adopted the *Atlantic Marine*

analysis throughout to reject Senior Ride Connection's arguments and to enforce the parties' Maine forum-selection clause.

In fact, Senior Ride Connection presents no argument whatsoever that the trial court's *forum non conveniens* analysis was flawed in any way. It has certainly not been prejudiced by having this case dismissed, as the parties are engaged in litigation in the District of Maine regarding the same issues presented in this case. *See generally ITNAmerica v. Senior Ride Charleston*, Case No. 2:16-cv-00409-GZS (D. Me. filed Aug. 10, 2016). Nor can Senior Ride Connection legitimately complain about having this case dismissed, as it chose to ignore the parties' contract when it filed suit in South Carolina in the first place:

Such caution [about inconveniencing a plaintiff by dismissing a case pursuant to *forum non conveniens*] is not warranted, however, when the plaintiff has violated a contractual obligation by filing suit in a forum other than the one specified in a valid forum-selection clause. In such a case, **dismissal would work no injustice on the plaintiff.**

Atlantic Marine, 134 S. Ct. at 583 n.8 (emphasis added). The Court should affirm the trial court's rulings as a result.

CONCLUSION

Just as forum-selection clauses are a fundamental part of modern commerce, enforcing these contractual provisions is a basic part of modern jurisprudence. Even in 1972, the United States Supreme Court observed that resistance to enforcing such agreements

appears to rest at core on historical judicial resistance to any attempt to reduce the power and business of a particular court and has little place in an era when all courts are overloaded and when businesses once essentially local now operate in world markets. It reflects something of a provincial attitude regarding the fairness of other tribunals.

M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 12 (1972). More recently, the District of South Carolina warned that not enforcing forum-selection clauses “could affect the business climate in this State.” *T.R. Helicopters, LLC v. Bell Helicopter Textron, Inc.*, Case No. 3:10-2250-JFA, 2010 U.S. Dist. LEXIS 121923, at *12 (D.S.C. Nov. 17, 2010).

Predictably enforcing forum-selection clauses creates a host of efficiencies, including eliminating confusion about where litigation should take place, reducing pretrial disputes about the correct forum for litigation, and reducing the cost of doing business because of the predictability of litigation. See generally *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 593–94 (1991) (outlining numerous benefits to forum-selection clauses). As the *Atlantic Marine* Court summarized, enforcing these contractual provisions “protects [the parties’] legitimate expectations and furthers vital interests of the justice system.” 134 S. Ct. at 581 (quoting *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 33 (1988) (Kennedy, J., concurring)).

Judge Cooper’s decision to enforce the parties’ Maine forum-selection clause was entirely consistent with these authorities; in fact, it was compelled by *Atlantic Marine*’s holding that “[i]n all but the most unusual cases, therefore, the ‘interest of justice’ is served by holding parties to their bargain” and enforcing these provisions. *Id.* at 583.

Senior Ride Connection has presented no argument against upholding the *Atlantic Marine* analysis, nor has it even suggested that Judge Cooper abused his discretion when he followed *Atlantic Marine* and dismissed this case so that it could be heard in Maine. Instead, it has offered only minor, technical arguments to avoid having to address the actual merits of this issue. Because those arguments are fundamentally incorrect, as explained above, the Court should affirm the trial court’s rulings.

Respectfully submitted,

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May 26, 2017

PROOF OF SERVICE

I, the undersigned Legal Secretary of the law offices of Womble Carlyle Sandridge & Rice LLP, Attorneys for Appellant, do hereby certify that I have served the below parties in this action with a copy of the pleading(s) specified below by mailing a copy of the same, postage prepaid, to the following address(es):

Pleading: Respondent's Initial Brief

Parties Served:

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May 26, 2017

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

Re: Senior Ride Connection, f/k/a ITNCharleston Trident v. ITNAmerica
Civil Action No. 2016-CP-10-1629
Appellate Case No. 2017-000024

Dear Ms. Kitchings:

Please find enclosed the following materials for filing in the above-referenced case:

- Respondent's Initial Brief and 1 copy;
- Respondent's Designation of Matter and 1 copy; and
- Respondent's Motion to Strike and 7 copies, along with our check in the amount of \$25.

Please file the originals and return clocked copies in the enclosed envelope. If we can provide the Court with anything further, please let us know.

Very truly yours,

M. Todd Carroll

MTC/tm
cc: Jennifer Thiem

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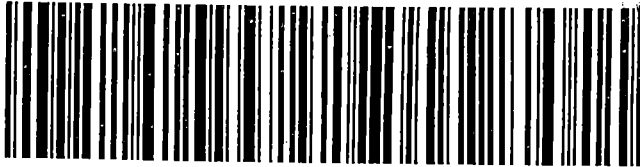
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