

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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SFP 22 2016

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

S.C. SUPREME COURT

R. Lawton McIntosh, Circuit Court Judge

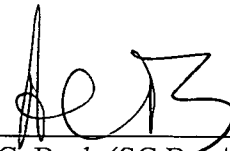
Opinion No. 2016-000662 (S.C. Ct. App. filed Aug. 22, 2016)

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

v.

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

**APPENDIX
VOLUME II**



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The South Carolina Court of Appeals

Mattress by Appointment, LLC., Appellant,

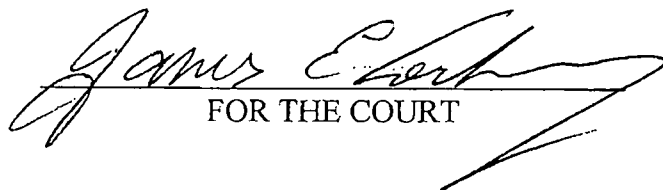
v.

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

Appellate Case No. 2016-000662

ORDER

After careful consideration, we find the circuit court's interlocutory order is not immediately appealable. *See* S.C. Code Ann. § 14-3-330 (1) & (2) (1976) (stating that to be appealable an interlocutory order must (1) involve the merits of the case or (2) affect a substantial right when the order in effect determines the action and prevents a judgment from which an appeal might be taken); *see also Weldon v. Southern Ry. Co.*, 167 S.C. 526, 166 S.E. 723 (1932) (finding an order requiring the plaintiff to make allegations in the complaint more definite and certain is not immediately appealable). Accordingly, the appeal is dismissed.


FOR THE COURT

Columbia, South Carolina

cc:

Adam Crittenden Bach, Esquire
Paul S. Landis, Esquire
Beattie B. Ashmore, Esquire
Lewis W. Tollison, III, Esquire

FILED

June 9, 2016

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

R. Lawton McIntosh, Circuit Court Judge

Case No. 2016-000662

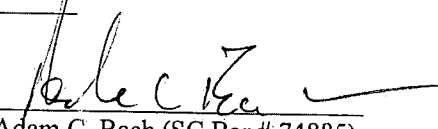
Mattress by Appointment, LLC, a Florida limited liability company
f/k/a Carolina Bedding Direct, LLC, a Florida limited liability company, ...
Appellant,

v.

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

PETITION FOR REHEARING

June 17, 2016


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JUN 21 2016

SC Court of Appeals

On June 9, 2016, this Court entered an order dismissing the Appellant, Mattress by Appointment, LLC's ("MBA") appeal. This Court dismissed the appeal because it found that the Circuit Court's order is interlocutory and not immediately appealable. The order cites to Weldon v. Southern Ry. Co., 167 S.C. 526, 166 S.E. 723 (1932) for the proposition that an order requiring a plaintiff to make a more definite and certain statement is not immediately appealable. Id.

MBA, however, is not seeking appellate review of the Circuit Court's requirement that it make a more definite and certain statement in an amended pleading. Rather, MBA is seeking appellate review of the Circuit Court's requirement that 1) MBA's attorneys verify its pleadings, motions, filings, and discovery responses, 2) MBA's highest ranking corporate officer verify all future pleadings, motions, filings and discovery responses, and 3) MBA identify itself as an entity other than the one it chose. These requirements affect MBA's substantial rights within the meaning of S.C. Code § 14-3-330.

In considering whether the order is immediately appealable, the "appellate court should look to the effect of an interlocutory order to determine its appealability." Thornton v. S.C. Elec. & Gas Corp., 391 S.C. 297, 304, 705 S.E.2d 475, 479 (Ct. App. 2011). An order requiring a party to plead a more definite statement is immediately appealable where it affects a substantial right. See Mason v. S. S. Kresge Co., 247 S.C. 144, 147, 146 S.E.2d 158, 160 (1966).

1. Background

On September 15, 2015, MBA filed its summons and complaint in Anderson County. MBA alleges that the defendants, acting either individually or in concert, hired a former owner and director of MBA, Darren Conrad, to act as their agent for the purpose of competing against MBA. MBA alleges that the defendants are using Conrad to tortiously interfere with their

contracts with third-parties, aiding and abetting Conrad's breach of his fiduciary duties to MBA, engaging in unfair trade practices, and that certain demands made by the defendants to MBA constitute civil conspiracy.

In response to MBA's complaint, the defendants moved to dismiss. Boxdrop Furniture, Inc. ("Boxdrop"), also moved for a more definite statement pursuant to Rule 12(e) because it claimed it was unclear what allegations were made as to Boxdrop. On January 25, 2016, MBA filed an amended complaint seeking to clarify its allegations in response to the defendants' motions to dismiss.

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

On January 29, 2016, MBA filed a motion to reconsider, alter, or amend judgment. See Motion to Alter or Amend Judgment, attached as **Exhibit B (excluding exhibits to the Motion)**. In its motion to reconsider, MBA asked the Circuit Court to clarify whether its requirement that all filings and discovery responses be verified by its attorneys referred to verification as provided for by Rule 11(c) or to the attorney's certification as required by Rule 11(a). MBA also asked the Court to amend its order requiring verification of these documents and to amend or clarify its order requiring MBA to name predecessor and successor entities. MBA asked the Court to stay its order pending a ruling on its motion to reconsider.

On February 2, 2016, the Circuit Court entered an order holding MBA's motion to reconsider in abeyance until the second amended complaint was filed and reviewed. See February 2, 2016 Order, attached as **Exhibit C**. On February 5, 2016, MBA filed its second amended complaint as commanded by the Circuit Court. On February 24, 2016, the Circuit Court entered an order denying MBA's motion to reconsider. See February 24, 2016 Order, attached as **Exhibit D**.

MBA then filed this appeal. On April 4, 2016, this court sent a letter to the parties asking all parties to submit a memorandum addressing whether the circuit court's order was immediately appealable. On April 14, 2016, MBA and the respondents submitted the required memoranda. This Court dismissed the appeal finding that the circuit court's order is interlocutory and not immediately appealable on June 9, 2016.

2. The Court of Appeals Order Misapprehends the Basis of MBA's Appeal

This Court's order dismissing the appeal finds that the order is interlocutory and not immediately appealable. In support the order cites to 1) S.C. Code Ann. § 14-3-330, providing that interlocutory orders are immediately appealable only if they affect a substantial right and 2) Weldon, 167 S.C. 526, a Supreme Court case finding that an order requiring a plaintiff to make a more definite and certain statement is not immediately appealable.

The order appealed by MBA contains four requirements: 1) it orders MBA to file an amended complaint with a more definite and certain statement, 2) it orders MBA's attorneys to verify the amended complaint and all future pleadings, motions, filings, and discovery responses, 3) it orders MBA's highest ranking corporate officer to verify all future pleadings, motions, filings, and discovery responses, and 4) orders MBA to identify all predecessor entities.

MBA is not appealing the first requirement. It is appealing the second, third and fourth requirements pursuant to S.C. Code § 14-3-330.

a. Requiring MBA's attorneys to verify pleadings, motions, filings, and discovery responses affects MBA's substantial rights

The Circuit Court's order requires MBA's attorneys to verify MBA's pleadings, filings, motions and discovery responses. Verification under the Rules of Civil Procedure requires that a person swear "before an officer authorized to administer oaths, that the affiant knows the facts stated be true of his own knowledge, except as to those matters stated on information and belief and as to those matters that he believes them to be true." Rule 11(c), SCRCP. MBA's attorneys, however, are not witnesses to any of the facts underlying MBA's complaint, nor should they be. Rule 3.7, RPC, Rule 407, SCACR.

MBA is a limited liability company and can only appear in circuit or appellate court through counsel, see Renaissance Enterp., Inc. v. Summit Teleservices, Inc., 334 S.C. 649, 651, 515 S.E.2d 257, 258 (1999); Travelers Ins. Co. v. Roof Doctor, Inc., 325 S.C. 614, 481 S.E.2d 451 (Ct. App. 1997), and MBA has a constitutional right to retain counsel to act on its behalf. Potashnik v. Port City Constr. Co., 609 F.2d 1101, 1117 (5th Cir.1980) ("the right to retain counsel in civil litigation is implicit in the concept of fifth amendment due process."). Absent counsel, MBA cannot proceed. See Travelers Ins., 481 S.E.2d at 451.

Required to have counsel, MBA has the right to diligent and competent representation within the meaning of the Rules of Professional Conduct. See Rules 1.1 and 1.3, RPC, Rule 407, SCACR; Alex Sanders & John S. Nichols, *Trial Handbook for South Carolina Lawyers*, § 1.53 (5th ed. 2012) ("[E]very client has a right to competent counsel."). Diligent and competent representation means that a lawyer must be able to act within the full scope of the Rules of

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

The Circuit Court’s order is directly at odds with MBA’s attorneys’ duties under the Rules of Professional Conduct. A lawyer is “not required to have personal knowledge of matters asserted in [pleadings and other documents], for litigation documents ordinarily present assertions by the client, or by someone on the client’s behalf, and not assertions by the lawyer.” Rule 3.3, RCP, Rule 407, SCACR at cmt. 3. Instead, a lawyer is required to present evidence helpful to his client even where the lawyer may not believe the evidence so long as he does not know that the evidence is false. Id. at cmt. 8 (“The prohibition against offering false evidence only applies if the lawyer knows that the evidence is false. A lawyer’s reasonable belief that evidence is false does not preclude its presentation to the trier of fact.”). A lawyer is required to move and act even where facts have not yet been fully substantiated, where the lawyer expects to develop evidence during discovery, or where he has relied on the veracity of his client’s statements concerning a case. See Rule 3.1, RPC, Rule 407, SCACR, cmt. 2; Rule 3.3 cmt. 8.

MBA’s lawyers cannot take any of these actions consistently with the Circuit Court’s order because verification requires that they swear under oath that they have personal knowledge of the facts or assertions contained in MBA’s pleadings, motions, filings, and discovery

responses or believe them to be true. MBA's attorneys have no personal knowledge of any facts or evidence in this case. Instead, its attorneys have relied on MBA and its investigation prior to filing the summons and complaint in forming MBA's complaint and acting on its behalf, consistent with their duties under the Rules of Professional Conduct.

The Circuit Court's order leaves MBA's lawyers with an impossible choice – fulfill their duties to their client under the Rules of Professional Conduct by a) relying on MBA (Rule 3.3, cmt. 8, RCP, SCACR); b) zealously acting within the Rules of Professional Conduct (Rule 3.1 cmt. 1, RCP, SCACR); c) acting where facts or evidence have not been fully developed or substantiated (Rule 3.1, cmt. 2, RCP, SCACR); d) preparing documents, pleadings, motions and other filings on behalf of MBA where they do not have personal knowledge of matters asserted therein (Rule 3.3 cmt. 3, RCP, SCACR); e) presenting evidence in pleadings, motions and other filings even where they may doubt that evidence (Rule 3.3, cmt. 8, RCP, SCACR); f) presenting evidence or statements on behalf of MBA that they cannot “vouch” for (Rule 3.3, cmt. 2, RCP, SCACR); or, alternatively, complying with the Circuit Court's order and failing to act except where they can provide a verification pursuant to the Rules. MBA's attorneys cannot both comply with the Circuit Court's order and provide zealous, diligent, and competent representation to MBA as defined by the Rules of Professional Conduct.

Thus, the order is immediately appealable because it affects MBA's substantial right to effective assistance of counsel, its substantial right to prosecute its case consistent with the Rules of Civil Procedure, and effectively discontinues the action. See Thornton v. S.C. Elec. & Gas Corp., 391 S.C. 297, 304, 705 S.E.2d 475, 479 (Ct. App. 2011) (“[A]n appellate court should look to the effect of an interlocutory order to determine its appealability.”); Morrow, 773 S.E.2d at 147.

Additionally, an interlocutory order is immediately appealable where it “establishes a principle which will finally affect the merits of the case.” Thornton, 705 S.E.2d at 479 (quoting Robertson v. Bingley, 6 S.C. Eq. 333, 351 (S.C. App. L. & Eq. 1826)). Here, the Circuit Court has established a principle that will necessarily affect the merits as MBA will be prevented from presenting testimony, facts, and evidence that it could otherwise present consistent with Rules of Civil Procedure because it and/or its attorneys cannot verify them.

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

Here, the impact of the Circuit Court’s order is more extreme than disqualification of counsel. Although the appellant in Hagood could not proceed with the counsel of his choice, he could still retain new counsel who could zealously and diligently represent him within the full scope of the Rules of Professional Conduct and the Rules of Civil Procedure. The Circuit Court has foreclosed that right for MBA, forcing it and whatever counsel it hires to act within a far narrower and more constrained sphere than the one contemplated by the Rules.

Additionally, to the extent the case proceeds it would be nearly impossible for an appellate court to determine whether MBA was prejudiced by its inability to offer facts and evidence due to the requirements of this order. Review following a final judgment would require the appellate court to review every single document submitted in the case, including all

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

b. Requiring MBA's highest corporate officer to verify all pleadings, motions, filings and discovery responses affects MBA's substantial rights

MBA has a substantial right to prosecute its case consistent with the Rules of Civil Procedure. See Rule 1, SCRCP; Ross v. Med. Univ. of S. Carolina, 312 S.C. 532, 534, 435 S.E.2d 877, 878 (Ct. App. 1993), rev'd, 317 S.C. 377, 453 S.E.2d 880 (1994) ("The South Carolina Rules of Civil Procedure govern actions brought in the courts of South Carolina in all suits of a civil nature."). South Carolina's legislature specifically chose not to require parties to verify their pleadings or other documents. See Rule 11, SCRCP ("Except when otherwise specifically provided by rule or statute pleadings need not be verified or accompanied by an affidavit."); off. cmt. ("Important as this change is, it is not as significant as the Rule itself, which eliminates the verification of pleadings...").

While MBA is permitted to verify its pleadings, it is not required to do so. See Rule 81, SCRCP (“[t]hese rules, or any of them, shall apply to every trial court of civil jurisdiction within this state, within the limits of the jurisdiction and powers of the court provided by law, and the procedure therein shall conform to these rules insofar as practicable.”). Additionally, the circuit court cannot require a certain person verify a corporation’s filings – in many instances the highest ranking corporate officer is not the person with knowledge sufficient to make a verification but that does not mean that the company does not possess the knowledge required to make a verification. By requiring verification contrary to the Rules, and by requiring that a certain person provide the verification, the circuit court has affected MBA’s substantial right to prosecute its case consistent with the Rules of Civil Procedure.

c. MBA has a substantial right to identify itself as it chooses

The Circuit Court’s order affects a substantial right by ordering MBA to identify its predecessors and successors. In Neeltec, the South Carolina Supreme Court held that an order substituting a defendant is immediately appealable as affecting a substantial right. 725 S.E.2d 926, 928-29. According to the Supreme Court, “the right of the plaintiff to choose her defendant is a substantial right.” Id. Additionally, MBA has the right to be the “architects of their own complaint,” Morrow, 773 S.E.2d at 146-147, and this right is impacted where a plaintiff cannot choose the identity of the parties to the lawsuit. Id. MBA has a right to identify itself as it chooses in its complaint, just as it has a right to identify its defendants.

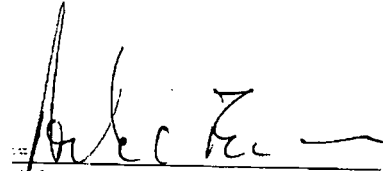
CONCLUSION

For the foregoing reasons, MBA respectfully seeks a rehearing of this Court’s order dismissing its appeal.

Signature page follows

Respectfully Submitted,

June 17, 2016



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Attorneys for Respondents

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

R. Lawton McIntosh, Circuit Court Judge

Case No. 2016-000662

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

v.

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

PROOF OF SERVICE

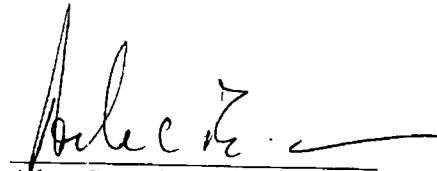
I certify that I have served this Petition for Rehearing on the Respondents, Retail Service Systems, Inc., Boxdrop Furniture, Inc., Carlton Scott Andrew, and Darren Conrad by depositing a copy of same in the United States Mail, postage prepaid, on June 17, 2016, addressed to their attorneys of record as follows:

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209 E. Washington Street
Greenville, SC 29601

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

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JUN 21 2016
SC Court of Appeals

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

A handwritten signature in black ink, appearing to read 'Adam C. Bach', with a long horizontal flourish extending to the right.

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Attorneys for Appellant

June 17, 2016

Greenville, South Carolina

Exhibit A

STATE OF SOUTH CAROLINA
COUNTY OF ANDERSON
IN THE COURT OF COMMON PLEAS

FORM 4

JUDGMENT IN A CIVIL CASE

CASE NO. 2015-CP-04-02161

Mattress by Appointment, LLC

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

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:

Attorney for : ☐ Plaintiff ☐ Defendant
or
☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRPC; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☐ Statement of Judgment by the Court:

See Pages Two (2) and Three (3).

ORDER INFORMATION

This order ☐ ends ☐ does not end the case.

Additional Information for the Clerk :

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
		\$
		\$
		\$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Circuit Court Judge

2155

Judge Code

A TRUE COPY

Date JAN 27 2016

CLERK OF COURT

SCRPC Form 4C (03/2013)

For Clerk of Court Office Use Only

This judgment was entered on the 27th day of Jan, 2016 and a copy mailed first class or placed in the appropriate attorney's box on this 27th day of Jan, 2016 to attorneys of record or to parties (when appearing pro se) as follows:

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT

FILED-CLERK'S OFFICE
JAN 27 2016

Court Reporter:

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

The Court is, sua sponte, requiring the Plaintiff to provide more definite and certain statements in the Complaint. The Amended Complaint shall be verified by Plaintiff's highest ranking corporate officer and Plaintiff's attorney. The amendment shall be as follows and shall be due no later than Friday, February 5, 2016 by 5:00 pm (unless otherwise ordered by the Court). The more definite and certain statement shall include:

A) Date and places of incorporation of Plaintiff, Mattress by Appointment, LLC; the names of any and all predecessor's entities, including dates and places of incorporation;

B) Date, places and names of incorporation of any and all successor entities of Mattress by Appointment, LLC (including but not limited to all successor entities of identical name) principle places of business(es);

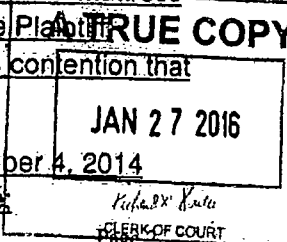
C) A brief description of the nature and matter by which Mattress by Appointment, LLC of Fla and Mattress by Appointment, LLC of South Carolina ⁽¹⁾ are legal successors in interest to Carolina Bedding Direct and how each legally became successors in interest to Carolina Bedding Direct (CBD), a Florida LLC;

D) Facts to support Plaintiff's underlying allegation(s) that Boxdrop Furniture, Inc. is wholly or partially owned by Defendant Retail Service Systems, Inc.;

E) Facts to support Plaintiff's contention in Paragraph 8 of its complaint that "Mattress by Appointment, LLC I" ⁽¹⁾ never conduct business, ⁽²⁾ is not a part of the Plaintiff Mattress by Appointment, LLC. ⁽³⁾ any and all facts to support Plaintiff's contention that "Mattress by Appointment, LLC I" was dissolved on February 6, 2014;

F) Facts to support Plaintiff's contention that Edwin Shoffner on September 4, 2014 purchased 55% interest in both "CBO/MBA" from the bankruptcy trustee;

SCRC Form 4C (03/2013)



G) Facts to support Plaintiff's contention in Paragraph 21 that on or around June, 2015 Conrad began acting as agent of RSS; H) Facts to support Plaintiff's contention that "contracts existed between MBA and Conrad..." (Paragraph 28 Complaint);

I) Facts to support Plaintiff's contention (Paragraph 30 Complaint) that RSS and Andrew tortiously interfered with these contracts;

J) Facts to support Plaintiff's contention in Paragraph 35 of the Complaint that RSS and Andrew assisted and/or abetted Conrad's breach of fiduciary duties.

Henceforth, all future pleadings, motions and filings and discovery responses shall be verified by the highest ranking corporate officer of each entity, the individual parties and their respective attorneys. No formal order is requested.

FILED-CLERK'S OFFICE
ANDERSON SO
JAN 27 2016 8:52
COMMON PLEAS COURT
GENERAL SESSIONS

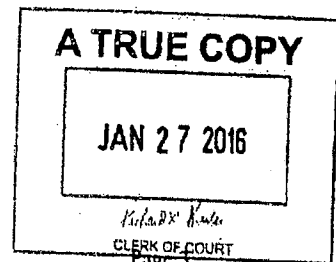


Exhibit B

STATE OF SOUTH CAROLINA

COUNTY OF ANDERSON

Mattress by Appointment, LLC,

Plaintiff,

vs.

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

Defendant.

MOTION FEE PAID
IN THE COURT OF COMMON PLEAS

CASE NO.: 2015-CP-04-02161

**MOTION AND ORDER INFORMATION
FORM AND COVERSHEET**

Plaintiff's Attorney: <u>Adam C. Bach, Bar No. 74885</u> Address: <u>2201 Augusta Street, Ste. 200, Greenville, SC 29605</u> Phone: <u>(864) 236-5013</u> Fax: <u>(864) 312-4191</u> E-mail: <u>abach@etblawfirm.com</u> Other: _____		Defendant's Attorney: Bar No. _____ Address: _____ Phone: _____ Fax: _____ E-mail: _____ Other: _____	
☒ MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III) ☐ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III) ☐ PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)			
SECTION I: Hearing Information Nature of Motion: <u>Motion to reconsider, amend or alter judgment</u> Estimated Time Needed: <u>30mins</u> Court Reporter Needed: ☒ YES ☐ NO			
SECTION II: Motion/Order Type ☒ Written motion attached ☐ Form Motion/Order I hereby move for relief or action by the court as set forth in the attached proposed order. Signature of Attorney for ☒ Plaintiff / ☐ Defendant <u>1/28/2016</u> Date submitted			
SECTION III: Motion Fee ☒ PAID - AMOUNT: \$25.00 ☐ EXEMPT: (check reason) ☐ Rule to Show Cause in Child or Spousal Support ☐ Domestic Abuse or Abuse and Neglect ☐ Indigent Status ☐ State Agency v. Indigent Party ☐ Sexually Violent Predator Act ☐ Post-Conviction Relief ☐ Motion for Stay in Bankruptcy ☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP) ☐ Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions Name of Court Reporter: _____ ☐ Other: _____			
JUDGE'S SECTION ☐ Motion Fee to be paid upon filing of the attached order. ☐ Other: _____		JUDGE CODE: _____ Date: _____	
CLERK'S VERIFICATION Collected by: <u>TSG</u> Date Filed: <u>1-29-16</u> ☒ MOTION FEE COLLECTED: \$ <u>25.00</u> ☐ CONTESTED - AMOUNT DUE: \$ _____			

SCCA 233 (11/2003)

A TRUE COPY

JAN 29 2016

Richard M. Kiley
ANDERSON CLERK OF COURT

MOTION FEE PAID

STATE OF SOUTH CAROLINA

COUNTY OF ANDERSON

Mattress by Appointment, LLC,

Plaintiff,

v.

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

Defendants.

) IN THE COURT OF COMMON PLEAS

) C.A. NO. 2015-CP-04-2161

A TRUE COPY

JAN 29 2016

Richard S. Kintz
ANDERSON CLERK OF COURT

) VERIFIED NOTICE OF MOTION,
) MOTION AND MEMORANDUM IN
) SUPPORT OF MOTION TO
) RECONSIDER, AMEND OR ALTER
) JUDGMENT

YOU WILL PLEASE TAKE NOTICE THAT the plaintiff, Mattress by Appointment, LLC, by and through its undersigned attorneys, will move at date and time to be set by the Court, for an order reconsidering, altering or amending its order entered on January 26, 2016. The basis for this motion and relief sought are as follow:

INTRODUCTION AND PROCEDURAL POSTURE

This matter came before the Court for a hearing on the defendants' motion to dismiss the plaintiff's complaint. The defendants originally sought dismissal on two grounds: 1) the plaintiff was not a party to a contract underpinning the complaint; and 2) jurisdiction and venue were properly in Duval County, Florida. Prior to the hearing, the plaintiff filed an amended complaint to address the first basis for the defendants' motion to dismiss. It did not learn of the defendants' second basis until the night before the hearing.

Following the hearing, the Court *sua sponte* entered an order requiring the plaintiff to plead additional facts in support of its complaint. In an email to the parties, the Court expressed concern regarding the multistate litigation between these parties.

Prior to addressing the grounds for its motion to reconsider, the plaintiff would like to provide the Court with background on this litigation in an effort to address the Court's concerns as expressed in its email and order.

BACKGROUND

Darren Conrad, a named defendant in this action, incorporated Carolina Bedding Direct, LLC in Florida ("CBD") on April 11, 2012. *See* Articles of Incorporation, attached as **Exhibit A**.

In November 2012, Conrad formed Mattress by Appointment, LLC 1 ("MBA 1") in Florida. *See* Entity Detail, attached as **Exhibit B**.

On March 19, 2013, Edwin Shoffner became a minority shareholder of CBD. Prior to acquiring his minority interest in CBD, Shoffner had no ownership in any company owned or ever owned by Conrad. Instead, Shoffner's relationship with Conrad was through his status as a sales representative of Serta and/or Park Place Corporation, two companies for which Shoffner worked prior to March 2013.

In November 2013, CBD began doing business as "Mattress by Appointment, LLC." *See* Affidavit of Conrad at ¶ 3, attached as **Exhibit C**. While at the time MBA 1 was still in existence, this entity was never used for any purpose and never conducted any business. *See* Letter from Conrad to Florida Secretary of State, attached as **Exhibit D**. Instead, as described by Conrad in his affidavit and subsequent testimony, while CEO and majority shareholder of CBD, Conrad created the Territory Agreement and entered into the Territory Agreement with CBD on December 3, 2013 and December 5, 2013. Conrad Affidavit at ¶¶ 3-7. Conrad filed articles of amendment officially changing CBD's name to Mattress by Appointment on February 4, 2014. *See* Articles of

Amendment, attached as **Exhibit E**. Conrad's affidavit affirms throughout that CBD was the operative entity in November and December 2013 and this was again confirmed by Conrad in a letter he provided to the Florida Secretary of State on January 27, 2014. *See* Letter of Conrad to Florida Secretary of State. MBA 1 was dissolved on February 6, 2014. *See* Entity Detail.

On February 4, 2014, Conrad filed articles of amendment changing CBD's name to Mattress by Appointment, LLC. *See* Articles of Amendment.

In March 2014, Shoffner was terminated as President by majority shareholder Conrad and the board of CBD. In total, Shoffner was a co-employee with Conrad for approximately one year. During that year, RSS filed suit against two entities previously created by Conrad, Carolina Bedding Direct, a dissolved North Carolina entity, and MBA 1, but failed to file suit against CBD of Florida, the current plaintiff. *See* Report and Recommendation of Mark Abel, Magistrate Judge, at page 7, attached as **Exhibit F** ("Carolina Bedding, LLC (FL), quite simply, is not a party to this action.") *affirmed*, Retail Service Systems, Inc. v. Carolina Bedding Direct, LLC, *et. al.*, 2:13-994-GCS, Docket Entry 102, August 27, 2014 (S. D. Ohio). RSS proceeded against CBD of North Carolina and MBA 1 and a default judgment was entered in Ohio against CBD of North Carolina and MBA 1 in February 2015.

In this litigation, RSS and Andrew allege in their motion to dismiss "the plaintiff has an extensive history of creating and renaming business" but neglect to mention that every single entity was created by their co-defendant and agent Conrad. The plaintiff in this litigation has existed in Florida since it was created by Conrad in 2012 and, except

for a name change in 2014, has always existed in the same corporate form, with the same Florida filing number and the same employer identification number. *See* Entity Detail.

On July 3, 2014, Conrad filed for bankruptcy in the United States Bankruptcy Court for the Middle District of Florida. *See In Re Darren Conrad*, 3:14-bk-3268-PMG (Bankr. M.D. Fla. 2014). On September 4, 2014, Shoffner purchased Conrad's majority interest in the plaintiff. *See* Order Approving Sale, attached as **Exhibit G**. RSS was a party to and consented in proceedings resulting in the transfer of Conrad's interest to Shoffner and received \$150,000.00 of the sale proceeds to facilitate the transaction. *See* Motion for Order to Approve Sale, excerpts attached as **Exhibit H**.

Following the sale of Conrad's interest to Shoffner in September 2014, Shoffner learned that Conrad had begun taking steps to begin forming a competing business. *See* Florida Order, attached as **Exhibit I**. Part of these steps was to begin contacting the plaintiff's dealers in an effort to convince them to begin doing business with Conrad's newly planned entity. *Id.* All of these actions were in violation of Conrad's Territory Agreement and the plaintiff's operating agreement to which Conrad was a party.

On October 13, 2014, the plaintiff in this litigation filed a verified complaint against Conrad in Duval County, Florida. In its Verified Complaint, the plaintiff alleged that on or about December 3, 2013, Conrad entered into a Territory Agreement, that Conrad violated multiple provisions of his Territory Agreement, breached his fiduciary duties to the plaintiff, and interfered with the plaintiff's business relationships. The plaintiff sought injunctive relief and damages. The plaintiff filed two subsequent verified amended complaints containing the same allegations and Conrad filed answers to these complaints as well. *See* First and Second Verified Amended Complaints and Conrad

Answers, these documents are not filed to avoid excessive material being submitted to the Court but are available upon request. During the course of discovery, Conrad denied that he was bound by the Territory Agreement but never denied that the plaintiff was a party to the agreement.

The Florida Court held five evidentiary hearings on the plaintiff's motion for a preliminary injunction – January 9, 2015, January 20, 2015, January 23, 2015, January 27, 2015, and January 29, 2015. *See Florida Order.* Darren Conrad, Edwin Shoffner, and other relevant witnesses provided sworn testimony at these hearings. During those hearings, the Florida Court reviewed testimony and evidence that Conrad began taking steps to compete against the plaintiff in August 2014 under a new entity named “Matress Direct, LLC” of Florida.

Following five evidentiary hearings, the presentation of live testimony, discovery conducted by the parties, and arguments of counsel, the Court entered an order granting the plaintiff's motion for a preliminary injunction on April 29, 2015. In its order, the Florida Court made findings of fact relevant to this action, some of which are included in the plaintiff's South Carolina complaint, including:

1. Conrad authorized and developed the plaintiff's Territory Agreement (Order ¶ 2);
2. Conrad agreed to the terms of the Territory Agreement with the plaintiff (Order ¶¶ 3, 33);
3. All of the plaintiff's dealers and key personnel entered into MBA Territory Agreements with Protective Covenants (Order ¶ 4);

4. Conrad solicited certain dealers in violation of both his Territory Agreement and the individual dealers' Territory Agreements, including:

- a. Leroy Adams
- b. James Amistadi
- c. Scott Anderson
- d. Randy Butson
- e. Gail Carlson
- f. Doreen Carson
- g. Clyde Faus
- h. Gary Gallo
- i. Thomas Gray
- j. Troy and Laurie Meath
- k. Mark Randall
- l. Kyle Sherratt
- m. John Swanson
- n. Rachel Taylor
- o. Chris Webb
- p. David Zaczynski¹

(Order Second ¶ 4, page 15)

5. That the Conrad Territory Agreement was reasonable and enforceable under Florida law (Order ¶ 17 - 21);

¹ The individuals listed in the Florida order were named by Conrad during his testimony in the Florida evidentiary proceedings. The plaintiff has since identified at least another ten dealers that Conrad has interfered with through subsequent depositions with fact witnesses.

6. That Conrad owed fiduciary duties to the plaintiff pursuant to the Operating Agreement and his status as an officer or former officer of the plaintiff (Order ¶ 22-23).

Conrad was held in contempt for his continued violation of the Florida Order on July 28, 2015, *see* Contempt Order, attached as **Exhibit J**, and his pleadings were stricken.

Despite entry of the preliminary injunction, Conrad continued competing against the plaintiff. Following entry of the preliminary injunction, Shoffner spoke with Defendant Andrew on multiple occasions. Following an industry trade show on or around August 2015, Andrew told Shoffner that he had “engaged” Conrad to recruit dealers for RSS, which Shoffner later learned to be Boxdrop. This conversation was confirmed by the discovery of Conrad’s creation of Boxdrop’s Facebook Page, which advertises itself as an affiliate of RSS. *See* Facebook Pages, attached as **Exhibit K** and Webpages, attached as **Exhibit L**. The plaintiff originally believed Boxdrop to be owned by RSS based on Andrew’s representations that he “engaged” Conrad as a recruiter, Conrad’s creation of Boxdrop’s Facebook page, and the fact that both entities are owned by Andrews. Boxdrop now represents that it is owned by Andrew’s wife, Daphene Andrew, and the plaintiff has amended to allege an affiliation between the companies but believes the evidence will ultimately show both entities are owned or controlled by Andrew or RSS.

Conrad continues to represent himself as an agent of Boxdrop on various website postings and other materials. *See* Exhibit N. In fact, Conrad is identified as a speaker at an upcoming conference hosted by Boxdrop. *Id.* Conrad’s agency with Andrew, RSS or

Boxdrop was also confirmed by third party witnesses and is known within the mattress industry. To the plaintiff's knowledge, Andrew, RSS, and Boxdrop have made no effort to conceal that Conrad is working on their behalf.

On June 21, 2015, Conrad created Boxdrop's Facebook page. Nine days later Conrad, without explanation, signed an affidavit admitting numerous allegations made by RSS and its predecessor PMD that Conrad had previously consistently denied over the course of 12 years of litigation. No explanation was provided for his reversal. On August 11, 2015, Shoffner received a call from Andrew threatening him with litigation if he did not agree to merge his business with RSS. During this call, Andrew repeatedly represented that Conrad was now working for him and that Conrad would now testify against the plaintiff unless the plaintiff agreed to merge with RSS.

Shoffner refused. On August 31, 2015, RSS filed suit in Ohio against the plaintiff. Despite knowing about the existence of the plaintiff for nearly three years, and despite knowing that it had failed to sue the proper entity in Ohio for more than a year, RSS did not file suit against the plaintiff until a) Conrad began working for RSS and b) Conrad signed his new affidavit contradicting his previous representations and allegations concerning the plaintiff.

The plaintiff filed this action on September 15, 2015 to stop RSS, Conrad and Boxdrop from continuing to interfere with its contractual relationships with its dealers, using information Conrad learned as an officer or director of the plaintiff to compete against it, continuing to engage in a conspiracy directed at the plaintiff, and for Unfair Trade Practices.

Just two weeks after this action was filed, the plaintiff obtained video surveillance and a video surveillance report indicating that persons matching the description of Conrad, Daphene Andrew, Scott Andrew and key dealers for the plaintiff, including Troy Meath, Mark Randall, Kyle Sherrat, Jimmy Amastadi, and Doreen Carson, were attending an RSS/Boxdrop/Mattress Direct event in North Carolina. Conrad, Mattress Direct, Meath, Sherrat, Randall, Amastadi, and Carson are all parties to the plaintiff's Territory Agreement and subjects of the Florida court's order.

DISCUSSION OF GROUNDS FOR MOTION TO RECONSIDER

The previous background to this litigation is provided in an effort to address the Court's concerns. RSS has no legal right to facilitate Conrad's continued violation of his non-compete and fiduciary duties or to use Conrad as its "recruiter" to interfere with the plaintiff's contracts. If RSS/Boxdrop chooses to use Conrad as its agent/recruiter, it is liable for its actions and his. Nothing about RSS's belated and suspicious action in Ohio gives it, Boxdrop, or Conrad, the right to violate the law in South Carolina, or anywhere else for that matter. The plaintiff has the right to bring this action to stop their illegal activity.

I. The order should be altered or amended to find that based upon the representations of the defendants, jurisdiction and venue are proper in Duval County, Florida

The plaintiff first learned of the defendants' forum arguments at 5:39 p.m. on the night before the hearing when it received an email from Mr. Ashmore, counsel for RSS and Andrew. See Email to Bach, attached as **Exhibit M**. The email contained no details concerning the arguments other than they were based on a forum selection clause

contained in a Territory Agreement that the defendants a) were not a party to and b) claim is unenforceable.²

The first requirement for invoking a Florida forum selection clause is that the moving party is subject to jurisdiction in Florida. *See Loyd & Ring's Wholesale Nursery, Inc. v. Long & Woodley Landscaping & Garden Ctr., Inc.*, 315 S.C. 88, 94, 431 S.E.2d 632, 636 (Ct. App. 1993) (discussing the enforcement of forum selection clauses under Florida law). At the hearing, the defendants argued repeatedly that this litigation should proceed in Florida. *See e.g.*, Hearing Transcript, January 26, 2016 at 4:22-5:1 (Ashmore: But my first argument to the Court, Your Honor, is that this litigation needs to be in Florida....); 11:13-14 (Ashmore: This is all taking place in Florida.); 11:25-12:1 (Ashmore: Your honor, it's all about this territory agreement which has got to be litigated in Florida.); 18:21-19:1 (Tollison: If I'm a non-party and I'm violating...a court order...you think we're going to win on jurisdiction – they're going to win on a jurisdiction argument...He can sue them in Florida for whatever he just alleged that he would allege to the Florida court.); 19:15-16 (Tollison: But let the Florida court do that).

This case was brought in Anderson County, South Carolina because the plaintiff believed that one or more of the defendants would object to jurisdiction in Duval County and it believes that three of the defendants (RSS, Boxdrop, and Andrew) may be subject to general jurisdiction in South Carolina. *See* S.C. Code § 36-2-802. The plaintiff brought this action here precisely to avoid a fight over venue and jurisdiction and has no desire to litigate about where to litigate. Although the plaintiff believes jurisdiction and

² The clause relied upon by the defendants is contained in the Territory Agreement, attached as Exhibit 5 to RSS and Andrew's original motion to dismiss, which was filed on November 13, 2015. No explanation was provided as to why forum was not raised in original filing.

venue are proper here, there are distinct advantages to placing venue in Florida, including its familiarity with these proceedings.

Following the hearing and learning about the defendants' position on jurisdiction, the plaintiff's counsel consulted with his client and his clients' Florida attorneys concerning whether a Florida court would find jurisdiction. The plaintiffs seek to make certain that the defendants do not object to jurisdiction in South Carolina only to arrive in Florida and object to jurisdiction there as well, which if successful would raise due process concerns. The defendants are subject to suit somewhere.

However, based on the defendants' arguments and their invocation of the Florida forum selection clause, the plaintiff agrees to transfer venue to Duval County, provided that this Court finds that the defendants are subject to jurisdiction in Duval County, Florida, have agreed not to contest jurisdiction in Duval County, Florida, and that venue is more appropriate in Duval County, Florida.

Alternatively, the plaintiff asks the Court to stay this action so that it may bring this action in Florida to obtain a determination on jurisdiction and venue in Florida. In the event the Florida court accepts jurisdiction and venue, counsel for the plaintiff will certify that the action is proceeding in Florida and enter a dismissal without prejudice. In the event the defendants raise objections to jurisdiction and venue in Florida and/or the Florida court does not accept jurisdiction and venue, the Court could lift the stay and proceed with this action.

II. The operative pleading is the plaintiff's amended complaint and the plaintiff asks the Court to amend its order to reflect the amended complaint

The Court's order is directed to the original complaint filed in this action. The plaintiff mailed an amended pleading to the defendants and the Anderson County Clerk of Court on January 19, 2016. See Amended Complaint with Certificate of Service, attached as Exhibit N. The pleading was filed by the Anderson County Clerk of Court on January 25, 2016, the day before the hearing on the defendants' motions to dismiss. *Id.* Once an amended pleading is filed, a party is no longer bound by the original pleading. *Duncan v. CRS Serrine Engineers, Inc.*, 337 S.C. 537, 542, 524 S.E.2d 115, 117 (Ct. App. 1999).

The primary differences between the pleadings as it concerns the Court's order are as follows:

- a) The amended pleading removes the South Carolina Mattress by Appointment entity because plans to transition the plaintiff to South Carolina have been put on hold pending the resolution of the Florida litigation.
- b) The amended pleading revises the allegations concerning Boxdrop and RSS to allege that they are affiliates or subsidiaries of one another.
- c) The amended pleading makes it clear that Conrad entered the Territory Agreement with the plaintiff in this action.
- d) The amended complaint more closely conforms to Conrad's affidavit.

III. The plaintiff asks the Court to reconsider or amend its order requiring additional facts to be pled by the plaintiff

The plaintiff asks the Court to reconsider or amend its order requiring the plaintiff to plead additional facts in support of its allegations for two reasons: 1) The defendants have not submitted a responsive pleading and some or all of the allegations contained in the current complaint are unlikely to be disputed by the defendants; and 2) The plaintiff is only required to plead ultimate facts.

First, the order requires the plaintiff to make numerous additional allegations about facts that are unlikely to be disputed or that are within the knowledge of the defendants, including:

- a) The Court requires the plaintiff to plead additional facts concerning the date, places and names of any all of its predecessor entities, including dates and places of incorporation. The plaintiff in this case was incorporated in Florida in 2012 by Darren Conrad and its name was changed to Mattress by Appointment, LLC in 2014, by Darren Conrad. We do not believe this is in dispute.
- b) The plaintiff does not believe that any party will dispute that Carolina Bedding Direct, LLC became Mattress by Appointment, LLC by filing amended articles changing its name.
- c) While Boxdrop has disputed that it is owned in whole or part by RSS, the plaintiff doubts that Boxdrop and RSS will dispute that they are at a minimum affiliated companies as represented on their websites.

d) RSS, Conrad, and Shoffner entered into a consent order regarding his purchase of Conrad's 55% interest in Mattress by Appointment, LLC f/k/a Carolina Bedding Direct and it is doubtful this allegation will be disputed.

e) Conrad has openly represented that he is an agent of Boxdrop, and Andrew has previously represented to Shoffner that Conrad is an agent. Given the openness of the relationship between Boxdrop and Conrad, the Court should determine if this allegation is disputed before requiring the plaintiff to plead additional facts.

Other allegation may be admitted by the defendants as well. Prior to requiring additional factual allegations to support the plaintiff's complaint, the defendants should be required to file a responsive pleading so the Court may determine what facts are in dispute.

Second, the plaintiff's complaint is only required to contain short and plain statements of the grounds and must be "simple, concise, and direct." *See* Rule 8(a) and (e). "The purpose of pleadings is to place the adversary on notice as to what the issues are." *Langston v. Niles*, 265 S.C. 445, 455, 219 S.E.2d 829, 833 (1975) *see also Shirley's Iron Works, Inc. v. City of Union*, 403 S.C. 560, 574, 743 S.E.2d 778, 785 (2013); *Watts v. Metro Sec. Agency*, 346 S.C. 235, 240, 550 S.E.2d 869, 871 (Ct. App. 2001) ("The purpose of a pleading is fair notice to the opponent and the court.").

Rule 8 "mandates that a pleading contain ultimate facts rather than evidentiary facts." *RoTec Servs., Inc. v. Encompass Servs., Inc.*, 359 S.C. 467, 473, 597 S.E.2d 881, 884 (Ct. App. 2004) (*quoting Watts v. Metro Sec. Agency*, 346 S.C. 235, 240, 550 S.E.2d 869, 871 (Ct. App. 2001)). "A litigant is not required to plead evidentiary matter and we have held that it is both unnecessary and improper to do so." *Stroud v. Riddle*, 260 S.C.

99, 102, 194 S.E.2d 235, 237 (1973). "The ultimate facts required to be stated in a pleading are those which the evidence upon the trial will prove, and not the evidence which will be required to prove those facts." *Id.*

The plaintiff believes it has complied with Rule 8 and asks the Court to alter or amend its judgment requiring the plaintiff to plead additional facts.

III. In the event the Court denies the plaintiff's motion to alter or amend its judgment requiring additional facts in support of plaintiff's allegations, the plaintiff asks the Court to clarify what is required by the Court when it requests additional "Facts to support Plaintiff's contention" or "Facts to support Plaintiff's underlying allegations"

The plaintiff desires to make sure it understands and fully complies with the Court's order without submitting too much.

For example, the Court instructs the plaintiff to provide facts to support its contention that a contract existed between the plaintiff and Conrad. The plaintiff relies on the order of the Florida court described in the Amended Complaint. The Florida court has already determined that Conrad entered into an enforceable contract with the plaintiff and its determination is entitled to Full Faith and Credit pursuant to Article IV of the United States Constitution. *See Microplanet Sys. USA Ltd. V. American Aire, Inc.*, 368 S.C. 146, 628 S.E.2d 43, 45 (2006) ("In accordance with [full faith and credit], the courts of one state must give such force and effect to a foreign judgment as the judgment would receive in the state where rendered."). Additionally, Conrad is barred by judicial estoppel and res judicata from re-litigating different or novel issues pertaining to the Territory Agreement. *See Cothran v. Brown*, 357 S.C. 210, 592 S.E.2d 629 (2004) ("judicial estoppel is an equitable concept that prevents a litigant from asserting a position

inconsistent with, or in conflict with, one the litigant has previously asserted in the same or related proceeding"); *Plum Creek Dev. Co. v. City of Conway*, 334 S.C. 30, 34, 512 S.E.2d 106, 109 (1999) ("[a] litigant is barred from raising any issues which were adjudicated in the former suit and any issues which might have been raised in the former suit."). Submission or recitation of the evidence supporting the Florida order would be voluminous.

As another example, the Court instructs the plaintiff to include facts to support the plaintiff's contention that Shoffner purchased a "55% interest in CBO/MBA." The plaintiff alleged that Shoffner purchased this interest from the bankruptcy trustee of Conrad's bankruptcy estate. The facts in the plaintiff's possession concerning this allegation would include portions of the record from the bankruptcy proceedings, Conrad's bankruptcy petition identifying the asset, motions to permit the sale of the asset, the bankruptcy court's order approving the sale, along with other materials from that proceeding.

As another example, the Court instructs the plaintiff to include facts to support the plaintiff's allegation that Boxdrop is owned partially or wholly by RSS. The facts in the plaintiff's possession include web pages, witness statements, and these entities' own representations. Similarly, the Court instructs the plaintiff to include facts to support its allegations that Conrad began acting as an agent for RSS (which collectively refers to Boxdrop in the complaint) and that RSS tortiously interfered with Conrad's contract. The evidence in the plaintiff's possession includes web pages, witness testimony, emails, and surveillance video.

The plaintiff desires to make sure it complies with Court's requirement without unnecessarily pleading or submitting evidence beyond what the Court is seeking. Therefore, the plaintiff asks the Court to alter or amend its order to provide clarification.

IV. The plaintiff asks the Court to alter, amend or clarify its requirement that pleadings, motions, filings, and discovery responses be verified by the highest ranking corporate officer of each entity, the individual parties and their respective attorneys

Verification as contemplated by the Rules of Civil Procedure is described in Rule 11(c). Rule 11(c) provides that verifications must be sworn before an officer who can administer oaths and provide that the affiant knows the facts stated to be "true of his own knowledge" or that he believes them to be true on information and belief.

Rule 11(a) provides that "except when otherwise specifically provided for by rule or statute, pleadings need not be verified or accompanied by an affidavit." Additionally, the verification of motions and some discovery responses are not provided for by the *Rules of Civil Procedure* and, in the case of motions, the client must often rely on facts or evidence discovered in litigation but outside of its knowledge. For example, many dispositive motions are based on testimony or evidence obtained from the opposing party, even where the moving party does not believe that testimony or evidence. Additionally, verification as contemplated by Rule 11(c) constitutes an individual's affidavit, which may not be proper where information or facts stated are not within the individual's firsthand knowledge. Therefore, the plaintiff asks the Court to reconsider its order requiring verification for pleadings, filings, motions and discovery responses. Alternatively, the plaintiff asks the Court to amend its order to require verification of pleadings and discovery responses only.

The plaintiff's counsel also seeks clarification regarding the Court's order requiring verification by the parties' attorneys for all pleadings, motions, filings, and discovery responses. The plaintiff asks the Court 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).

To the extent the Court is requiring attorney verification pursuant to Rule 11(c), the order is inconsistent with attorneys' obligations under the Rules of Professional Conduct. *See* 3.1, cmt. 2 (providing that the filing of an action, defense or taking an action for a client is not frivolous merely because facts have not first been fully substantiated or because the lawyer expects to develop evidence only by discovery); 3.3 cmt. 2 ("a lawyer in an adversary proceeding is not required to...vouch for the evidence submitted in a cause"), 3.3 cmt. 3 ("An advocate is responsible for pleadings and other documents...but is usually not required to have personal knowledge of matters asserted therein, for litigation documents ordinarily present assertions by the client, or by someone on the client's behalf."). To diligently and competently represent a party, an attorney must be able to act within the full scope of the Rules of Professional Conduct. While he is not permitted to make statements that he knows are false, he is permitted to file pleadings, motions, make other filings and serve discovery responses without personal knowledge of the matters asserted therein, which is inconsistent with the requirements for verification pursuant to Rule 11(c).

V. The plaintiff asks the Court to stay its January 26, 2016 ruling until this motion is decided.

The Court's ruling on one or more of the above issues will affect the plaintiff's compliance with the January 26, 2016 order. Therefore, the plaintiff asks the Court to stay its ruling until this motion may be heard and ruled upon.

CONCLUSION

Based upon the foregoing, the Rules of Civil Procedure and the common and statutory law of the State of South Carolina, the plaintiff respectfully requests that the Court alter or amend its order to provide the following:

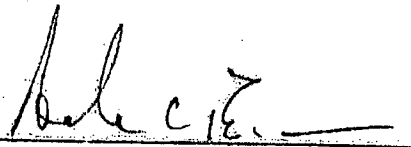
1. Finding that jurisdiction is proper in Duval County, Florida and the defendants are subject to jurisdiction in Duval County, Florida; that the parties agree to jurisdiction and venue in Duval County, Florida; and dismissing this case pursuant to Rule 12(b)(3) without prejudice to refile in South Carolina.
2. Alternatively, enter an order staying this case so that the plaintiff may file this action in Duval County, Florida to receive a determination on jurisdiction and venue from a Florida court.
3. Amend the order to reflect the allegations contained in the amended complaint; order the defendants to file a responsive pleading to determine which allegations addressed by the order, if any, are disputed and must be supported by additional facts; or amend the order to remove the requirement that the plaintiff plead additional facts in support of its previously stated allegations.
4. Alternatively, clarify what the plaintiff must plead in order to comply with the Court's requirement that it plead additional facts in support of various allegations;
5. Amend the order to remove the requirement that all pleadings, motions, filings, and discovery responses be verified by each party's highest ranking officer and

attorneys; or amend the order to provide that only pleadings and discovery responses must be verified by the parties.

6. Amend the order to make it clear that verification by attorneys refers to the signature requirement provided for in Rule 11(a), rather than the verification as provided for in Rule 11(c).

7. Stay its original order until this motion can be heard and decided.

Respectfully submitted,



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January 29, 2016
Greenville, SC

Attorneys for the plaintiff

The attorneys for the plaintiff affirm that they have consulted with opposing counsel prior to filing this motion

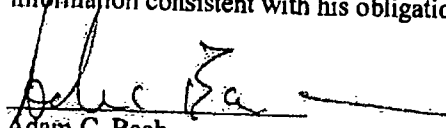

Adam C. Bach

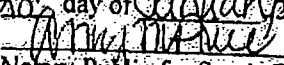
Verification of attorney on following page

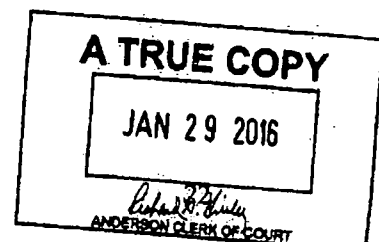
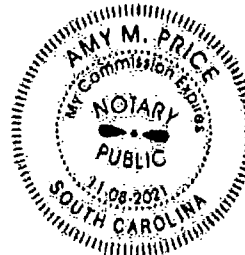
State of South Carolina)
County of Anderson)

Verification by Attorney

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), the counsel states that, except for matters of public record or which are obtainable in the public domain, the facts as set forth in this motion 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.


Adam C. Bach

SWORN to before me this
28th day of January 2016

Notary Public for South Carolina
My Commission Expires: 11-8-2021



) IN THE COURT OF COMMON PLEAS
) C.A. NO. 2015-CP-04-2161

Plaintiff,

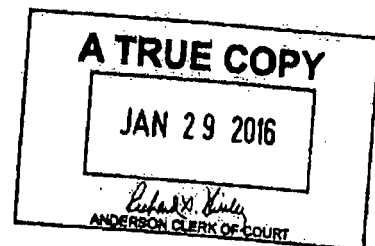
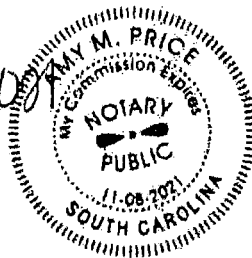
Y.

VERIFICATION

Defendants.


C. Edwin Shoffner, Member
Mattress by Appointment, LLC

Notary Public for South Carolina
My Commission Expires: 1-8



412

Exhibit C

STATE OF SOUTH CAROLINA
COUNTY OF ANDERSON
IN THE COURT OF COMMON PLEAS

FORM 4

JUDGMENT IN A CIVIL CASE

CASE NO. 2015-CP-04-02161

Mattress by Appointment, LLC

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

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:

Attorney for : ☐ Plaintiff ☐ Defendant
or
☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.
- ☐ ACTION DISMISSED (CHECK REASON): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other
- ☐ ACTION STRICKEN (CHECK REASON): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other
- ☐ DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☐ Statement of Judgment by the Court:

Plaintiff's Motion to Reconsider, Amend or Alter Judgment [from Form 4 Order dated 1/26/16] is held in abeyance until the amended pleadings have been filed and reviewed by the undersigned.

ORDER INFORMATION

This order ☐ ends ☐ does not end the case.
Additional Information for the Clerk :

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
		\$
		\$
		\$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Circuit Court Judge

2155

Judge Code

Date

Exhibit D

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF ANDERSON
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2015-CP-04-2161

Mattress by Appointment LLC

Retail Service Systems Inc.

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:

Attorney for: ☐ Plaintiff ☐ Defendant
or
☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRPC; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court:

ORDER INFORMATION

PLAINTIFF'S MOTION TO RECONSIDER DENIED WITHOUT A HEARING; NO FORMAL ORDER REQUIRED

This order ☐ ends ☒ does not end the case.

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
		\$
		\$
		\$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Circuit Court Judge

Judge Code

Date

For Clerk of Court Office Use Only

This judgment was entered on the 24th day of Feb, 2016 and a copy mailed first class or placed in the appropriate attorney's box on this 24th day of Feb, 2016 to attorneys of record or to parties (when appearing pro se) as follows:

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT

Court Reporter:

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

FILED CLERK'S OFFICE
7-17-2014 8:00 AM
2014 FEB 24 11:54
CLERK OF COURT

IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

RECEIVED

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

JUN 30 2016

SC Court of Appeals

R. Lawton McIntosh, Circuit Court Judge

Appellate Case No. 2016-000662

Circuit Case No. 2015-CP-04-2161

Mattress by Appointment, LLC, ...
Appellant,

v.

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

RETURN TO PETITION FOR REHEARING

Beattie B. Ashmore SC Bar No. 10419
Beattie B. Ashmore, P.A.
650 E. Washington Street
Greenville, SC 29601
Office: 864-467-1001 Fax: 864-672-1406
beattie@beattieashmore.com
Attorney for Respondents
Retail Service Systems, Inc. and
Carlton Scott Andrew

Other Counsel of Record:
Adam C. Bach
James W. Fayssoux, Jr.
Paul Landis
Walt Tollison

For the reasons set forth in the Respondents' Memorandum Addressing Appealability (hereinafter the "Respondents' Memorandum"), the entirety of which is incorporated herein, this Court correctly dismissed the appeal. The respondents further address the arguments contained in the appellant's Petition for Rehearing below.

I. PROCEDURAL HISTORY.

The procedural history of this case is set forth in the Respondents' Memorandum. (*See* Respondents' Memorandum, pp. 1-6). However, since the respondents filed their Memorandum, additional litigation has ensued in Ohio Federal Case No. 2:13-cv-00994 (referred to as "Ohio Case No. 1"). In that case, "Mattress by Appointment, LLC, Mattress by Appointment, LLC, and C. Edwin Shoffner" have sought to intervene and stay the proceedings. (Exhibit 1, Intervenor's Mattress by Appointment, LLC, Mattress by Appointment, LLC, and Edwin Shoffner's Motion to Intervene and Stay Proceedings). This comes only after CBD (NC) and MBA (FL) I litigated the case for almost a year, default was entered against both entities, a permanent injunction was entered against CBD (NC), and the court held an extensive damages hearing.¹ Retail Service Systems has sought sanctions for this latest attempt to delay the case. (Exhibit 2, Retail Service Systems Memorandum in Opposition, p. 20).

II. RESPONSE TO APPELLANT'S BACKGROUND OF CASE.

The respondents dispute the appellant's characterization of various facts as stated in their Petition.

First, despite the appellant's characterization, the verification requirements are not specific to the appellant. The circuit court's January 26, 2016 Order (1) directs the appellant to amend its complaint by providing more definite and certain statements; (2) requires all parties to

¹ The designations of the various entities are for ease of reference only. The respondents in no way concede that any of the entities are distinct.

verify future pleadings, motions, filings, and discovery responses by the highest ranking corporate officer of each entity or the individual parties; and (3) requires all attorneys to verify future pleadings, motions, filings, and discovery responses. (January 26, 2016 Order, Exhibit 10 to Respondent's Memorandum).

Second, as discussed more fully below, the appellant's "verification" arguments completely rest on a false premise: That by use of the term "verification," the Order "requires" that the attorneys and parties "swear under oath that they have personal knowledge of the assertions contained in MBA's pleadings, motions, filings, and discovery responses or believe them to be true." (Petition for Rehearing pp. 6-7). This is simply not the case. Interestingly, the appellant has not always construed the Order this way. In the appellant'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)." (Motion to Reconsider, p. 18, attached as Exhibit 11 to Respondents' Memorandum). The appellant, the respondents, and their respective attorneys have been submitting verifications, none of which the circuit court has struck due to noncompliance with its Order.

Third, the requirement that the appellant identify its predecessor and successor companies in an amended complaint is a requirement for a more definite and certain statement. The Order does not prohibit the appellant from bringing this lawsuit in the name of whatever entity it chooses. The appellant is able to choose who it is, and the Order does not affect this choice. It simply requires that the appellant (whoever that may be) allege additional facts identifying its

predecessor and successor entities. As discussed more fully below, the appellant is not deprived of any substantial right by being required to allege these facts.

The circuit court had concerns as to the pending motions to dismiss and to this case. (Honorable Lawton McIntosh email, attached as Exhibit 9 to Respondents' Memorandum). The respondents moved to dismiss the case because the appellant brought various causes of actions based on duties allegedly owed to MBA (FL) I and damages allegedly suffered by MBA (FL) I. (Respondents' Memorandum, Exhibit 5). Yet, it specifically alleged that it was *not* MBA (FL) I. (Respondents' Memorandum, Exhibit 5, ¶ 8). Due to the circuit court's concerns, it ordered verifications and more definite and certain statements. There is nothing improper about the Order.

Section 14-3-330 limits the appeal from an interlocutory order as follows:

The Supreme Court shall have appellate jurisdiction for correction of errors of law in law case, and shall review upon appeal:

- (1) Any intermediate judgment, order or decree in a law case involving the merits in actions commenced in the court of common pleas and general sessions, brought there by original process or removed there from any inferior court or jurisdiction, and final judgments in such actions; *provided*, that if no appeal be taken until final judgment is entered the court may upon appeal from such final judgment review any intermediate order or decree necessarily affecting the judgment not before appealed from;
- (2) An order affecting a substantial right made in an action when such order (a) in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues the action, (b) grants or refuses a new trial or (c) strikes out an answer or any part thereof or any pleading in any action;
- (3) A final order affecting a substantial right made in any special proceeding or upon a summary application in any action after judgment; and
- (4) An interlocutory order or decree in a court of common pleas granting, continuing, modifying, or refusing an injunction or granting, continuing, modifying, or refusing the appointment of a receiver.

S.C. Code Ann. § 14-3-330 (*italics original*); *see also* Edwards v. SunCom, 369 S.C. 91, 94, 631 S.E.2d 529, 530 (2006). The Order does not fall into any of these categories, therefore the Court correctly dismissed this appeal.²

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

The entire basis of the appellant's argument is that by using the term "verify," the Order requires its attorneys to "swear under oath that they have personal knowledge of the facts or assertions contained in MBA's pleadings, motions, filings, and discovery responses or believe them to be true." (Appellant's Petition for Rehearing, pp. 6-7). This is not what the Order states. The circuit court merely uses the term "verify." The attorneys in this case, including those for the appellant, 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.

(Respondents' Memorandum, Exhibit 12, p. 5). The circuit court did not strike this pleading due to non-compliance with its Order. Similarly, the appellant's attorney submitted the following verification with the appellant's Verified Reply in Support of Motion to Amend:

² The appellant has not asserted that subparts (1), (3), or (4) apply here, and in fact they do not (*see* Respondents' Memorandum).

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.

(Respondents' Memorandum, Exhibit 13, p. 6). The circuit court did not strike this pleading due to non-compliance with its Order. The appellant's attorney submitted an identical verification with the appellant's Second Amended Complaint, which the court did not strike due to non-compliance with its Order. (Respondents' Memorandum, Exhibit 14, p. 20).

Even assuming that by use of the term "verify," the Order requires the appellant's attorneys to "swear under oath that they have personal knowledge of the facts or assertions contained in MBA's pleadings, motions, filings, and discovery responses or believe them to be true," the Order does not affect a substantial right of the appellant.

The appellant argues that the Order affects its "substantial right to effective assistance of counsel." (Petition for Rehearing, p. 7). The appellant's argument is premised on its attorney's alleged "impossible choice" between complying with the Order or acting in conformance with the Rules of Professional Conduct. (Petition for Rehearing, p. 7). However, it has already submitted pleadings and verifications pursuant to the Order. Clearly the appellant is not arguing that its attorney violated the Rules of Professional Conduct by submitting these pleadings and verifications.³

³ Even if the appellant is arguing that its attorneys violated the Rules of Professional Conduct by submitting these pleadings and verifications, the appellant has waived the right to challenge the Order insofar as it relates to the filings and verifications already submitted to the court. *See Ex parte Whetstone*, 289 S.C. 580, 580-81, 347 S.E.2d 881, 881-82 (1986); *see also* Respondents' Memorandum.

What the appellant is actually arguing is that by using the term “verify,” 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. However, if in the future the Order requires the appellant’s attorneys to make this “impossible choice,” the correct procedure would be to refuse to comply with the Order, and if held in contempt for failing to comply, appeal that contempt order. *See* Preamble, Rule 407, SCACR (“While it is a lawyer’s duty, when necessary, to challenge the rectitude of official action, it is also a lawyer’s duty to uphold legal process”); 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). This procedure is consistent with S.C. Code Ann. § 18-1-30, which limits appellate review to parties aggrieved by a judgment or order below. *See Ex parte Whetstone*, 289 S.C. at 581, 347 S.E.2d at 882 (citations omitted). Here, the appellant has not been aggrieved. *Id.* (“The 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”).

The appellant argues that the verification portion of the Order “effectively discontinues the action.” (*See* Petition for Rehearing, p. 7). 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); *see also Edwards v. SunCom*, 369 S.C. 91, 94, 631 S.E.2d 529, 530 (2006) (“Interlocutory orders affecting substantial rights may be immediately appealed pursuant to § 14-3-330(2). Orders affecting a substantial right ‘discontinue an action, prevent an appeal, grant or

refuse a new trial, or strike out an action or defense”)) (quoting Mid-State Distribs. v. Century Importers, Inc., 310 S.C. 330, 334, 426 S.E.2d 777, 780 (1993)). The phrase “effectively discontinues the action” does not appear in the statute.

The Order here does not “effectively discontinue the action,” nor does it “in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues the action.” It merely directs the appellant provide more definite and certain statements and all parties and their attorneys to verify future pleadings. Other than the automatic stay pursuant to Rule 241(a), SCACR, this case has been continuing since the circuit court entered the Order. The appellant has filed a Second Amended Complaint and verifications. The respondents have filed a Motion to Dismiss the Second Amended Complaint and verifications.

Moreover, the Order does not disqualify the appellant’s attorney. See Hagood v. Sommerville, 362 S.C. 191, 607 S.E.2d 707 (2005) (holding that an order disqualifying a party’s attorney in a civil case affects a substantial right and may be immediately appealed under Section 14-3-330(2)). It does not deprive the appellant of a mode of trial to which it is entitled to as a matter of right. See Flagstar Corp. v. Royal Surplus Lines, 341 S.C. 68, 72, 533 S.E.2d 331, 333 (2000) (“An order granting bifurcation of issues for trial simply does not strike to the heart of this Court’s traditional analysis of claims of denial of a mode of trial. That analysis proceeds by determining whether or not a party is erroneously denied a trial by jury in a law case, or is erroneously required to proceed before a jury in an equity case”).

The appellant argues that if this case proceeds, it would be “nearly impossible for an appellate court to determine whether MBA was prejudiced by its inability to offer facts and evidence due to the requirements of this order.” (Petition for Rehearing, p. 8). However, compliance with the Order does not prevent the appellant (or any of the parties) from offering

facts and evidence. It does not “establish any principle which will *finally* affect the merits of the case.” (Petition for Rehearing p. 8) (italics added).⁴ It only requires the parties and their attorneys to verify pleadings related to his case. In the future, if the appellant’s attorneys are not able to verify a pleading because such verification would violate the Rules of Professional Conduct, they can chose to not verify the pleading or verify it in a way that fulfills their obligations under Rules of Professional Conduct, and then appeal any contempt ruling.

Further, the Order does not affect the appellant’s alleged “substantial right to prosecute its case consistent with the Rules of Civil Procedure.” (Petition for Rehearing p. 7). 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 not uncommon 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

⁴ The appellant cites to Thornton, 705 S.E.2d at 479 in support of its argument. (Petition for Rehearing p. 8). However, it appears the appellant meant to cite to Tatnall v. Gardner, 350 S.C. 135, 138, 564 S.E.2d 377, 379 (Ct. App. 2002), in which the Court quoted Robertson v. Bingley, 6 S.C. Eq. (1 McCord Eq.) 333, 351 (Ct. App. 1826).

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 v. Sommerville, 362 S.C. 191, 196, 607 S.E.2d 707, 709 (2005) (“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).

Even further, 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. This Court properly dismissed the appeal.

IV. THE CIRCUIT COURT’S REQUIREMENT THAT APPELLANT’S HIGHEST CORPORATE OFFICER VERIFY ALL FUTURE PLEADINGS, MOTIONS, FILINGS, AND DISCOVERY RESPONSES DOES NOT AFFECT THE APPELLANT’S SUBSTANTIAL RIGHTS.

The appellant again claims that it has a “substantial right to prosecute its case consistent with the Rules of Civil Procedure.” (Petition p. 9). As explained above, 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. *See supra*; *see also Knowles*, 274 S.C. at 59, 261 S.E.2d at 49; Ex Parte Ferguson, 82 S.C. 563, 64 S.E. 750. 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 supra*; *see also Knowles*, 274 S.C. at 59, 261 S.E.2d at 49.

Despite the appellant’s contention, the circuit court can require the highest ranking corporate officer to verify pleadings. The circuit court here was “concerned” about this case. (Honorable Lawton McIntosh email, Respondents’ Memorandum, Exhibit 9). The Court

therefore imposed verification requirements. *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. There is nothing improper about the Order.

Nevertheless, even if the circuit court did not have such authority, the Order does not affect the appellant's substantial rights. Clearly the appellant is not arguing that its corporate officer committed perjury when he submitted verifications pursuant to the Order. In the future, if the Order would require the appellant's corporate officer to commit perjury, he can refuse to comply with the Order, and if held in contempt for failing to comply, appeal that contempt order. *See Ex parte Whetstone*, 289 S.C. 580-81, 347 S.E.2d at 881-82. As discussed above, this procedure is consistent with S.C. Code Ann. § 18-1-30, which limits appellate review to parties aggrieved by a judgment or order below. *See Ex parte Whetstone*, 289 S.C. at 581, 347 S.E.2d at 882.

Moreover, as explained in Respondents' Memorandum, the attorney or party verification requirement does not reach the merits of the action and the appellant 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 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); *Ex parte Whetstone*, 289 S.C. at 580, 347 S.E.2d at 881 (an appeal from an order compelling a non-party witness directing him to attend a deposition and produce certain documents 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 Court correctly dismissed the appeal.

V. THE ORDER DOES NOT PREVENT THE APPELLANT FROM IDENTIFYING ITSELF AS IT CHOOSES.

The portion of the Order directing the appellant identify its predecessor and successor companies in an amended complaint *is* an order for a more definite and certain statement. The Order does not prohibit the appellant from bringing this lawsuit in the name of whatever entity it chooses. The appellant is able to choose who it is and the Order does not affect this choice. It merely requires that the appellant (whoever that may be) to identify its predecessor and successor entities. This is the result of the motion to dismiss and accompanying oral arguments wherein the true nature of various entities has been brought into question.

As discussed in the Respondents' Memorandum, South Carolina courts have long held that orders directing a party to provide more definite and certain statements are not immediately appealable. *See Pickett v. Fidelity & Casualty Co.*, 52 S.C. 584, 30 S.E. 614, 615 (1898); *Dawkins v. Columbia Electric St. Ry. Light & Power Co.*, 82 S.C. 166, 63 S.E. 746 (1909); *Thornton v. South Carolina Elec. & Gas Corp.*, 391 S.C. 297, 306, 705 S.E.2d 475, 408 (Ct. App. 2011). The respondents incorporate their arguments herein by reference. By ordering the appellant to provide more definite and certain statements identifying its predecessors and successors, the circuit court did not strike out any allegations of the appellant's original complaint, nor did it require the appellant to change its identity. The appellant had the right to name itself as the plaintiff in the Second Amended Complaint, and had the right to include each and every allegation of its original Complaint in its Second Amended Complaint. This appeal was properly dismissed.

VI. 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).

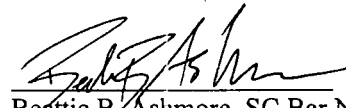
As explained in the Respondents’ Memorandum, the Notice of Appeal was not timely served. The respondents incorporate their argument herein. For clarification, the respondents’ argument is *not* that a party cannot file a motion to reconsider, alter or amend an interlocutory order. An interlocutory order can be reconsidered, altered or amended by the circuit court. Rather, the respondents’ argument is that a motion to reconsider, alter or amend an interlocutory order is not (and could not be) a motion made pursuant to Rule 59(e), SCRPC. This is because Rule 59(e), SCRPC, 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. Because the appellant’s Notice of Appeal was served after the 30-day deadline of Rule 203(b)(1), SCACR, this appeal must be dismissed.

VII. CONCLUSION.

For these reasons, and for those stated in the Respondents’ Memorandum, the Court correctly dismissed this appeal and the appellant’s Petition for Rehearing should be denied.

This 27th day of June, 2016

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Beattie B. Ashmore', written over a horizontal line.

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EXHIBIT 1

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO, EASTERN DIVISION**

RETAIL SERVICE SYSTEMS, INC.,	:	
Plaintiff,	:	CASE NO. 2:13-CV-994
v.	:	Judge Sargus
CAROLINA BEDDING DIRECT,	:	
LLC, et al.,	:	
Defendants.	:	

**INTERVENORS MATTRESS BY APPOINTMENT, LLC. MATTRESS BY APPOINTMENT,
LLC. AND EDWIN SHOFFNER'S MOTION TO INTERVENE AND STAY PROCEEDINGS**

AND NOW come Intervenors, Mattress by Appointment, LLC, Mattress by Appointment, LLC, and C. Edwin Shoffner (collectively "Intervenors") by and through counsel, and hereby respectfully move to intervene in this action. Pursuant to Fed. R. Civ. P. 24(a)(2) and 24(b)(1)(B), the proposed Intervenors hereby move this Court for leave to intervene in this action as of right, as interested third parties, and to stay all proceedings pending the outcome of the case filed by Plaintiff Retail Service Systems, Inc. (hereinafter "RSS") against these Intervenors in the U.S.D.C. for the Southern District of Ohio at Case No. 2:15-cv-02769. In the alternative, Intervenors seek permissive intervention. RSS is improperly attempting to hold Intervenors liable for the default judgment obtained against the defendants in this matter on the basis of successor liability, despite the fact that this tactic has previously been attempted by Plaintiff and rejected by this Court. Therefore, Intervenors have a significant interest in the subject matter of this case and the existing Defendants cannot adequately represent their own interest. The grounds for this Motion are set forth in the Memorandum below.

Respectfully submitted,

/s/ Jessica A. Reese

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Carolina Bedding Direct, LLC), Mattress by
Appointment, LLC, and C. Edwin Shoffner*

MEMORANDUM IN SUPPORT OF MOTION TO INTERVENE AND STAY

Intervenors hereby move this Court, pursuant to Fed. R. Civ. P. 24(a)(2) and/or Fed. R. Civ. P. 24(b)(1)(B) for leave to intervene and stay, and in support of their motion, aver as follows:

I. INTRODUCTION

In October of 2015 RSS filed an action against Intervenors in the Southern District of Ohio, Eastern Division, alleging that Intervenors violated Ohio's Uniform Trade Secrets Act. *See Retail Service Systems, Inc. v. Mattress by Appointment, LLC et al* 2:15-cv-02769 (hereinafter the "2015 Litigation"). It has now become apparent that RSS seeks to avoid actually litigating the 2015 Litigation on the merits, including meeting their burden of proving that an alleged trade secret exists or that Intervenors somehow misappropriated that alleged trade secret. Instead, RSS is attempting an "end-run" around the 2015 Litigation by improperly attempting to utilize a default judgment it obtained against Carolina Bedding Direct, LLC, a dissolved North Carolina entity, and Mattress by Appointment, LLC (hereinafter "MBA (FL) I"), a dissolved Florida entity, both of whom RSS well knows are unable to defend themselves, for alleged violation of the Ohio Uniform Trade Secrets Act in this matter (hereinafter the "2013 Litigation").

RSS's attempt to use offensive collateral estoppel of a default judgment against the Intervenors is improper and should not be condoned by this Court. During the 2013 Litigation, after RSS obtained defaults against the dissolved entities, RSS had multiple opportunities to amend its Complaint to add Intervenors as a defendant, including

Intervenors' offers to accept service¹, so that RSS's claims involving alleged misappropriation of trade secrets could be heard on the merits. Rather than litigate on the merits, however, RSS chose to ignore Intervenors' offer to accept service or to enter the case as a named defendant. Instead, RSS maintained that the default judgments against the dissolved defendants did not include a default against the Intervenors and pursued its claims against only those dissolved entities.

Then, despite not naming Intervenors as parties to the 2013 Litigation or actually pleading theories of successor liability, RSS attempted in the 2013 Litigation to use the default judgments entered against the dissolved defendants against the Intervenors on the basis of successor liability/alter-ego. This Court has already ruled that Intervenors were not parties to the 2013 Litigation and that the Complaint in the 2013 Litigation did not include a claim for successor liability. (See 07.25.14 Report and Recommendation of Magistrate Judge Abel, Dkt. 89). Thereafter, undersigned counsel for Intervenors specially appeared at a hearing in the 2013 Litigation on April 8, 2015, before Magistrate Judge Deavers, for the exclusive purpose of clarifying to the Court that Intervenors were a different entity than the named defendant in the 2013 Litigation and should have no involvement in the 2013 Litigation. Following that limited appearance by undersigned counsel, RSS made no effort to amend to add Intervenors to the 2013 Litigation and proceeded against the dissolved entities as determined by the Court.

¹ "If RSS wants full-blown merits discovery against multiple individuals and entities, it has options. It can amend its Complaint. **It can accept defendants' qualified offer to accept service.** What it cannot do, however, is abuse the limited authority this Court gave it to conduct discovery against a single entity for a limited purpose. **Either RSS continues pursuit of its limited default hearing against a single dissolved entity, or it names the parties it really wants and affords them the opportunity to defend themselves.**" (Dkt. 52, p. 5)

As further evidence that RSS is well aware that the defaulted defendants in this case are not the same as or the predecessors of the Intervenor, RSS attempted to direct third-party discovery against Intervenor in the 2013 Litigation. As was made clear by this Court in the 2013 Litigation, and as was also clear to and not contested by RSS, the 2013 Litigation did not involve the Intervenor. Accordingly, the Intervenor at that time did not have reason or standing to become involved in the 2013 Litigation, and indeed RSS confirmed that Intervenor had no basis to be involved in the 2013 Litigation. (See RSS Memo in Opp. to Motion to Cont., Dkt. 23). Accordingly, RSS was ultimately able to obtain an uncontested default judgment without having to prove its case on the merits for either liability or, more recently, damages.

In spite of the determinations already made by this Court concerning the Intervenor, RSS's treatment of Intervenor as separate parties who were not involved in the 2013 Litigation, and RSS's deliberate choice not to join or name Intervenor as defendants in the Default Judgment when it had the opportunity to do so, RSS is again seeking to hold Intervenor responsible for the judgment obtained in the 2013 Litigation. Therefore, Intervenor seek to intervene so that this attempted judicial "end-run" may be properly prevented and to stay all further proceedings or findings in the 2013 Litigation until the Court in the 2015 Litigation makes a determination on the merits.

Intervenor have a right to intervene in this action as interested parties under Fed. R. Civ. P. 24(a) because, as a result of RSS's apparent attempts to hold Intervenor liable for the judgment obtained in the 2013 Litigation, Intervenor now have an interest relating to the property or transaction which was the subject of the 2013 Litigation. Any further proceedings in the 2013 Litigation will undoubtedly impair and/or impede Intervenor's

abilities to protect their interests. It is respectfully submitted that under these circumstances, this Honorable Court should grant the relief being requested pursuant to Rule 24(a). However, even in the event the Court would find that Intervenorors do not have a right to intervene in the 2013 Litigation, then Intervenorors should be permitted to intervene under Fed. R. Civ. P. 24(b)(1)(B) because Intervenorors have one or more claims or defenses that share with the main action a common question of law or fact; *i.e.*, whether a trade secret exists, whether a trade secret has been misappropriated by Intervenorors individually or as successors to the defendants in the 2013 Litigation and whether Intervenorors can be held responsible for the default judgment obtained against the defendants in the 2013 Litigation.

Intervenorors only recently became aware of RSS's intention to attempt to improperly hold Intervenorors responsible for alleged damages in the 2013 Litigation (where said alleged damages were based on a default judgment and provided to the Court without the benefit of any cross-examination or scrutiny whatsoever), when counsel for RSS sent a letter to counsel for Intervenorors notifying the latter of this objective. (*See* RSS Counsel's March 22, 2016 letter, a true and correct copy of which is attached hereto and marked as Exhibit "1").

II. FACTS

Intervenorors are currently involved in litigation with RSS, wherein RSS's claims that Intervenorors violated Ohio's Uniform Trade Secrets Act and are liable as successors-in-interest for the misappropriation of RSS/RSS's predecessor's trade secrets. (*See* RSS's Complaint in the 2015 Litigation, a true and correct copy of which is attached here to as Exhibit "2"). RSS alleges that prior to the date of either litigation, two companies,

collectively known as the PMD Entities, developed “a unique and comprehensive marketing program that they applied to the mattress and furniture industry.” (Exhibit 2 at ¶ 12). Pursuant to a 2013 Purchase Agreement, RSS, an Ohio corporation, allegedly now owns the majority of the assets of the PMD Entities, including the intellectual property rights to the marketing, selling, and management system for establishing this specialized retail business in the mattress and furniture industry. (Exhibit 2 at ¶¶ 6, 13).

Darren Conrad (hereinafter “Conrad”) was an employee of Power Marketing Direct, LLC (hereinafter “PMD”), one of the PMD Entities, from 2000 until 2003. (Exhibit 2 at ¶¶ 16-17). Following his departure, RSS alleges that Conrad started his own competing business and used training and sales/marketing materials he took from PMD in violation of his separation agreement. (Exhibit 2 at ¶¶ 17-19). Upon becoming aware of Conrad’s competing business and his use of materials from PMD, PMD filed an action in the Court of Common Pleas of Franklin County, Ohio, where it was successful in obtaining a judgment and injunctive relief against Darren Conrad for his conduct in misappropriating his employer’s proprietary information.² (Exhibit 2 at ¶¶ 20-26). PMD first obtained a preliminary injunction and, following Conrad’s failure to adhere to the terms of that preliminary injunction, PMD obtained a fifteen-month permanent injunction which commenced in January of 2009. (Exhibit 2 at ¶¶ 22-26). Plaintiff RSS claims that soon after the fifteen-month injunction was imposed, Darren Conrad and Edwin Shoffner (an Intervenor) jointly and knowingly used PMD’s trade secrets and methodologies to engage

² Although this issue is not before the Court at this time, it should be noted that Intervenor’s dispute that the aforementioned “marketing, selling, and management system,” purchased from PMD by RSS, which is now the subject of the present alleged violation of Ohio’s Uniform Trade Secrets cause of action against Intervenor’s, is in fact a “trade secret,” under Ohio’s Uniform Trade Secrets Act.

new mattress dealers in Greenville, South Carolina and Charlotte, North Carolina. (Exhibit 2 at ¶¶ 20-28).

RSS's Complaint in the 2015 Litigation goes on to describe a variety of subsequent companies created by Conrad to carry out his business, including the defendants in this matter. RSS claims that after Defendant Carolina Bedding (NC) dissolved in 2012, Carolina Bedding (FL) "continued the business of Carolina Bedding (NC), recruiting, training, and advising dealers across the country, including in Ohio, using RSS' proprietary marketing, merchandising, sales, and management systems." (Exhibit 2 at ¶33). RSS boldly claims in the 2015 Litigation that the Intervenor, one of whom who has been identified by Plaintiff as "Mattress by Appointment, LLC (MBA (FL) II)" (formerly known as Carolina Bedding Direct, LLC of Florida/Carolina Bedding (FL), which may be referred to at times herein as Carolina Bedding (FL) or CBD (FL)) is a successor-in-interest to these companies. (Exhibit 2 ¶¶ 7, 29-46).³

On February 24, 2015, RSS obtained a default judgment against the named defendants to the 2013 Litigation, Carolina Bedding (NC) and MBA (FL) I (Dkt. 117). At the time the Complaint was filed in the 2013 Litigation, Carolina Bedding (NC) was dissolved. Additionally, MBA (FL) I was non-operational when the lawsuit was filed and eventually dissolved during the pendency of the 2013 Litigation. Neither of the dissolved defendants to the 2013 Litigation are operational nor do they have any assets.

Moreover, while the 2013 Litigation was ongoing, RSS acknowledged that Carolina Bedding Direct of Florida was a third-party that was not involved in the then-ongoing lawsuit, including the following statements made on the record:

³ Intervenor dispute, both here and in the 2015 Litigation, that they are successors-in-interest to the defendants in the 2013 Litigation.

a. "The [default judgment] hearing **does not involve ... 'Carolina Bedding Direct, LLC that is organized under Florida law....'**" (Pl's Mem in Opp'n to Motion to Continue Hr'g at 4-5, Dkt. 23)(emphasis added);

b. "Plaintiff maintains that it **sued Carolina Bedding Direct, LLC, which was formed and dissolved in North Carolina.** Plaintiff asserts that ... the Clerk of Court entered judgment against that entity." Therefore, "Carolina Bedding Direct, LLC (Florida) February 10, 2014 motion to continue the February 20, 2014 hearing on plaintiff's motion for default judgment (Doc. 21) is DENIED." (Order at 1-2, Dkt. 25)

c. "**Carolina Bedding (FL) ... is not party** to the default that has been entered against ... Carolina Bedding Direct, LLC, a North Carolina limited liability company." (Pl's Response to Motion to Set Aside Entry of Default at 1 (Dkt. 31); (emphasis added); and,

d. "RSS therefore could not have served Carolina Bedding (FL) through Mr. Lyle, **nor has RSS ever claimed that it had.** Further, Carolina Bedding (FL) is not the subject of the Clerk's entry of default." (Id. at 4-5.) (emphasis added);

Further evidence that RSS did not consider Carolina Bedding (FL) a party to the 2013 Litigation or subject to the default judgments therein is evidenced by the fact that RSS sought discovery from "Carolina Bedding Direct LLC (as incorporated in Florida)" by way of a Fed.R.Civ.P. 45 subpoena. (See Notice of Service of Subpoenas, Dkt. 40, and 40-2 at pp. 960-969)

Nevertheless, during the course of the pending 2013 Litigation, RSS tried to assert the same position it now attempts by claiming that any judgments against the defendants in the 2013 Litigation would be enforceable against the Intervenor by way of successor liability. The first time that RSS presented this theory was at a status conference on February 7, 2014, wherein this Court noted the following:

Additional information provided by counsel during the February 7 telephone conference. Counsel said there were

three entities RSS believes have violated the Ohio Trade Secrets Act: Carolina Bedding Direct of North Carolina, LLC, Carolina Bedding Direct of Florida, LLC, and Mattress By Appointment, LLC. Further, Carolina Bedding Direct of North Carolina, LLC filed a dissolution with the North Carolina Secretary of State before this lawsuit was filed. RSS asserts that Carolina Bedding Direct of Florida, LLC and/or Mattress By Appointment, LLC are successor limited liability companies of Carolina Bedding Direct of North Carolina, LLC. A judgment against Carolina Bedding Direct of North Carolina, LLC would be good against them.

(See 02.07.14 Scheduling Conference Order, Dkt. 20, pp. 2-3)

However, this Court determined otherwise on July 25, 2014, wherein it held that:

Equally misguided, however, are RSS's attempts to assert that there are three named defendants rather than two. **Carolina Bedding, LLC (FL), quite simply, is not a party to this action.** Despite RSS's assertion that Carolina Bedding Direct of Florida, LLC and/or Mattress By Appointment, LLC are successor limited liability companies of Carolina Bedding Direct of North Carolina, LLC, and a judgment against Carolina Bedding Direct of North Carolina, LLC would be good against them, the complaint makes no such allegations. If RSS intended to bring this action against Carolina Bedding, LLC (FL) in addition to CBD Dissolved, the case caption should have clearly identified Carolina Bedding, LLC (FL) as a defendant.

(Dkt. 89, p. 7) (emphasis added).

Additionally, undersigned counsel for Intervenor's specially appeared at a hearing in the 2013 Litigation on April 8, 2015, before Magistrate Judge Elizabeth A. Preston Deavers, for the exclusive purpose of clarifying to the Court that Intervenor's were different entities than the named defendants in the 2013 Litigation and had no involvement in the 2013 Litigation. Following that limited appearance by undersigned counsel, RSS made no effort to amend to add Intervenor's to the 2013 Litigation and proceeded against the dissolved entities as determined by the Court.

Despite RSS's previous, unsuccessful attempts during the 2013 Litigation to tie the default judgment to Intervenor, it appears that RSS is once again seeking to hold Intervenor liable for the default judgment obtained in the 2013 Litigation instead of actually litigating the 2015 Litigation on the merits. As a result, Intervenor seek to intervene and stay the 2013 Litigation pending the outcome of the 2015 Litigation and the Court's determination on liability therein and then, if necessary, open the default entered in this case.

III. LAW & ARGUMENT

A. Fed. R. Civ. P. 24(a)

Under Fed. R. Civ. P. 24(a), "an outsider may intervene as 'of right': '(2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.'" *Michigan State v. Miller*, 103 F.3d 1240, 1245 (6th Cir. 1997). The U.S. Court of Appeals for Sixth Circuit "has interpreted [Fed. R. Civ. P. 24(a)] as establishing four elements, each of which must be satisfied before intervention as of right will be granted: (1) timeliness of the application to intervene, (2) the applicant's substantial legal interest in the case, (3) impairment of the applicant's ability to protect that interest in the absence of intervention, and (4) inadequate representation of that interest by parties already before the court." *Id.*; *Cuyahoga Valley Ry. Co. v. Tracy*, 6 F.3d 389, 395 (6th Cir. 1993).

(1) The Motion to Intervene was timely filed.

The first element necessary to establish a right to intervene is that the motion must be timely filed. The determination of whether a motion to intervene is timely rests “within the sound discretion of the trial court.” *Bradley v. Milliken*, 828 F.2d 1186, 1191 (6th Cir. 1987); *NAACP v. New York*, 413 U.S. 345, 365 (1973); (citations omitted). The mere fact that a final judgment has been entered in an action is not in and of itself sufficient as a basis for denial of a motion to intervene. *Taylor v. KeyCorp*, 680 F.3d 609, n. 7 (6th Cir. 2012); *United Airlines, Inc. v. McDonald*, 432 U.S. 385, 394-96 (1977) (holding that a motion to intervene, filed after final judgment, should have been granted.). The Sixth Circuit has considered the following factors in determining whether a motion has been timely filed:

(1) the point to which the suit has progressed; (2) the purpose for which intervention is sought; (3) the length of time preceding the application during which the proposed intervenor knew or reasonably should have known of his or her interest in the case; (4) the prejudice to the original parties due to the proposed intervenor's failure, after he or she knew or reasonably should have known of his or her interest in the case, to apply promptly for intervention; and (5) the existence of unusual circumstances militating against or in favor of intervention.

United States v. City of Detroit, 712 F.3d 925, 930-931 (6th Cir. 2013); *Grubbs v. Norris*, 870 F.2d 343, 345-346 (6th Cir. 1989).

With respect to the first consideration, Intervenor's note that although the 2013 Litigation has progressed to the point of final judgment, Intervenor's are not seeking to participate in the 2013 Litigation in the traditional sense of the word. Rather, Intervenor's are seeking to stay any further action pending the outcome of the 2015 Litigation. RSS has not yet sought to execute the judgment in the 2013 Litigation, but upon information and

belief it intends to do, albeit improperly; therefore, this Court may properly grant a stay in these proceedings.

The second consideration questions the purpose for which intervention is sought. As discussed above, Intervenorors seek to intervene in and stay the proceedings in the 2013 Litigation until the Court in the 2015 Litigation makes a determination on the merits regarding both liability and damages, which will directly relate to RSS's attempts to hold Intervenorors liable for the judgment obtained in the 2013 Litigation. Therefore, Intervenorors motion is for a limited purpose and should be granted.

The third factor relates to the length of time the intervenor knew or should have known of its interest in the case. In this matter, Intervenorors were assured by statements made by RSS that they were not parties to 2013 Litigation, determinations of this Court that they were not parties to the 2013 Litigation, and undersigned counsel also confirmed the same by specially appearing at hearing before the Court on April 8, 2015 to clarify Intervenorors' lack of involvement in the 2013 Litigation. Intervenorors had a reasonable basis to believe all concerned parties knew they did not have an interest in the 2013 Litigation. However, given RSS's notification on March 22, 2016 that it nevertheless intends to hold Intervenorors responsible for the judgment obtained in the 2013 Litigation, Intervenorors believe this Motion to be necessary to again reassert their posture. Accordingly, this motion is timely.

The fourth factor considers the prejudice to the original parties of the litigation. Considering that RSS is also the Plaintiff in the 2015 Litigation, wherein it will have full opportunity to litigate its trade secrets claims, it is respectfully submitted that this Motion in no way prejudices the parties as the requirement for RSS to prove liability and damages

on the merits does not constitute actual prejudice. It was RSS's choice to forego litigating against Intervenor as part of the 2013 Litigation – it cannot now achieve a windfall by avoiding litigation on the merits against Intervenor but relying upon a default judgment against dissolved entities. Furthermore, the prejudice element is limited only to the issue of timeliness of the motion to intervene, not the prejudice of the intervention itself. *Blount-Hill v. Zelman*, 636 F.3d 278, 284 (6th Cir. 2011) (The fourth factor considers “prejudice to the original parties due to the proposed intervenors’ failure to promptly intervene after they knew or reasonably should have known of their interest in the case.”); *United States v. City of Detroit*, 712 F.3d 925, 933 (6th Cir. 2013) (Analysis of the fourth factor is “limited to the prejudice caused by the untimeliness, not the intervention itself.”); *Davis v. Lifetime Capital, Inc.* 560 Fed. Appx., 477, 493 (6th Cir. 2014) (“The only prejudice relevant to the timeliness determination is incremental prejudice from a would-be intervenor’s delay in intervening, not prejudice from the intervention in and of itself.”); *Also see Cameron v. Hess Corp.*, 2013 U.S. Dist. LEXIS 117972 (S.D. Ohio 2013); Additionally, as explained further below, offensive collateral estoppel, let alone one attempting to use a default judgment, is disfavored in Ohio.

Likewise, no prejudice whatsoever will result to the named defendants in the 2013 Litigation, which consists of a dissolved entity and a non-operational, now dissolved entity which have no assets and will not be able to pay that judgment. A stay in the proceedings of the 2013 Litigation will not have any negative impact on the parties to that litigation.

In fact, the only parties who stand to be prejudiced if this Court were to deny their motion to intervene and stay are the Intervenor. It is the Intervenor whom were not afforded any opportunity whatsoever to raise defenses on the merits of RSS's claims in the

2013 Litigation, and who now would suffer the same fate in the 2015 Litigation based on RSS's present attempt to avoid litigating its claims on the merits and instead apply the default judgment. This is the very essence of prejudice and judicial inequity.

The final factor considers the existence of unusual circumstances. In this case, unusual circumstances support the grant of intervention. Default judgment in the 2013 Litigation was only entered as a direct result of the ever-shifting testimony of RSS's current agent and employee, Darren Conrad. When the 2013 Litigation was commenced, Darren Conrad was the CEO of Mattress by Appointment of Florida, f/k/a Carolina Bedding Direct, LLC of Florida (Carolina Bedding (FL) or CBD (FL)), one of the Intervenor's here, and was previously the incorporator of CBD of North Carolina, the dissolved entity currently a party to the 2013 Litigation. (*See* Conrad Affidavit, attached as Exhibit 1 to Defendants' Motion to Set Aside Entry of Default, to Deny Motion for Default Judgment, to Vacate Hearing date and for Leave to Move or Plead in Response to the Complaint, Dkt. 27-2). Conrad submitted an affidavit in this action confirming that CBD of Florida was not served with a summons and complaint and was a separate entity from CBD of North Carolina. *Id.* Conrad further represented to this Court that "although Plaintiff knew Carolina Bedding was a Florida company, it did not even attempt service on Carolina Bedding and, instead, attempted service only a dissolved out of state company." (Dkt. 18 at p. 3) Conrad further represented – "Plaintiff served process on Nicholas Lyle as alleged statutory agent for a dissolved company in North Carolina. But defendant Carolina Bedding is a Florida company, not a North Carolina company, and has no affiliation with Mr. Lyle." *Id.* at 4.

This Court originally let CBD of North Carolina out of default and permitted it to file an answer. (Dkt. 89 and Order Adopting, Dkt. 102). Twenty-two days prior to

recommending that CBD of North Carolina be let out of default and permitted to answer, Conrad filed a voluntary petition for Chapter 7 bankruptcy. (See Conrad Bankruptcy Petition, a true and correct copy of which is attached hereto as Exhibit 3). On October 24, 2014, CBD of North Carolina's attorney moved to withdraw as counsel and filed an affidavit in support. (See Affidavit of Daniel Clark, Dkt. 106-1). Mr. Clark explained that he was withdrawing as counsel for CBD of North Carolina because "the Court correctly determined that CBD of Florida 'quite simply is not a party to this action.'" (Dkt. 106-1, ¶ 5). Because of this determination, Clark explained that "the two named defendants are dissolved limited liability companies [CBD of NC and MBA 1 of Florida]" and any judgment against CBD of North Carolina would only be "against the members to the extent of distributions received." Therefore, "any such recovery efforts will be directed toward Mr. Darren Conrad...who is in Chapter 7 bankruptcy proceedings at this time." *Id.* at ¶ 6.

This Court granted Clark's motion to withdraw and ordered CBD of North Carolina to obtain new counsel within 28 days. (Dkt. 107). CBD of North Carolina failed to do so, RSS moved for default on that basis (Dkt. 111), and default was entered as to CBD of North Carolina. (Dkt. 112).

CBD of North Carolina, therefore, was only put into default because of the representations by Conrad that CBD of North Carolina was a separate entity from CBD of Florida. (See Clark Aff., Dkt. 106-1, ¶ 5). Conrad became employed by RSS in the summer of 2015. Following his employment by RSS, Conrad signed an affidavit "confessing" that all of his previous sworn testimony to the Court was false and that CBD of NC was really CBD of Florida. (Compare Dkt. 18 at 4 ("Plaintiff served process on Nicholas Lyle as alleged statutory agent for a dissolved company in North Carolina. But defendant Carolina Bedding

is a Florida company, not a North Carolina company, and has no affiliation with Mr. Lyle”) with Dkt. 8-1 of the 2015 Litigation, a true and correct copy of which is attached hereto as Exhibit 4, at ¶¶ 26-27 (“CBD of Florida was meant to continue in place of the North Carolina version...(Carolina Bedding (NC)).” Replace Conrad’s testimony from the 2015 Litigation (after he became employed by RSS) with Conrad’s testimony from the 2013 Litigation (when he was being sued by RSS), and Attorney Clark would not have withdrawn as counsel in the 2013 Litigation, and default would not have been entered. RSS agent Conrad’s representations were the direct and only cause of CBD of North Carolina’s counsel withdrawal, which was the direct and only cause of CBD of North Carolina’s default.

RSS submitted its agent’s new version of the facts on October 19, 2015. (Exhibit 4). The Intervenor, however, did not begin to understand RSS’s scheme until 2016, when RSS began to reveal its plan in litigation pending in South Carolina and Florida. (See Hearing Transcript, January 26, 2016, *Mattress by Appointment, LLC v. Retail Service Systems, Inc., et al.* 2015-CP-04-2161 (Anderson County, South Carolina), a true and correct copy of which is attached hereto as Exhibit 5, at p. 20-21 (RSS Attorney Beattie Ashmore: MBA 1 is being sued in federal court in Ohio, and a huge judgment is getting ready to get handed down against MBA 1. MBA 1 was in default. What they’ve been doing is playing shell games, Your Honor...And the damages are anywhere between six hundred thousand and six million. They don’t want to be MBA 1.); see also Defendants’ Motion to Strike filed in pending litigation in Florida, a true and correct copy of which is attached hereto as Exhibit 6) (CBD of Florida “has never had to explain why, if it actually owns the protected information, it is also permanently enjoined from using the trade secrets because Plaintiff was careful not to

disclose to the Court...the fact that a permanent injunction had been entered against its predecessor just two weeks before Plaintiff filed the instant actions.")

Although RSS is now using the default judgment offensively, it has never disclosed to the South Carolina or Florida courts that default judgment was only obtained against CBD of North Carolina because of its agent Conrad's previous sworn testimony, which resulted in CBD of North Carolina's attorney's withdrawal, which resulted in default. RSS has also failed to disclose to these sister courts that Ohio previously determined that CBD of Florida and CBD of North Carolina are not the same entities and that RSS failed to sue CBD of Florida in the 2013 Litigation.

While this scheme should not be permitted in any circumstances, RSS has already jumped the gun. RSS has gone on offense with its default judgment without obtaining a determination from any court anywhere in the country that CBD of North Carolina and CBD of Florida are related entities. Instead, the only Court to examine that issue – this Court – found that they were not. Fortunately, RSS has revealed its scheme in time for Intervenor to intervene in this action and prevent RSS from further offensive use of a default judgment obtained through its agent's representations. Given this, unusual circumstances exist and Intervenor should be permitted to intervene in this action.

(2) Intervenor has substantial legal interest in the case.

The second element necessary to establish a right to intervene is that the applicant must have a substantial legal interest in the litigation. The Sixth Circuit has adopted a broad interpretation of the word "interest." *Bradley*, 828 F.2d at 1192. ("[T]his Court has acknowledged that "interest" is to be construed liberally."). The issue of whether an

intervener has a substantial legal interest in the case is a fact-based inquiry. *Michigan State*, 103 F.3d at 1245.

RSS's recent tactics in the 2015 Litigation clearly establish Intervenor's substantial interest in the 2013 Litigation. The Court in the 2013 Litigation clearly held that Intervenor was not a party to that litigation, a fact also conceded on multiple occasions by RSS. Despite that ruling, RSS now seeks to hold Intervenor liable for a default judgment obtained in the 2013 Litigation on the sole unsupported and unestablished basis of alleged successor liability.

In addition to its attempt to argue that Intervenor was a party to the 2013 Litigation, RSS is also using the default judgment in the South Carolina matter. *See Supra* 15; *Mattress by Appointment, LLC v. Retail Service Systems, Inc., Boxdrop Furniture, Inc. Carlton Scott Andrew, and Darren Conrad*, Case NO. 2015-CP-04-02161. RSS and Scott Andrew, RSS's President, (hereinafter "Andrew") filed a Motion to Dismiss MBA (FL) II's Second Amended Complaint in the South Carolina litigation based on its claim that CBD of North Carolina is MBA (FL) because "[t]he significance of which entities existed and when is tremendous as there is a judgment in the Ohio Federal court against entities known as MBA 1 and Carolina Bedding Direct, LLC formed in North Carolina." (See Andrew's Motion to Dismiss, a true and correct copy of which is attached hereto and marked as Exhibit 7). Andrew unilaterally refers to CBD (NC) (one of the entities involved in the 2013 Litigation) as MBA (FL) II's alleged predecessor, thereby further confirming RSS's scheme to seek application of the default judgment against MBA (FL) II. Similarly, Conrad alleges in his Motion to Dismiss in the South Carolina matter that Carolina Bedding (FL) (not a party to either 2013 Litigation or 2015 Litigation) changed its name to MBA (FL) II to "avoid

liability” in the 2013 Litigation. (See Conrad’s Motion to Dismiss, a true and correct copy of which is attached hereto and marked as Exhibit 8).

Lastly, portions of the hearing transcript from the South Carolina case regarding the above-mentioned Motions to Dismiss further suggest RSS’s intention to attempt to improperly hold MBA (FL) II liable for the default judgment in the 2013 Litigation. During that hearing, counsel for RSS repeatedly argued that MBA (FL) II is playing “shell games” in an effort to avoid being considered a successor to MBA (FL) I and to avoid liability under the default judgment. (Exhibit 5). It is clear that RSS intends to attempt to hold Intervenor, who were not parties to the 2013 Litigation, liable for the default judgment entered in the 2013 Litigation.

In deciding this Motion, this Court should also consider the implications of what RSS is attempting to accomplish. In addition to Intervenor’s substantial legal interest in this matter, there are also strong public policy considerations against permitting RSS’s attempted use of offensive collateral estoppel, which has been consistently disfavored by Ohio courts. *O’Nesti v. Debartolo Realty Corp.*, 862 N.E.2d 803, 809 (Ohio 2007) (Holding that courts will not permit a plaintiff to assert offensive collateral estoppel when its use will discourage judicial economy and create unfairness.); *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 329-330 (1979) (Where “application of offensive collateral estoppel would be unfair to a defendant, a trial judge should not allow the use of offensive collateral estoppel.”).

Offensive collateral estoppel is disfavored because of its inherent potential to encourage parties “to wait and see whether the outcome will be in their favor while not running the risk of being bound by an adverse judgment.” *O’Nesti* at 809. The Sixth Circuit has held that it would be unfair to apply offensive issue preclusion in situations where the

defendant had little or no incentive to defend the first lawsuit or where the subsequent lawsuit was not foreseeable. *U.S. v. Guy*, 257 Fed. Appx. 965, 967 (6th Cir. 2007).

Intervenors were repeatedly assured that they were not parties to the 2013 Litigation; therefore, Intervenors had no incentive to litigate that lawsuit. Furthermore, RSS knowingly continued the 2013 Litigation against a dissolved entity and a non-operational entity, even after it became aware that Intervenors were not parties. RSS made no effort to add Intervenors as parties to that litigation; yet, RSS now would seek to hold Intervenors liable for the judgment in that case. It is now apparent that RSS's intentions all along were to obtain a default judgment against the defunct entities so as to avoid resistance in hopes of still later using that judgment against Intervenors in the 2015 Litigation. RSS's proposed use of offensive collateral estoppel should not be condoned by allowing the 2013 Litigation to eliminate RSS's obligations to prove liability and damages on the merits in the 2015 Litigation.

Moreover, Ohio Courts have consistently declined to give default judgments issue preclusive effect, unless "the judgment expressly adjudicates an issue. A default judgment based on an unanswered complaint does not constitute an express adjudication." *Kline v. Mortg. Elec. Sec. Sys.*, 2011 U.S. Dist. LEXIS 30821, *17 (S.D. Ohio 2011). RSS only obtained a default judgment in the 2013 Litigation because of the defendants' failure to file a responsive pleading and through the misguided testimony of Darren Conrad. Thus, the issues in the 2013 Litigation matter were not expressly adjudicated, and RSS's use of offensive collateral estoppel against Intervenors under these circumstances would be unjust.

The inappropriateness of RSS's attempt to assert offensive collateral estoppel in this matter is further evidenced by the wholly contradicting testimony by its star witness, Darren Conrad. The default judgment obtained by RSS was largely based on testimony of Conrad, who is presently an employee of RSS, regarding the existence and the misappropriation of trade secrets. (See, December 16, 2016 Hearing Transcript from 2013 Litigation, a true and correct copy of which will be filed under seal as Exhibit 9). This testimony was at complete odds with Conrad's prior testimony in 2009, when he was not an employee of RSS/PMD but instead being sued by RSS/PMD, wherein he argued that PMD's methods were not protected trade secrets. (See Decision and Entry Granting Permanent Injunction, in *Power Marketing Direct, Inc. v. Darren Conrad v. Jeffrey Hosking*, Case No. 04CVH-02-1519, a true and correct copy of which is attached hereto and marked as Exhibit 10)

By way of further example, on January 20, 2009, Conrad, at the request of Scott Andrew (RSS's current President), signed an affidavit in a lawsuit brought by Andrew against PMD wherein Conrad asserted that all or most of PMD's sales and advertising techniques were actually taken from a different third party, Vector Marketing. (See Conrad January 20, 2009 Affidavit, a true and correct copy of which is attached here to and marked as Exhibit 11; see also January 10, 2009 e-mail from Scott Andrew to Darren Conrad, a true and correct copy of which is attached hereto and marked as Exhibit 12) Yet on June 30, 2015, in direct conflict with the aforementioned affidavit, Conrad signed yet another affidavit claiming this time that both Conrad and PMD developed the sales and advertising system used by PMD. (See June 30, 2005 Conrad Affidavit, a true and correct copy of which is attached hereto and marked as Exhibit 13) Conrad also claimed that he did not

understand that this system belonged to PMD, that it was PMD's intellectual property, or that he was not allowed to use it in his new businesses. *Id.*

Similarly, in a pending Florida lawsuit, Conrad claimed to have personally developed the marketing and training materials used by MBA (FL) II. (See Defendant's Response and Memorandum in Opposition to Plaintiff's Emergency Motion for Preliminary Injunction in *Mattress by Appointment, LLC f/k/a Carolina Bedding Direct, LLC v. Darren Conrad*, Case No. 16-2014-CA-7243 (Fourth Judicial Circuit, Duval County, Florida), true and correct copies of which are attached hereto, collectively marked as Exhibit 14). Conrad also maintained that the business of selling mattresses is a business "from which a trade secret cannot possibly be derived." *Id.*; also see Defendant's Memorandum in Opposition to Plaintiff's Emergency Motion for Preliminary Injunction, a true and correct copy of which is attached hereto as Exhibit 15) ("Here, MBA has no trade secrets. There is no special 'formula' for selling mattresses."). Yet somehow in December 2015, now employed by RSS, Conrad nevertheless testified in the 2013 Litigation at a hearing on December 16, 2015 that PMD's business model is unique, that he knew it belonged to PMD, and that it was wrong to use it or provide it to anyone else. (Exhibit 9).

Conrad's ever contradicting testimony, parts of which were utilized by RSS in support of its claims in the 2013 Litigation, confirms that RSS's use of offensive collateral estoppel in this matter would constitute an egregious assault on equity and justice. For these reasons, this Court should grant Intervenor's Motion, as it is necessary not only to protect Intervenor's substantial legal interests in this matter, but also to reaffirm Ohio's longstanding policy of protecting defendants from inequitable application of offensive collateral.

(3) In the absence of intervention, intervenors' ability to protect their interest will be substantially impaired.

The third element necessary to establish a right to intervene is an impairment of the applicant's ability to protect its interests absent intervention. The Sixth Circuit has held that this is a minimal burden. *Michigan State*, 103 F.3d at 1247. Denial of Intervenor's Motion to Intervene and Stay could prevent Intervenor from having the opportunity to dispute the successor liability issues in the 2015 Litigation. The only manner in which Intervenor can adequately protect their interests in the 2013 Litigation is through the within Motion.

(4) There has been inadequate representation of Intervenor's interest by the parties involved in the 2013 Litigation.

The fourth and final element necessary to establish a right to intervene is that Intervenor's interests will not be adequately protected by the existing parties to the action. The Sixth Circuit has also held that this is a minimal burden. *Michigan State*, 103 F.3d at 1247. The movant need only show that the representation may be inadequate, not that the representation will in fact be inadequate. *Id.* For example, a party can establish this element by showing "that the existing party...will not make all of the prospective intervenor's arguments." *Id.*

The 2013 Litigation was apparently purposefully brought against a dissolved entity and a non-operational entity over which Intervenor had no control or ownership interests. Intervenor Shoffner bought only Carolina Bedding Direct of Florida, which RSS repeatedly asserted was not a party to the 2013 Litigation and refused to add as a defendant, and whom this Court confirmed was not a party. Intervenor did not participate in that action and a default judgment was entered against the parties to that action solely because those

defendants failed to file a responsive pleading. The lack of representation of Intervenor's interests in the 2013 Litigation to date was based on this Court's determination that Intervenor were not parties to that action. Intervenor can only protect their interests by intervening in and staying the 2013 Litigation until the parties have had a meaningful opportunity to litigate the claims on the merits that are being asserted by RSS in the 2015 Litigation, namely whether a trade secret exists, whether a trade secret has been misappropriated by Intervenor individually or as successors to the defendants in the 2013 Litigation and whether Intervenor can be held responsible for the default judgment obtained against the defendants in the 2013 Litigation.

B. Fed. R. Civ. P. 24(b)(1)(B)

Fed. R. Civ. P. 24(b)(1)(B) allows for permissive intervention when the party seeking to intervene can establish that (1) the motion was timely filed, and (2) one or more of the applicant's claims or defenses share a common question of law or fact with the main action. *Purnell v. Akron*, 925 F.2d 941, 950 (6th Cir. 1991) (citations omitted). The Sixth Circuit has repeatedly held that Rule 24 is to be "broadly construed in favor of potential Intervenor." *Stupak-Thrall v. Glickman*, 226 F.3d 467, 472 (6th Cir. 2000); *Purnell*, 925 F.2d at 950. Intervenor's motion is timely for the same reasons outlined above.

Furthermore, Intervenor have established that one or more of their claims or defenses share a common question of law or fact with the main action; *i.e.*, whether Intervenor are successors-in-interest to the parties in the 2013 Litigation and whether RSS can hold Intervenor liable for the judgment obtained in that action. Additionally, both the 2013 Litigation and the 2015 Litigation concern RSS's claims that defendants in the 2013 Litigation and Intervenor violated the Ohio Uniform Trade Secrets Act.

RSS knowingly pursued the 2013 Litigation against a dissolved entity and a non-operational entity which it knew or should have known would be incapable of paying any judgment obtained in that case. This Court acknowledged and refused RSS's attempts to hold Intervenor responsible for the judgment in the 2013 Litigation; however, those rulings have yet to thwart RSS's efforts to obtain payment of that default judgment from Intervenor. One or more of Intervenor's claims or defenses share a common question of law and fact with the 2013 Litigation. Therefore, Intervenor should properly be permitted to intervene in and stay the 2013 Litigation, pending the outcome of the 2015 Litigation.

IV. CONCLUSION

As a result of the foregoing, Intervenor respectfully request that this Court grant their motion to intervene as interested third parties, and that this Court stay all proceedings in the 2013 Litigation until a determination has been made by the Court in the 2015 Litigation on the issue of successor liability.

Respectfully submitted,

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Date: May 3, 2016

CERTIFICATE OF SERVICE

I, Jessica R. Reese, hereby certify that the foregoing *Motion to Intervene and Stay* was filed electronically on this 3rd day of May, 2016. Notice of this filing will be sent to all parties listed below by operation of the Court's filing system. Parties may access this filing through the Court's filing system.

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This document has been electronically filed and is available for viewing and downloading from the ECF system.

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EXHIBIT 2

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

RETAIL SERVICE SYSTEMS, INC.,	)	
	)	
Plaintiff,	)	Case No. 2:13-CV-00994
	)	
v.	)	
	)	
CAROLINA BEDDING DIRECT, LLC,	)	Judge Sargus
<i>et al.</i> ,	)	
	)	Magistrate Deavers
Defendants.	)	
	)	

PLAINTIFF RETAIL SERVICE SYSTEMS, INC.'S MEMORANDUM IN OPPOSITION
TO PROPOSED INTERVENORS MATTRESS BY APPOINTMENT, LLC,
MATTRESS BY APPOINTMENT, LLC, AND EDWIN SHOFFNER'S
MOTION TO INTERVENE AND STAY PROCEEDINGS¹

I. Introduction

Now faced with the prospect that Plaintiff Retail Service Systems ("RSS") can establish successor liability against them in a related case, Proposed Intervenor ("Intervenor") have become ever more brazen and seemingly will stop at nothing to delay this case, even if it means changing their story and attempting to rewrite history. Intervenor admit their deliberate and strategic decision to not intervene earlier or continue to defend the Defendants in this case was a mistake and now seek an eleventh-hour reversal of that error. The Court should reject Intervenor's attempt to reconsider their ill-advised legal strategy.

Intervenor want the Court to believe that they had no idea until March of 2016 that RSS would pursue successor liability against them—despite the fact that RSS filed a related case in

¹ Not only did Intervenor file a 24-page Memorandum in Support without the accompanying table of contents (per Local Rule 7.2(a)(3)), they failed to properly authenticate many of their exhibits. As such, the Court need not consider any of the arguments beyond page 20 of Intervenor's Memorandum in Support, nor Exhibits 6, 11, 12, 14, or 15 to their motion. Nevertheless, RSS has responded to the entirety of Intervenor's motion, to the extent the Court considers their entire filing and all of their filed exhibits.

August 2015 with a claim for “Successor Liability.” But even before that successor lawsuit was filed, one Intervenor sued its former attorney for legal malpractice in June 2015 and seeks to hold him liable for any damages *in this case*—despite its claim of recent surprise. Moreover, multiple filings by Defendants and Intervenor establish that they knew no later than *mid-2014* that RSS would pursue damages for misappropriation of its trade secrets by the Defendants *and* their successors. Intervenor’s motion, *filed two years later*, can be denied on this ground alone.

Even if Intervenor’s motion was timely, it would still fail, as RSS is not attempting to use offensive collateral estoppel in any way. Rather, RSS intends to pursue judgment in this matter and then seek to collect from Intervenor if and when the Court makes a finding of successor liability in the related case, *Retail Service Systems, Inc. v. Mattress By Appointment, LLC, et al.*, Case No. 2:15-cv-002769 (S.D. Ohio) (“Related Case”). In the Related Case, Intervenor has denied that they are successors, and will have every opportunity to litigate that issue in the Related Case. If the Court determines that Intervenor are in fact successors to Defendants (a conclusion that has to be established in the Related Case), RSS can only then seek to collect any judgment in this matter against them. As such, Intervenor has no right to intervene here, and should not be permitted to do so given their assertions that they are not successors.

Moreover, Intervenor’s request to stay this case pending the outcome of the Related Case should be denied, as RSS would be severely prejudiced by such a ruling. Not only has RSS toiled for two and a half years to obtain judgment in this matter, it has incurred substantial attorneys’ fees and expended tremendous resources fighting Defendants’ largely frivolous attempts to slow this case down. Staying the case now—when the only remaining step is the Court’s ruling following the default judgment hearing—would be a tremendous waste of both the parties’ resources and the Court’s time invested in this case since 2013. Defendants cannot

benefit from what Judge Smith held to be an “intent to thwart judicial proceedings.” While Intervenor’s call their motion one to “intervene,” what they are actually seeking is to erase the effect of the defaults as to Defendants and re-litigate every aspect of this case. The Court should reject their attempt to do so and levy all appropriate sanctions for Intervenor’s latest attempts at delay and deception.

II. Identification of Relevant Entities

The proliferation of similarly-named entities was caused by Defendants’ and Intervenor’s attempts to avoid liability in this matter. RSS believes that Defendants and Intervenor are one continuous company, and intends to prove as much in the Related Case. However, for purposes of clarification, RSS identifies the relevant entities as follows:

1. Carolina Bedding Direct, LLC of North Carolina (“**CBD (NC)**”);
2. Mattress By Appointment, LLC of Florida (“**MBA(FL) I**”).
3. Carolina Bedding Direct, LLC of Florida (hereinafter “**MBA(FL) II**” because it changed its name from “Carolina Bedding Direct, LLC” to “Mattress By Appointment, LLC” after RSS filed this case and obtained defaults);
4. Mattress By Appointment, LLC of South Carolina (“**MBA (SC)**”); and
5. Charles Edwin Shoffner (“**Shoffner**”), who now owns all of the relevant entities.

CBD (NC) and MBA (FL) I (entities 1 and 2 identified above) are the relevant Defendants in this action. Intervenor’s are entities 3, 4, and 5 identified above. A timeline identifying the relevant entities and timeframes is also attached for the Court’s convenience. *See* Ex. 1.

III. Factual Background

RSS filed this lawsuit in 2013 against what it believed to be all operative entities using RSS’s proprietary system for establishing dealers to sell mattresses via one-on-one appointments

(the “RSS System”). At that time, RSS believed there were only two operative entities: (1) a company called “Carolina Bedding Direct, LLC” that was formed in North Carolina and was also registered in Florida, which had an Employer Identification Number (“EIN”) of 45-3622490 (*see* Complaint at ¶¶ 6-7); and (2) a company called “Mattress By Appointment, LLC” with an EIN of 46-2062381, which was the only “Mattress By Appointment” entity in existence at that time. RSS sought monetary damages for Defendants’ past and “ongoing violations” of the RSS System, as well as permanent injunctions against Defendants’ continued use of those trade secrets. *See* Complaint at ¶¶ 4, 47. Defendants failed to answer, and the Clerk entered default against both Defendants. *See* ECF Nos. 8, 16.

Defendants retained counsel and vigorously fought the defaults, claiming there were in fact *three* operative entities and RSS had only served two of them. *See* ECF Nos. 18, 27. Magistrate Abel determined there was some ambiguity in the names and entities of the Defendants, and held that a third alleged entity—MBA(FL) II, which shares the same EIN as CBD (NC)—had not been served. Accordingly, Magistrate Abel set aside CBD (NC)’s default, but left MBA(FL) I’s default in place, as he found that MBA(FL) I expressed an “intent to thwart judicial proceedings.” *See* ECF No. 89 (R&R); ECF No. 102 (Order adopting R&R) at 11.

On July 3, 2014, Defendants’ co-owner, Darren Conrad, filed for personal bankruptcy. When Shoffner, Defendants’ other co-owner, offered to purchase Mr. Conrad’s 55% interest in MBA(FL) II in the bankruptcy court, this case was stayed temporarily pending that sale. *See* ECF No. 103. In October 2014, shortly after the stay was lifted, Defendants’ counsel moved to withdraw. *See* ECF Nos. 105-106. Magistrate Judge Abel granted the motion but ordered Defendants to retain new counsel within 30 days, on pain of default. *See* ECF No. 107.

When new counsel failed to appear, RSS sought a second default against CBD (NC) (since MBA(FL) I's default remained in place). *See* ECF Nos. 112, 114. Judge Smith accordingly entered default judgment against CBD (NC), permanently enjoined CBD (NC) from using "RSS's trade secrets and proprietary materials," and held that RSS is entitled to damages "in an amount to be determined at a damages hearing." ECF No. 117.

The damages hearing occurred in December 2015, at which RSS presented considerable evidence that Defendants improperly used the RSS System and caused RSS substantial damages, both in the form of testimony from Darren Conrad (Defendants' former owner) and Carleton Andrew (RSS's President). *See* ECF No. 137, RSS's Post-Hearing Brief. In particular, RSS sought the following damages: (1) monetary damages for misappropriation of RSS's trade secrets against (a) CBD (NC) from October 18, 2011 through April 26, 2012; and (b) MBA(FL) I from November 30, 2013 – January 20, 2014; and (2) a permanent injunction barring both Defendants from using the RSS System. *Id.* The only remaining action to be entered in this case is the issuance of the Court's final decision on liability and damages, based on the evidence and testimony presented at the December 2015 damages hearing and RSS's Post-Hearing Brief.

On August 31, 2015, in order to pursue liability against all possibly related entities (which included yet another newly formed MBA entity), RSS filed the Related Case against three entities: (1) MBA(FL) II (*i.e.*, an entity that Magistrate Abel determined was not a party to this matter and had since changed its name from "Carolina Bedding Direct" to "Mattress By Appointment" and kept the same EIN as CBD (NC)); (2) MBA (SC) (*i.e.*, another company called "Mattress By Appointment" but registered and newly created in South Carolina by Shoffner); and (3) Charles Edwin Shoffner—the owner of all successor entities.

RSS's Complaint in the Related Case asserts two counts: (1) Successor Liability; and (2) Violation of Ohio's Uniform Trade Secrets Act. Related Case ECF No. 1. Specifically, Paragraph 56 of that Complaint asserts that Intervenor's are "present successors-in-interest, and are liable to Plaintiff RSS for damages caused by their predecessors' misappropriation of RSS's trade secrets." *Id.* Paragraph 57 asserts that Intervenor's "are also subject to the permanent injunction entered against CBD (NC) by the Federal District Court of the Southern District of Ohio." *Id.* Thus, the Complaint in the Related Case made it abundantly clear that RSS was seeking successor liability against Intervenor's for the judgment to be issued in the instant matter.

The purpose of filing the Related Case was twofold: (1) to prove the ever-shifting "CBD / MBA" entities in the Related Case were successors to CBD (NC) and MBA(FL) I, and thus liable for any judgment issued in this matter; and (2) to obtain additional damages (and an injunction) against Intervenor's for the improper use of the RSS System from April 2012 to the present. The Related Case damages are completely exclusive of the damages being sought in the instant matter, as they cover a different timeframe and (allegedly) different entities. As such, RSS intends to proceed to judgment in the current matter and then pursue successor liability in the Related Case to collect on the judgment issued in this matter.

IV. Law and Argument

A. Intervenor's Are Not Entitled To Intervene As a Matter of Right.

Federal Rule of Civil Procedure 24(a)(2) provides for intervention where that party "claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest." *Id.* The Sixth Circuit has established a four-pronged test to determine whether Rule 24's standard is

satisfied: (1) the application for intervention is timely; (2) the applicant has a substantial legal interest in the action; (3) the applicant's ability to protect that interest may be impaired in the absence of intervention; and (4) the existing parties do not adequately represent the applicant's interest. *See, e.g., Johnson v. City of Memphis*, 73 F. App'x 123, 131 (6th Cir.2003), citing *United States v. Tennessee*, 260 F.3d 587, 591 (6th Cir.2001). "The applicant has the burden of demonstrating the four prongs, and the failure to satisfy any of the four prongs prevents the applicant from intervening as of right." *Id.* Intervenor fails to satisfy any of these prongs.

1. Intervenor's Motion Is Untimely.

Whether a motion to intervene is timely filed depends on a five-factor test: (1) the point to which the suit has progressed; (2) the purpose for which intervention is sought; (3) the length of time preceding the application during which Intervenor knew or should have known of their interest in the case; (4) prejudice to the original parties due to Intervenor's failure to promptly intervene after they knew or reasonably should have known of their interest in the case; and (5) the existence of unusual circumstances militating against or in favor of intervention. *See, e.g., Johnson v. City of Memphis*, 73 F. App'x 123, 131 (6th Cir. 2003). These factors each support the conclusion that Intervenor's motion is untimely.

a. The Suit Has Progressed Nearly to a Final Judgment.

Intervenor admits that this suit has progressed "to the point of final judgment." Motion to Intervene at 12. Indeed, the suit has been pending for two and a half years, more than 140 documents have been filed, discovery exchanged, a thorough damages hearing held and all evidence submitted. They cannot intervene now.

Intervenor cites *Taylor v. KeyCorp*, 680 F.3d 609 (6th Cir.2012) and *United Airlines, Inc. v. McDonald*, 432 U.S. 385 (1977), for the proposition that intervention can and should be

granted, even after final judgment. Both cases are inapplicable. In *KeyCorp*, the court actually denied a motion to intervene, noting that the trial court lost jurisdiction over the motion once a notice of appeal was filed. 680 F.3d at 607. The *McDonald* court, on the other hand, allowed a putative class member to intervene on behalf of the class (rather than her individual interests) after final judgment, but only because she moved “promptly” and “as soon as it became clear to the respondent that the interests of the unnamed class members would no longer be protected by the named class representatives.” 432 U.S. at 394. In contrast, Intervenor here sat on their rights for years before moving to intervene, and their motion is untimely.

b. The Purpose for Which Intervention is Sought Is Improper.

Intervenor’s claimed reason for seeking intervention is that RSS “intends to . . . improperly” execute a judgment in this matter. Motion to Intervene at 12-13. They essentially seek a stay of execution of the forthcoming judgment until the Court rules in the Related Case whether Intervenor are Defendants’ successors. Intervenor are wrong for at least three reasons.

First, RSS has *never* indicated that it will improperly attempt to collect a judgment in this matter from Intervenor, and has no intention of doing so. Second, a request to stay execution of a forthcoming judgment is not yet ripe, given that the Court has not issued a judgment entry. Third, RSS should at least be permitted to take post-judgment discovery from the named Defendants to determine whether they are in fact dissolved entities with no assets (as Intervenor assert on Defendants’ behalf), or whether they can otherwise satisfy a judgment in this matter.

c. Intervenor Knew of Their Purported Interest in the Case Since its Inception, But Did Nothing But Wait on the Sidelines.

Intervenor’s two-year delay in seeking intervention is fatal to their attempt to do so now. *See, e.g., Stupak-Thrall v. Glickman*, 226 F.3d 467, 472 (6th Cir. 2000) (motion to intervene filed

seven months after case initiated and party knew of its potential interest in case was untimely); *Johnson v. City of Memphis*, 73 F. App'x 123, 132 (6th Cir. 2003) (motion to intervene filed seven months after party knew or should have known of interest in case was untimely); *Anglers of the AU Sable v. U.S. Forest Serv.*, 590 F. Supp. 2d 877, 880 (E.D. Mich. 2008) (motion to intervene filed shortly after final judgment not timely because party had known of its potential interest in case for years).

Intervenors make the remarkable (and false) claim that they only became aware of RSS's intent to "hold Intervenors responsible for the judgment obtained" in this matter on **March 22, 2016**, seven months after RSS filed the Complaint in the Related Case in August 2015.² Motion to Intervene at 13. Is this Court to assume they did not read the Complaint in the Related Case, which expressly and specifically asserts a claim of "Successor Liability"? See ECF No. 1 in Related Case. Regardless, and tellingly, Intervenors never actually identify the specific language in the March 22 letter from Plaintiff's counsel that allegedly made them aware of this so-called secret strategy, nor can they. That letter reveals no "new" information that would have suddenly given Intervenors knowledge of RSS's already-obvious intent to impose successor liability.

The following undisputed facts establish that Intervenors have known of RSS's intent to pursue successor liability for years:

- **October 4, 2013**: RSS filed its Complaint in the instant matter referring to a number of related entities, including MBA(FL) II. ECF No. 1 at ¶¶ 6-7.
- **October 4, 2013 (or shortly thereafter)**: Defendants *and* Intervenor MBA(FL) II retained counsel to defend this action. See Complaint in *Mattress By Appointment, LLC f/k/a Carolina Bedding Direct, LLC, et al. v. The Penuel Firm*,

² Intervenors falsely state that the Related Case was filed in **October** 2015, thus appearing to make their realization in March 2016 timelier than it was. They are incorrect, as the docket clearly reflects that the Complaint in the Related Case was filed in **August** 2015. See ECF No. 1 in Related Case.

LLC, Duval County Circuit Court Case No. 16-2015-CA-003955, at ¶¶'s 9, 30, 40, 45 (June 19, 2015), attached hereto as Ex. 2.

- **January 30, 2014:** Defendants *and* Intervenor MBA(FL) II (which still called itself "Carolina Bedding Direct, LLC") filed a motion to set aside the defaults against them. ECF No. 18.
- **August 26, 2014:** Intervenor Shoffner filed a motion jointly with RSS in the bankruptcy of Darren Conrad which *twice* acknowledged his agreement that RSS would seek successor liability against Intervenor. In the filing, Shoffner affirms that "RSS will, at some point seek to establish that the Defendant Entities are the alter ego of the Debtor and/or that [MBA(FL) II] is liable to RSS under a successor liability or some other legal theory." Ex. 3 at ¶ 22 (emphasis added). The motion further stated that "the parties agree that RSS is seeking to impose some liability upon [MBA(FL) II] for the prior acts of [Conrad], [CBD (NC), and MBA(FL) I] and their relationship, if any, to [MBA(FL) II]." *Id.* at ¶ 23 (emphasis added).
- **September 8, 2014:** The Court stayed this action so Shoffner could purchase Mr. Conrad's shares in MBA(FL) II. *See* ECF No. 103.
- **September 26, 2014:** Shoffner wrote an email to the President of RSS seeking to resolve any claims in this *and any related matters* in which RSS would seek successor liability.³ *See* Ex. 4.
- **January 20, 2015:** RSS filed its Response to Order to Show Cause in this matter indicating the difficulty in distinguishing between Defendants and Intervenor, and noting that Darren Conrad had admitted that Defendants and Intervenor were the same entity. *See* ECF No. 115 at 2 (citing Resp. to Motion for Temporary Restraining Order at ¶ 11, *Mattress By Appointment, LLC v. Conrad*, 16-2014-CV-007243 (4th Cir. Duval County Fla. Jan. 8, 2015)). This filing was served on Intervenor. *Id.* at 6.
- **August 31, 2015:** RSS filed its Complaint in the Related Case, specifically referring to the instant matter and pursuing a claim for "Successor Liability." *See* ECF No. 1 of Related Case.

³ Intervenor may argue that this email is not admissible as "settlement communications" under Fed.R.Evid. 408. They would be wrong, however, because the email is admissible under Rule 408's exception for "another purpose," such as to prove that Intervenor knew RSS's strategy in 2014. *See, e.g., Breuer Elec. Mfg. Co. v. Toronado Sys. of Am., Inc.*, 687 F.2d 182, 185 (7th Cir. 1982) ("Rule 408 controls when evidence of settlement attempts is offered 'to prove liability,' but it 'does not require exclusion when the evidence is offered for another purpose....' In this case, the 'settlement' evidence was properly presented below to rebut defendants' assertion that they had not been aware of the issues until the suit was filed").

- **September 24, 2015**: Intervenor filed a motion to dismiss the Related Case and argued that RSS was alleging that “these Defendants are liable as successors-in-interest for the misappropriation of Plaintiff RSS’ trade secrets” based initially on the instant case and arguing that “none of the Defendants in the present matter were parties to that case.” See ECF No. 4 of Related Case at 2, 15.
- **January 26, 2016**: Intervenor’s motion references a hearing in a South Carolina state court lawsuit (filed by Intervenor against RSS after RSS initiated the Related Case) during which Intervenor was again informed of RSS’s intent to impose successor liability. See Motion to Intervene at 17. Despite allegedly learning RSS’s strategy at that time, Intervenor did nothing to intervene here until May 3, 2016.

These filings all demonstrate that Intervenor has known for years that RSS has intended to pursue a claim of successor liability against them. Their feigned cries of recent surprise should be rejected.

Even more troubling is what Intervenor desperately want this Court to ignore. Intervenor MBA(FL) II filed a legal malpractice action against its Florida attorney in June 2015—even before RSS filed the Related Case. In that malpractice action, MBA(FL) II specifically requested damages relating to any default judgment issued in this matter. Ex. 2 at ¶ 43 (“As a direct and proximate result of Defendants’ breach of reasonable duty of care, Plaintiffs were damaged in that Defaults were entered against Plaintiffs in the underlying litigation”). In other words, Intervenor are telling a Florida state court that any judgment issued in this matter is good against them and that they should recover such damages against their former attorney. Yet they argue in *this* Court that a judgment issued in this matter would *not* issue as to them. This inconsistent conduct cannot be reconciled and potentially constitutes a fraud on this Court. At the very least, it establishes that Intervenor have known RSS’s strategy all along and failed to timely intervene.

d. RSS Is Significantly Prejudiced Due to Intervenor's Failure to Promptly Intervene.

RSS expended considerable resources preparing for and presenting evidence at the damages hearing, all of which could have been prevented if Intervenor had moved to intervene earlier. As the Sixth Circuit has noted, “[i]nterested parties should not be able to join at a late stage and re-litigate issues that they watched from the sidelines.” *United States v. City of Detroit*, 712 F.3d 925, 932 (6th Cir. 2013). Moreover, Intervenor prevented RSS from taking “party” discovery from them, instead insisting that any discovery take place pursuant to subpoenas, of which RSS would be required to seek compliance in Florida. *See, e.g.* ECF No 78 at 11-12 (Order from Magistrate Abel requiring RSS to compel discovery compliance in Florida). Not only did this significantly increase the time and expense incurred by RSS, it largely prevented RSS from seeking discoverable information from Intervenor, such as by way of Interrogatories or Requests for Admissions. In addition, by taking the “wait and see” approach, Intervenor obtained the benefit of discovering RSS’s trial strategy during the December 2015 damages hearing before deciding whether to seek leave to intervene.

e. There Are No Unusual Circumstances Supporting Intervention; In Fact, the Opposite.

In support of this factor, Intervenor accuses RSS of employing a secretive strategy to improperly sue “a dissolved entity and a non-operational entity which it knew or should have known would be incapable of paying any judgment obtained in that case.” *See, e.g.*, Motion to Intervene at 26.⁴ If this was true, why would RSS have pursued damages and a permanent injunction for Defendants’ “ongoing violations”? *See* Complaint at ¶¶ 4, 47. Indeed, virtually

⁴ Intervenor fails to mention that MBA(FL) I was an operative company—and the only “Mattress By Appointment” entity at the time this lawsuit was filed—and was only dissolved after RSS obtained a default against MBA(FL) I. *See, e.g.*, Ex. 1; *see also* ECF Nos. 8, 16 (entering default as to both Defendants).

every filing by RSS disproves Intervenor's claim, and there can be no doubt that RSS intended to serve all possible operative entities and believed that it had done so. *See, e.g.*, ECF No. 1 at ¶¶ 6-7 (referring to MBA(FL) II); ECF No. 20, February 7, 2014 Order at 3 ("RSS asserts that Carolina Bedding Direct of Florida, LLC and/or Mattress By Appointment, LLC are successor limited liability companies of Carolina Bedding Direct of North Carolina, LLC. A judgment against Carolina Bedding Direct of North Carolina, LLC would be good against them").

It was only through Defendants' (and Intervenor's) attempts to obfuscate the truth that Magistrate Abel concluded that MBA(FL) II was not a party to this action. *See* ECF No. 89 at 7. RSS thereafter initiated the Related Case to ensure that all possible related entities were sued, and indicated that the cases were "related" on the Civil Cover Sheet. *See* ECF No. 1-6 of Related Case. The Court thereafter agreed that the cases were "related" and assigned Judge Sargus to oversee them both. *See* ECF No. 128. The necessity of filing the Related Case was hardly a secret and was brought about only because Defendants and Intervenor made it an issue. And to the extent Intervenor complains that RSS has not adjudicated the case on the merits, the Court has already indicated that RSS is required to prove liability by a *prima facie* showing and damages upon a preponderance of the evidence. *See, e.g.*, ECF No. 13. RSS presented sufficient documentary evidence and testimony at the damages hearing to meet these burdens.⁵

Second, Intervenor repeatedly and falsely assert that the Court has already held that Intervenor are not successors to Defendants. *See, e.g.*, Motion to Intervene at 26. They are incorrect, as the only issue before the Court was whether Intervenor MBA(FL) II was a *party* to

⁵ Intervenor attack the credibility of Darren Conrad throughout their motion, claiming that he has testified inconsistently regarding RSS's trade secrets. What Intervenor ignore is that Mr. Conrad lost those legal arguments in the Franklin County Common Pleas case in 2009, a fact that he fully acknowledged in the 2015 damages hearing. *See* ECF No. 137 at 3-4. Nevertheless, had Intervenor wanted to argue issues of credibility, they should have moved to intervene in this case prior to the 2015 damages hearing, but they did not.

this action—and Magistrate Abel determined it was not. *See, e.g.*, ECF No. 89 at 7. Indeed, a primary purpose of the Related Case is to have the Court hear evidence and decide whether Intervenor are successors to Defendants. *See* Count I of Complaint in Related Case (alleging “Successor Liability”).

Third, Intervenor had every incentive to litigate this case—and apparently incurred more than \$270,000 in attorneys’ fees defending themselves. *See* Ex. 2 at ¶ 29 (claiming that MBA(FL) I and MBA(FL) II “incurred and paid \$270,166.51 in legal fees and costs” in this action). Their motion nevertheless argues that they were “repeatedly assured that they were not parties to the 2013 Litigation” and thus “had no incentive to litigate that lawsuit.” Motion to Intervene at 21. RSS has never disguised the fact that regardless of whether or not Intervenor were deemed “parties” to this lawsuit, RSS intended to pursue a claim of successor liability. *See, e.g.*, ECF No. 20 at 3 (noting RSS’s argument that a “judgment against [CBD (NC)] would be good against [Intervenor]”); and ECF No. 115 at 2 (noting the shell games being played by Defendants and their successors, and serving a copy of the filing on Intervenor). Their decision to terminate legal representation of the Defendants and default after spending \$270,000 in legal fees is simply inexplicable, particularly when RSS consistently alleged that Intervenor would be responsible for any judgment in this matter. Defendants (and Intervenor) thus had every incentive to litigate this matter, and they should be forced to deal with the natural outcome of their strategic decision to watch from the sidelines.

Fourth, Intervenor falsely accuse RSS of failing to alert a Florida state court (which they call a “sister court”) of the procedural status of this matter. Motion to Intervene at 18. What they fail to mention is that RSS is not a party to that action, has never been a party to that action,

and has never been served with any of the filings in that matter. How could RSS have a duty to a court overseeing a case in which it is not even a party?

Intervenors also cite a South Carolina state court case they filed against RSS after RSS filed the Related Case, but they fail to mention that their use of multiple entities led to the trial judge issuing an order requiring them to identify all of their successor and predecessor entities, and to file all future pleadings with verification by the highest ranking corporate officer and their attorneys (which they have appealed). *See* Ex. 5, Order from Judge McIntosh

Fifth, Intervenors accuse RSS President Carleton Scott Andrew of taking a position in an earlier lawsuit that the RSS System was not a trade secret. *Id.* at 22. As Mr. Andrew testified in the damages hearing—and as further affirmed in the attached affidavit—the earlier lawsuit related only to a breach of Mr. Andrew’s contract and deceptive information used to fraudulently induce potential dealers, not the proprietary methodologies for establishing and training dealers (which Mr. Andrew and RSS have always asserted is a trade secret). *See* Transcript of Default Judgment Hearing, Ex. 9 to Motion to Intervene, at 50:11 -- 51:19 (filed under seal per ECF No. 141); *see also* Ex. 7, Affidavit of Carleton Scott Andrew.

Also alarming is Intervenors’ attempt to destroy evidence showing they are successors. After RSS pointed out that Intervenors’ website contained a timeline tracing their roots back to Defendants (*see* Related Case ECF No. 8-3), Intervenors: (1) deleted the webpage; (2) denied that any changes were made; and (3) subsequently refused to provide any substantive response to the discovery request even after RSS informed Intervenors of the falsity of their discovery responses. *See* Ex. 6, Intervenor MBA(FL) II’s Original and Supplemental Responses to Interrogatory No. 7.

Finally, the Court has already determined that MBA(FL) I has displayed an “*intent to thwart judicial proceedings.*” ECF No. 102 at 11 (emphasis added). Neither MBA(FL) I nor its alleged successors should benefit from that contumacious conduct by further delaying the issuance of a judgment in this matter.

2. Intervenor Do Not Have a Substantial Legal Interest in this Action.

Intervenors cite two reasons why they allegedly have a substantial legal interest in this case, both of which are incorrect. First, they claim RSS will improperly use any judgment issued in this matter against Intervenor. Motion to Intervene at 19. They are wrong. RSS has never indicated an intention to execute a judgment issued in this matter on Intervenor unless and until the Court in the Related Case determines that they are successors. And in any event, if Intervenor are to be taken at their word, they have no relationship to Defendants, are not successors to Defendants, and cannot be held liable for any judgment issued in this matter. By their own argument, they have no substantial legal interest in this case.

Second, Intervenor argue that public policy disfavors using offensive collateral estoppel. See Motion to Intervene at 20. RSS is not using estoppel, and the Sixth Circuit has already determined that the approach used by RSS is permissible. See, e.g., *Gen. Star Nat. Ins. Co. v. Administratia Asigurarilor de Stat*, 289 F.3d 434, 441 (6th Cir.2002) (default judgment against predecessor entity can be collected from successor entity upon a finding that the alleged successor is a legal successor); see also *In re Mullins*, 449 B.R. 299, 303 (Bankr.S.D.Ohio 2011) (giving preclusive effect to a default judgment and enforcing the judgment as to a successor entity).

Moreover, Intervenor’s own citation to *O’Nesti v. Debartolo Realty Corp.*, 113 Ohio St.3d 59 (2007), proves exactly why they should not be permitted to intervene now, given that a

party cannot “wait and see whether the outcome will be in their favor while not running the risk of being bound by an adverse judgment.” *Id.* at ¶ 22. In any event, the Court in *O’Nesti* made the unremarkable holding that a plaintiff not in privity with a former plaintiff cannot use collateral estoppel offensively on issues that were not actually litigated in the former lawsuit. *Id.* at ¶ 1. Regardless, any claim that RSS is using offensive estoppel is an issue for the Related Case, not here. Nothing precludes the Intervenor from fully litigating those issues in that case.

3. Intervenor’s Interests Are Not Impaired in the Absence of Intervention.

Intervenor’s interests will not be impaired if the Court denies the request to intervene. RSS will not execute a judgment in this matter against Intervenor unless and until the Court in the Related Case determines Intervenor are successors of Defendants. Moreover, given that this case has proceeded almost to the point of final judgment, there is nothing for Intervenor to do to protect their alleged interests in this matter. Thus, intervention would be futile and should be denied. *See, e.g., Indiana State Dist. Council of Laborers & Hod Carriers Pension & Welfare Fund v. Omnicare, Inc.*, 583 F.3d 935, 942 (6th Cir. 2009) (affirming denial of motion to intervene as futile).

4. Intervenor’s Interests Have Been Adequately Represented.

RSS acknowledges that neither Defendant currently has counsel and that neither Defendant was represented at the December 2015 damages hearing. However, both Defendants and Intervenor *MBA(FL) II* had counsel from December 2013 until October 2014, when Magistrate Abel permitted counsel to withdraw. *See* ECF No. 107. Notably, the Court had previously vacated CBD (NC)’s default in July 2014—three months before counsel withdrew—giving CBD (NC) (or a potentially interested third party, such as *MBA(FL) II*) every opportunity to argue the merits of the case at that point. *See* ECF No. 89. CBD (NC) chose not to defend

itself, and MBA(FL) II chose not to seek leave to intervene on CBD (NC)'s behalf. It cannot complain of inadequate representation now, having had an opportunity to protect its potential interest in July 2014.

Moreover, any suggestion that Defendants' counsel withdrew for mistaken reasons several months later (thus resulting in inadequate representation) is simply false. *See* Motion to Intervene at 18 (alleging that the "only" reason RSS obtained defaults was because of Darren Conrad's testimony that allegedly led counsel to withdraw). As stated in the affidavit of Daniel Clark, former counsel for Defendants and Intervenor MBA(FL) II, counsel only moved to withdraw after his representation was *voluntarily terminated* by Defendants. *See* ECF No. 106-1 at ¶ 8 ("Defendants [CBD (NC)] and [MBA(FL) II] have terminated Vorys in this matter and agreed it should seek to withdraw[]"). Magistrate Abel then ordered Defendants to retain new counsel or risk default. *See* ECF No. 107 at 1 (each Defendant "will be in default if it fails to retain new counsel who enters an appearance on its behalf within 30 days"). It was Defendants' voluntary termination of counsel that led counsel to withdraw, and Defendants' decision not to retain new counsel that led to default. Intervenor cannot argue lack of adequate representation when they freely chose—at least twice—not to represent their potential interests in this matter.

B. Alternatively, Intervenor Cannot Seek Permissive Intervention.

Likewise, Intervenor cannot seek permissive intervention. Federal Rule 24(b)(1)(B) allows a party to seek permissive intervention if it proves (1) the motion was timely filed; and (2) one or more of the applicant's claims or defenses share a common question of law or fact with the main action. Intervenor's motion fails as to both elements.

First, as noted above, Intervenor's motion was filed more than two years after they knew of RSS's intent to seek successor liability and a year and a half after Intervenor's counsel withdrew. Thus, they cannot satisfy the test for permissive intervention.

Second, this case and the Related Case do not currently share common questions of law or fact, but even if they did, Intervenor has waived any such claim by taking a "wait and see" approach. The only potential common issue identified by Intervenor is whether they are successors to Defendants (and thus liable for any judgment issued in this matter). The Court has not made any decision as to whether Intervenor are successors to Defendants (nor has it been asked to make such a decision in this case); rather, that issue will be decided by the Court in the Related Case. Because the question of successor liability will arise only in one case, it cannot be "common" to both cases.

Moreover, the fact that RSS is seeking damages for the misappropriation of its trade secrets against Defendants in this case and Intervenor in the Related Case is not a "common question of law or fact." First, RSS is seeking separate damages in each case, covering different time periods against what Intervenor claim are different entities. Second, nothing is preventing Intervenor from arguing in the Related Case that: (1) they are not successors to Defendants (as they have claimed); and (2) they did not use the RSS System from April 2012 – present. As such, the issues are entirely distinct and the cases do not contain common issues of law or fact. Intervenor's attempt to seek permissive intervention should thus be denied.

C. The Court Should Not Stay This Case.

Finally, the Court should deny Intervenor's request to stay this case. In requesting a stay, Intervenor essentially invite the Court to take the same erroneous "wait and see" approach used by Intervenor after they told their attorneys to withdraw in 2014. This request ignores the

procedural posture of this case, unfairly trivializes the Court's and RSS's substantial investment of time in this case, and would cause RSS substantial prejudice.

First, of course, Intervenor has no standing to request a stay until or unless they are granted leave to Intervene. Second, there is virtually nothing to stay, given that the only remaining action in this case is the Court's issuance of the default judgment decision. And to the extent Intervenor is actually asking the Court to stay execution of any forthcoming judgment, such relief is not proper because RSS will not seek to execute a judgment issued in this matter against Intervenor unless and until the Court in the Related Case deems them successors to Defendants.

Third, staying the case now saves no judicial resources and would mean that RSS's efforts to prosecute this case for the last two and a half years have been entirely fruitless. Indeed, the request for stay ignores the fact that RSS filed this case nearly two years *before* it filed the Related Case, yet Intervenor wants the newer-filed action to proceed to judgment first (which is curious in light of their attempt to dismiss the Related Case on jurisdictional grounds). *See* Related Case ECF No. 4. RSS has gone to great lengths to segregate any damages sought in this matter to ensure that it is not seeking double recovery of any damages in the Related Case, and has committed tremendous resources to bringing this matter to a conclusion. RSS therefore respectfully requests that the Court deny Intervenor's motion in full and issue a final judgment holding Defendants liable for the damages requested at the December 2015 hearing.

V. Conclusion

For the foregoing reasons, the Court should deny Intervenor's Motion to Intervene and levy all appropriate sanctions against Intervenor for their latest attempt to delay this case.

Respectfully submitted,

/s/ James E. Arnold

James E. Arnold (OH 0037712)

Trial Attorney

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Counsel for Plaintiff Retail Service Systems, Inc.

CERTIFICATE OF SERVICE

The undersigned certifies that on the 23rd day of May 2016, a true and correct copy of the foregoing Plaintiff Retail Service Systems, Inc.'s Memorandum in Opposition to Proposed Intervenor Mattress By Appointment, LLC, Mattress By Appointment, LLC, and Edwin Shoffner's Motion to Intervene and Stay Proceedings was filed with the Court using the Clerk of Court's cm/ecf filing system, which will send notice of this filing to all parties that have entered an appearance in this matter:

Jessica A. Reese, Esq.
Joseph J. Golian, Esq.
Dickie, McCamey & Chilcote, PC
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jgolian@dmclaw.com

Counsel for Defendants

/s/ James E. Arnold
James E. Arnold

The South Carolina Court of Appeals

Mattress by Appointment, LLC, Appellant,

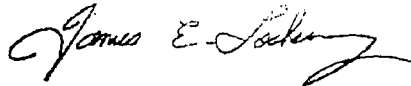
v.

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

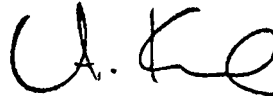
Appellate Case No. 2016-000662

ORDER

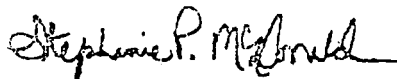
After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.



C.J.



J.



J.

Columbia, South Carolina

cc:

Adam Crittenden Bach, Esquire
Paul S. Landis, Esquire
Beattie B. Ashmore, Esquire
Lewis W. Tollison, III, Esquire

FILED

August 22, 2016

State of South Carolina

County of Anderson

In the Court of Common Pleas

Mattress by Appointment LLC,)

Plaintiff,)

-vs-)

Retail Service Systems Inc.,)

Carlton Scott Andrew, BoxDrop)

Furniture Inc., Darren Conrad,)

Defendants.)

2015-CP-04-2161

January 26, 2016

Transcript of Record

B E F O R E:

The Honorable R. Lawton McIntosh, Judge

A P P E A R A N C E S:

Adam Crittenden Bach, Esquire
Attorney for the Plaintiff

Beattie B. Ashmore, Esquire
Attorney for Defendants Retail Service Systems Inc. & Carlton Scott Andrew

Paul S. Landis, Esquire
Attorney for Defendant BoxDrop Furniture Inc.

Lewis Walt Tollison III, for defendant
Attorney for Defendant Darren Conrad

Renee Tollison
Circuit Court Reporter

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EXHIBITS

No	DESCRIPTION	ID	EV
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No exhibits were presented during the hearing

1 **January 26, 2016**

2 (WHEREUPON, court convened with all parties present
3 and the following proceedings were had commencing at
4 approximately 9:51 a.m.)

5 THE COURT: Good morning. Please be seated.

6 This is Mattress by Appointment, LLC, versus Retail
7 Service Systems, Inc., BoxDrop Furniture, Inc., Carlton
8 Scott Andrew and Darren Conrad.

9 Gentleman, I haven't read all of the file, but it
10 appears these are motions to dismiss variously; is that
11 correct?

12 MR. BACH: Correct, Your Honor.

13 THE COURT: All right.

14 Mr. Ashmore?

15 MR. ASHMORE: Your Honor, may it please the
16 Court. Beattie Ashmore. And, Your Honor, I represent
17 RSS, which is Retail Service Systems, as well as Scott
18 Andrew, Carlton Scott Andrew. With me -- and I'll let
19 them speak on behalf of themselves and in support of
20 their own motions -- Paul Landis on behalf of BoxDrop and
21 Walt Tollison on behalf of Darren Conrad.

22 Your Honor, we filed our motion to dismiss. Didn't
23 get a response. But last week Mr. Bach -- and Mr. Bach
24 is also from Greenville and a friend of ours from way
25 back. A very fine lawyer.

1 Last week we got from him essentially a letter of
2 explanation along with a document, Your Honor. It's a
3 territory agreement dated December 3rd, 2013. And this
4 is the document -- and I'm happy to pass it up to Your
5 Honor. But this is the document. When you look at all
6 of this paperwork and then years of litigation, this is
7 what we're talking about today. It's a territory
8 agreement, again, dated December 3rd of 2013. And, Your
9 Honor, this territory agreement has within it paragraph
10 nineteen (b) which says, "This agreement shall be
11 governed and construed in accordance with the laws of the
12 State of Florida without giving effect to the conflict
13 laws provision thereof. Any action to enforce this
14 agreement shall be brought only in a federal or state
15 court located in Duvall County Florida. And the parties
16 hereby irrevocably commit to the jurisdiction and venue
17 of such courts and waive any claims of 409 convenience or
18 other causes for change of venue."

19 And so the easiest argument, Your Honor -- and we
20 have a number of more difficult arguments to make which
21 at the end of the day we think are very straightforward.
22 But my first argument to the Court, Your Honor, is that
23 this litigation needs to be in Florida. Again, this is
24 the one document that we've been provided by Mr. Bach
25 that we think controls and serves as the basis for this

1 entire lawsuit, Your Honor. And I just -- perhaps Mr. --
2 we could tackle that issue first and see what Mr. Bach's
3 response is to that. And based on that, we could talk
4 about making these other arguments.

5 THE COURT: All right.

6 Mr. Bach?

7 MR. BACH: Sure. Thank you, Your Honor.

8 The territory agreement that we provided was
9 attached to an affidavit signed by a gentleman named
10 Darren Conrad. He's a party to this suit. And he was a
11 defendant in a case in Florida involving the
12 interpretation of an agreement that he had with the
13 entity that we're here about, my client, Mattress by
14 Appointment, and Carolina Bedding Direct.

15 The Florida court is engaged in a year of litigation
16 involving Mr. Conrad and has found him in violation of
17 the territory agreement. Issued an injunction commanding
18 him to stop violating this territory agreement and
19 continuing Mattress by Appointment. Enjoined all those
20 associated with him to stop violating the territory
21 agreement. Mr. Conrad has not stopped. He has been
22 ordered by that court to report to prison in
23 Jacksonville, Florida, for violation of the court's
24 orders.

25 So that agreement is not -- we are not here to re-

1 litigate that. That's been litigated in Florida. We
2 have brought an action for tortious interference with a
3 contract against a South Carolina entity and a South
4 Carolina individual and another entity that we allege is
5 affiliated with the South Carolina entity, RSS, and
6 Darren Conrad who we allege is employed by BoxDrop, RSS
7 and this other individual.

8 Let's just start at the beginning. BoxDrop and RSS
9 and Scott Andrews are not parties to the territory
10 agreement. So a forum selection clause -- no court that
11 I could find anywhere in the country has ever held that
12 parties who are not a party to an agreement can be bound
13 by a forum selection clause. If we go to Florida,
14 BoxDrop and Mr. Andrews will say we'll we're not
15 residents of Florida. We're not a Florida company. We
16 never signed a territory agreement agreeing to Florida
17 jurisdiction. No court anywhere has ever gone so far
18 with a forum selection clause to say that non-parties are
19 bound by it. MBA ---

20 THE COURT: Let me ask you, Mr. Bach.

21 MR. BACH: I'm sorry.

22 THE COURT: Who are you maintaining are not
23 parties to that ---

24 MR. BACH: All the defendants except Darren
25 Conrad.

1 THE COURT: And as to Mr. Conrad, you would
2 concede that that has to be dealt with down in Florida
3 under the forum selection clause?

4 MR. BACH: No, because the agreement states any
5 action to enforce or interpret this agreement shall be
6 brought, et cetera, et cetera ---

7 THE COURT: The underpinnings of your complaint
8 seem to stem from that agreement; is that correct?

9 MR. BACH: We're not asking this Court ---

10 THE COURT: Yes or no?

11 MR. BACH: It does -- well, no. I guess I
12 would say no because the agreements that we're talking
13 about are the agreements that they're interfering with,
14 which are not the agreement between MBA and Conrad.
15 Again, he's already been found to violate that. We're
16 now saying that Conrad as an agent of BoxDrop and RSS is
17 interfering with numerous other -- and that's exactly
18 what the Florida court has enjoined him to stop doing.
19 But we're saying that BoxDrop and its agent, Darren
20 Conrad, are tortiously interfering with the agreements of
21 third parties. And none of those contracts are before
22 the Court at this time. I mean, at this point yet.

23 We have evidence of who these dealers are, who
24 they've interfered with. But I would say that a tortious
25 interference with a contract claim, aiding and abetting

1 breach of fiduciary duty, these are all tort actions.
2 And all we have to prove is that there is a contract and
3 the defendants knew about the contract and interfered
4 with it without justification. And at this stage, the
5 motion to dismiss stage, all we have to do is to have
6 pled it properly essentially.

7 So we have pled that there are third parties, not
8 Darren Conrad, not anybody in this litigation, that have
9 valid enforceable contracts with MBA, and that these
10 defendants, the South Carolina defendants, and the
11 individual, Mr. Conrad, are interfering with those
12 agreements. And I think certainly at a 12(b)(6) stage,
13 that is enough to go on into discovery.

14 You know, I'd also just point out that generally
15 forum selection clauses are enforced strictly as to their
16 terms. Again, this says, "any action to interpret this
17 agreement," the one between MBA and Conrad which is not
18 what we're here about, "shall be brought only in a
19 federal or state court." And the only reason why all the
20 Florida litigation and those proceedings were laid out
21 and the territory agreement with Mr. Conrad is to show
22 that a Florida court, which is what this agreement is --
23 the law it's under has found that this is a valid and
24 enforceable contract which is element one of a tortious
25 intervention with a contract claim. So all we have to do

1 is show ---

2 THE COURT: Now, let me make sure I understand.
3 The territory agreement is a valid, enforceable contract?

4 MR. BACH: Correct.

5 THE COURT: Okay. And so RSS, BoxDrop and
6 Andrew are not parties to that agreement?

7 MR. BACH: Correct.

8 THE COURT: But you're saying that predicate
9 one is on the tortious interference, so there has to be
10 in existence from the plaintiff and a third party a valid
11 contract?

12 MR. BACH: That's exactly right.

13 THE COURT: All right.

14 MR. BACH: And they are not parties to it and
15 can't invoke the forum selection clause. And if we went
16 to Florida, they'd say, we don't have jurisdiction, and
17 would probably be correct. But they are South Carolina
18 residents, entities. We believe RSS and BoxDrop are
19 affiliated with one another. So, again, this does not
20 rise out of -- we're not asking the Court to interpret
21 it, this agreement, to enforce the agreement. All we
22 have to show for purposes of our action is their
23 knowledge of the agreement. That's it. That step one.

24 And then, Your Honor, I would just point out, you
25 know, South Carolina has a long and complicated history

1 with forum selection clauses. You know, § 15-7-120, the
2 statute stating that notwithstanding provision in a
3 contract requiring a cause of action arising under it to
4 be brought in a location other than as provided in this
5 title, the cause of action may be brought here. You
6 know, that had been applied in Johnson versus Paraplane
7 to say that forum selection clauses generally are not
8 enforceable in South Carolina. But if you can bring it
9 in South Carolina otherwise, you can bring it in either
10 state.

11 But I don't even think the Court needs to get there.
12 I think at the motion to dismiss stage, we have pled that
13 there is a valid and enforceable agreement between MBA
14 and third parties, that they have knowledge of that
15 agreement because the Florida Court has found that
16 agreement enforceable in Florida against their agent.
17 They're using Mr. Conrad, BoxDrop and RSS to interfere
18 with those agreements.

19 THE COURT: Okay. All right, sir.

20 MR. ASHMORE: Your Honor, again, the territory
21 agreement that you asked the question -- and this is what
22 they're using to connect the dots to our clients. It's
23 the December 3rd territory agreement. An amended
24 complaint was provided to us last week as well, Your
25 Honor, once we pointed out -- we made various arguments

1 in our motion to dismiss. And the amended complaint,
2 Your Honor, at paragraph twenty-two alleges Darren Conrad
3 violated the territory agreement, this same territory
4 agreement.

5 Paragraph twenty-three. Mattress by Appointment
6 filed suit, and an emergency injunction in Duvall County
7 Florida against Conrad further alleges that Conrad was a
8 party to the territory agreement and enjoined him from
9 filing specific things that they list in the amended
10 complaint.

11 Paragraph twenty-six. Conrad is in violation of the
12 non-compete in the territory agreement and in violation
13 of the Florida order. This is all taking place in
14 Florida, Judge. And that's what they're using to serve
15 as the basis for this complaint.

16 Paragraph twenty-seven. Conrad is an agent of RSS
17 and is in violation of his non-compete in the territory
18 agreement and the Florida order. That's how they're
19 connecting the dots to RSS is through this Florida
20 territory agreement that says it's got to be litigated in
21 Florida.

22 Paragraph twenty-eight. RSS and Andrew knew or
23 should have known of the existence of the non-compete and
24 the Florida order.

25 Your Honor, it's all about this territory agreement

1 which has got to be litigated in Florida. And so, Your
2 Honor, I think this case should be dismissed on the forum
3 selection clause.

4 THE COURT: Let me ask Mr. Bach one question.

5 MR. BACH: Yes, sir.

6 THE COURT: Granted, I haven't read through
7 this file, so please bear with me. And I hear what
8 you're saying about the territory agreement earlier. But
9 you are alleging in your amended complaint that the
10 relationships that are being tampered with or interfered
11 with are business relationship between your client and
12 some third-party customers; is that correct?

13 MR. BACH: Correct.

14 THE COURT: And then you also argued that there
15 was a contract that was deemed to be valid, and,
16 therefore, that's the first step in your complaint. And
17 that is the territorial agreement; correct?

18 MR. BACH: Correct. The allegation ---

19 THE COURT: Has there been any determination,
20 one way or the other -- I'm just wrapping my arms around
21 it -- as to these other contractual arrangements with
22 your customers?

23 MR. BACH: In some cases there has, Your Honor.
24 Some of the dealers that we know bought through BoxDrop.
25 For example, you know, this again would be, I think,

1 beyond the scope of a 12(b)(6). But we brought Facebook
2 postings showing BoxDrop Furniture signing up dealers who
3 are subject to the same agreement. And, again, what we
4 pled regarding the territory agreement in Florida all
5 goes as to knowledge. Okay? So, you know ---

6 THE COURT: That's what I was wondering because
7 you were saying, you know, number one, the way I look at
8 it from my perspective at this juncture is I have to deem
9 your well-pled complaint or amended complaint would be a
10 true allegation.

11 MR. BACH: Correct.

12 THE COURT: And then when you argued a minute
13 ago that there has been a court finding that there is a
14 valid contract, you are, in fact, referring to the
15 territorial agreement and not the other agreements with
16 your existing customers. But you're bringing your case
17 based on those contractual relationships with your
18 existing customers; correct?

19 MR. BACH: Correct. And what I'd say is that
20 the -- the reason why we have pled and put so much in our
21 pleading about the Florida litigation is because it goes
22 to the knowledge of BoxDrop's agent, Darren Conrad, that
23 there is a valid and enforceable contract. And then we
24 are permitted -- I don't know of any case anywhere that
25 has held that -- if there was a contract between Michelin

1 and an Oregon Company that said it had to be done in
2 Oregon and some third party wanted to sue Michelin for
3 violating it ---

4 THE COURT: Yeah, I got that.

5 MR. BACH: --- it's not -- the tortious
6 interference is separate from a breach of contract. And,
7 again, the defendants in this case are not -- A, they are
8 not parties to the territory agreement. So I don't
9 believe they can invoke the forum selection clause. B,
10 they can be sued for any purpose whatsoever of general
11 jurisdiction because they are South Carolina entities or
12 an affiliate of South Carolina entities or a South
13 Carolina resident.

14 And our allegation is that these proceedings took
15 place in Florida about this contract. When that court
16 found that contract valid and these defendants had
17 knowledge of it, then we can come here and plead tortious
18 interference with it if they are interfering with the
19 contract, so ...

20 THE COURT: See, you keep going in circles.
21 And that's why I keep trying to get my arms around it.
22 You keep saying tortious interference with it.

23 MR. BACH: Yeah. And I apologize for that.

24 THE COURT: And either the territorial
25 agreement or the -- it seems to me that you're really

1 arguing that they are interfering with your business
2 relationships with existing customers.

3 MR. BACH: Well, let me -- and I apologize.
4 And I don't mean to use concise language. Let me use
5 exactly what's in the complaint and what I think the
6 Court has to accept as true. "As an agent of RSS, Conrad
7 has interfered in MBA's business relationships with
8 dealers, customers and key personnel in violation of his
9 non-compete and the Florida order by engaging in the
10 following conduct: directly soliciting MBA dealers and
11 key personnel to violate their respective territory
12 agreements, copying sales information to facilitate
13 dealer transitions, utilizing insider knowledge, selling
14 competing products in violation."

15 Then I go on in paragraph twenty, "Despite RSS and
16 Andrew's knowledge of the territory agreement, these
17 defendants solicited and engaged Conrad's services to
18 take advantage of and make relationships with these MBA
19 dealers." In the tortious interference claim, I say,
20 "Contracts existed between MBA, Conrad and numerous
21 independent dealers." So, again, the allegation is that
22 they are tortiously interfering with these contracts.

23 THE COURT: Okay.

24 MR. BACH: And I don't think that one of the
25 elements of the tortious interference claim is it has to

1 be a South Carolina contract. It's just that you
2 interfered with a contract, you knew about the contract,
3 and you have no legal justification for it.

4 So it's almost -- I feel almost like, you know,
5 we're -- we could have taken out all the allegations
6 about the Florida litigation and just said, MBA has a
7 contract with the parties. They're violating those
8 contracts. We're entitled to damages. But we gave the
9 background to show the knowledge, that they have
10 knowledge of it, they're aware of it. That they -- you
11 know, that they know these contracts. I mean, that's the
12 first element, that you have knowledge of a contract and
13 you violated it without justification. There's nothing
14 that says it's a South Carolina contract.

15 And, again, I couldn't find any case that allowed a
16 non-party to a contract to invoke a forum selection
17 clause to go to Florida to litigate it. And I would just
18 say that the forum selection clause in this case says
19 that a dispute between the parties, meaning the parties
20 of the contract, which BoxDrop, RSS and Andrew were not.
21 And it says as to the -- arising out of the enforcement
22 of the agreement. Well, we're not asking the Court to
23 enforce the agreement. We're not asking the Court to
24 interpret the agreement. We're just asking the Court to
25 find that the defendants had knowledge of the agreement

1 and interfered with it unjustifiably.

2 THE COURT: All right.

3 Yes, sir?

4 MR. TOLLISON: Your Honor, Walt Tollison. I
5 represent Darren Conrad. But I want to just clarify one
6 thing in the discussion that you're having with Mr. Bach
7 because we can all have an intelligent discussion about
8 it. And we're not looking to change the pleadings. We
9 can't do that now. We're not looking to the Court to
10 alter the pleadings. The box the plaintiff is in in this
11 case is they are asking you the exact -- this Court and
12 this pleading -- to do what you're raising as should be
13 done in Florida. He seeks injunctive relief here. How
14 can this Court give injunctive relief, issue a
15 restraining order, without interpreting or enforcing the
16 territory agreement?

17 So if you go to the cause of action -- instead of
18 cause of action, he says he wants this Court to find that
19 RSS, Mr. Ashmore's client, and Andrew, BoxDrop and/or
20 Conrad, mine, collectively have wrongfully procured
21 valuable customers and dealers in violation of the
22 dealer's territory agreement, soliciting MBA dealers to
23 breach their territory agreement and assisted Conrad in
24 competing with the territory -- in violation of the
25 territory agreement. This Court cannot adjudicate a

1 resolution of that cause of action without enforcing or
2 interpreting the territory agreement.

3 Now, the box they're in -- they didn't have to sue
4 Conrad in this action. That Florida action is still
5 pending. He can get all the relief -- his client. I'm
6 not sure what's going on here. But in Florida, it's
7 still pending. My client's still a party. He can get
8 all the relief he wants from my client under that
9 territory agreement. He doesn't have to come here and
10 argue res judicata or some estoppel issue with this
11 Court. It goes right back there. I'm not aware of a
12 party's ability, non-parties to the territory, to not to
13 be able to defend in Florida if they're in -- so he
14 argues in paragraph twenty -- this is his pleadings. In
15 paragraph twenty-eight, at all times, Beattie's client,
16 both of his clients, RSS and Andrew, knew or should have
17 known of the existence of the non-compete and the Florida
18 order. In fact, he alleges RSS and Andrew were
19 specifically -- he doesn't say how -- specifically made
20 aware of the proceedings in Duvall County, Florida.

21 If I'm a non-party and I'm violating -- and I've
22 been made aware of a court order and I'm violating it,
23 you think we're going to win on a jurisdiction -- they're
24 going to win on a jurisdiction argument there? He can
25 sue them in Florida for whatever he just alleged that he

1 would allege to the Florida court. Mr. Ashmore's clients
2 was made aware, Your Honor, by virtue of whatever it was
3 he's not pleading here. He violated -- currently, he's
4 in violation of the agreement because the court there
5 issued a restraining order. So they're not even
6 litigating that anymore.

7 The court in Florida has already issued a
8 restraining order. But he wants you to just kind of put
9 aside the efficacy of the territory agreement where he
10 can proceed with all of the non-parties to the territory
11 agreement. But you can't do that without the genesis of
12 this case being does the territory agreement apply.

13 And that takes us to another argument. I think the
14 territory agreement has expired. But that requires you
15 to dive into the merits to some degree. But let the
16 Florida court do that. But I don't know how he can seek
17 injunctive relief in a complaint and not ask the Court --
18 and the various allegations -- to interpret or enforce
19 the territory agreement. He wants to enforce it to my
20 client and then wrap these folks in to say, well, you
21 knew or should have known, and, therefore, you're in
22 violation too. That gives rise to my tortious
23 interference claim. That gives rise to my civil
24 conspiracy claim. But if you take me and move me to
25 Florida, he can stay here if he wants to. He can re-

1 plead the complaint without Darren Conrad. I don't know
2 why they wouldn't do that.

3 THE COURT: All right. Okay. Go to your next
4 arguments, please, sir.

5 MR. ASHMORE: Your Honor, beyond that, as it
6 turns out, once you start looking at things, there are
7 two Mattress By Appointments. The plaintiff in this case
8 is Mattress by Appointment, LLC. And, again, Your Honor,
9 as we peel back the layers of the onion, it turns out
10 there are actually two Mattress by Appointments. And for
11 ease of reference, I'm going to call them MBA 1 and MBA
12 2. And this is what this case is all about. This is why
13 they don't want to be MBA 1. They want to be MBA 2.

14 MBA 1 is being sued in federal court in Ohio, and a
15 huge judgment is getting ready to get handed down against
16 MBA 1. MBA 1 was in default. What they've been doing is
17 playing shell games, Your Honor. They're just creating
18 entities left and right. And it's finally caught up with
19 them. They're now painted in a corner. They don't want
20 to be MBA 1.

21 There was a damages hearing December 16th of last
22 year. The judge has got it under advisement. It was not
23 opposed. I think they fought over service for almost a
24 year. Again, trying to play shell games with what
25 entitles existed or didn't exist. But at the end of the

1 day, there is going to be a judgment that was -- and
2 nobody appeared for MBA 1 at the damages hearing. And
3 the damages are anywhere between six hundred thousand and
4 six million dollars. They don't want to be MBA 1. They
5 know that.

6 And in the complaint, when you read the complaint,
7 Your Honor, again, the operative dates, the territory
8 agreement was December 3rd of 2013. That's the date of
9 that agreement. Again ---

10 THE COURT: Say that again, please, sir.

11 MR. ASHMORE: December 3rd, 2013 -- that's the
12 date of the agreement -- there were two Mattress by
13 Appointment Florida entities. Now, how they knew that, I
14 don't know. But there were, according to them, MBA 1 and
15 MBA 2. And the plaintiff in this action claims to be MBA
16 2. And I'll let Mr. Bach disagree if he wants to. But
17 they clearly are stating the position that they're MBA 2.
18 Your Honor, MBA 2 came into existence January 27, 2014.
19 That is after the territory agreement. This plaintiff
20 didn't exist at the time of the territory agreement.
21 This is -- the territory agreement that they complain of
22 that serves as the basis for all their complaints and all
23 of their damages, this plaintiff can't complain of this
24 territory agreement because they didn't even exist at the
25 time it was executed, Your Honor. And so they don't have

1 standing to come in here now and complain of this
2 particular territory agreement. They didn't exist.

3 THE COURT: Mr. Bach, what's your response to
4 that?

5 MR. BACH: Your Honor, we filed an amended
6 complaint last week in order to clean up the pleadings
7 with regard to that. I agree that it was confusing the
8 way that it was pled. Here's what happened. First of
9 all, talking about all of these shell entities, Mr.
10 Ashmore neglected to mention that that was Mr. Conrad.
11 Mr. Conrad declared bankruptcy and sold the assets of
12 this company to my client. So we didn't do any of this.
13 And Mr. Conrad, Mr. Tollison's client, is the one who set
14 up the Ohio entity. There was a North Carolina entity.

15 THE COURT: Let me ask you this. Was MBA 2
16 created on January 27, 2014?

17 MR. BACH: It was filed -- the Secretary of
18 State -- and the Articles of Incorporation were filed on
19 that date.

20 THE COURT: Well, isn't that creation?

21 MR. BACH: That I -- well, there was an entity
22 called Carolina Bedding Direct. And it began doing
23 business in November of 2013 as Mattress by Appointment.
24 And Darren Conrad ---

25 THE COURT: What type of entity was that?

1 MR. BACH: It was an LLC. It was a foreign
2 LLC. And Darren Conrad instructed his accountant to file
3 a name change to change the name to Mattress by
4 Appointment because they had been doing business as
5 Mattress by Appointment actually at that point for some
6 time.

7 THE COURT: The territory agreement, though, is
8 between Conrad and others and Mattress by Appointment 1;
9 right?

10 MR. BACH: By Appointment 2. We would argue by
11 Appointment 2. The reason is, is that ---

12 THE COURT: I'm just not seeing if I'm trying
13 to get my arms around this right. But if you could have
14 MBA 1 that was incorporated prior to January 2014, you
15 had this other entity that was doing business under
16 another corporate entity name ---

17 MR. BACH: Right.

18 THE COURT: --- that ultimately corrected that
19 name, as you're saying, incorporated January 2014, how is
20 it taking advantage of this territorial agreement that
21 was dated 2013?

22 MR. BACH: Because Darren Conrad has admitted
23 in an affidavit, which is what we provided prior to this
24 hearing, that when he clicked through the territory
25 agreement and accepted the terms, the company was

1 mistakenly still called Carolina Bedding Direct because
2 articles of incorporation were filed instead of a name
3 change. He wrote a letter to the Secretary of State in
4 January 2014 saying, we made a mistake. The Mattress by
5 Appointment entity that you now have set up never
6 existed, never did business, never operated. We meant to
7 file a name change article, and we didn't.

8 And so, Your Honor -- and, again, this, I think,
9 gets back a little bit to some of the representations
10 that have been made in the Florida agreement. Darren
11 Conrad has already admitted that in November 2013,
12 Carolina Bedding Direct started to do business as
13 Mattress by Appointment, that it set up a website with a
14 territory agreement that he clicked through and accepted
15 the terms of.

16 So, you know, Your Honor, I mean, the courts -- and
17 I don't know that we need to get into this again at the
18 12(b)(6) stage.

19 THE COURT: Right.

20 MR. BACH: But this is again why we pled the
21 Florida agreement, going back to our tortious
22 interference claim. All we have to do is show there was
23 a contract. It doesn't say a South Carolina contract, a
24 contract in Japan or China or Korea or wherever. All we
25 have to do is show element one, there is a contract. The

1 Florida court has already decided that. There is a
2 contract. Darren Conrad admitted it. He admitted that
3 there was a contract with MBA, the entity that is suing
4 him today. He admitted it in an affidavit. The Florida
5 court has already entered an order saying, yes, you're
6 bound by that.

7 Now we have that order, we can take that to wherever
8 a defendant is interfering with territory agreements and
9 say, you can't do this. You can't interfere with the
10 territory agreement.

11 So, again, that's why I think the Florida litigation
12 is important, but it's not necessary this be litigated in
13 Florida. If there was a Texas entity that was
14 interfering with these territory agreements, we can go
15 and sue for tortious interference with a contract in
16 Texas because they are -- all we have to do is show a
17 contract. Not a South Carolina contract, not a contract
18 under a South Carolina law subject to its jurisdiction
19 and governing law, et cetera, et cetera.

20 So we pled some of the Florida litigation, but,
21 again, in our amended complaint, which I understand they
22 sort of crossed in the night. But I agreed that our
23 original pleading with Mr. Ashmore -- I agree with him
24 that it was unclear. So we went back and we cleaned it
25 up a little bit to allege that MBA 2, which was Carolina

1 Bedding Direct, is the entity that Darren Conrad entered
2 into the territory agreement with.

3 But let's just say just for argument's sake that
4 they are right. In order for them to dismiss my tortious
5 interference claim, they would have to show the same
6 thing with all the other agreements. I mean, we're not
7 here about -- I have no desire to re-litigate Darren
8 Conrad's territory agreement. That's over. I'm going to
9 come to court when we get to discovery and show that
10 there are dozens of agreements, territory agreements,
11 that were entered into with third parties between this
12 MBA entity, the third parties that they are intentionally
13 and tortiously interfering with.

14 So we don't have to -- I mean, you know, talking
15 about this issue about which entity and who, is
16 irrelevant to the tortious interference with a contract
17 claim. We're not here to say that they're tortiously --
18 I mean, that may be part of it, that Darren Conrad's
19 agreement was tortiously interfered with. But it's the
20 dozens of other dealers that we're here about, that they
21 were tortiously interfered with, their territory
22 agreements.

23 And there's no allegation that this went on and on.
24 I mean, this MBA 1 entity existed for about two months
25 right up until the time Darren Conrad discovered that he

1 had mistakenly filed articles of incorporation instead of
2 a name change. He wrote a letter to the Secretary of
3 State, said, it's never been a business, and filed the
4 correct article.

5 So, again, I feel like in some respects we're being
6 hung maybe by providing more information about the
7 Florida litigation than we even have to in this case. I
8 mean, we can strip it all out and just say they're aware
9 of third-party territory agreements and are interfering
10 with them. But I don't think that there's anything wrong
11 with providing the Court and the parties information to
12 show that there are these valid agreements.

13 THE COURT: Mr. Ashmore, what's your next
14 argument, or anything further along those lines?

15 MR. ASHMORE: Your Honor, I would defer to Mr.
16 Tollison and Mr. Landis.

17 THE COURT: Okay, sir.

18 MR. LANDIS: Your Honor, Paul Landis on behalf
19 of BoxDrop Furniture, Incorporated. And as usual I find
20 myself riding Mr. Ashmore's coattails on arguments as
21 they relate to motions to dismiss. But I do have, I
22 think, Your Honor, if the motion to dismiss were granted,
23 we would, I think, fall under that the way the complaint
24 is pled. But I also have, in the alternative, if the
25 Court is not inclined to grant the motion to dismiss, a

1 motion for more definite statement. And the reason is,
2 Judge, that Mr. Bach in his complaint -- and I'm sincere
3 in this motion, Judge. In the complaint, here's what Mr.
4 Bach says. He says that BoxDrop Furniture, Incorporated,
5 is a subsidiary of defendant Retail Service Systems,
6 Incorporated. And then he says, "I'm going to collectively
7 refer to RSS and BoxDrop." I mean -- yeah. "RSS and
8 BoxDrop and collectively refer to them as RSS." And the
9 problem I have -- and that's the last time that BoxDrop
10 Furniture is independently identified in the complaint.
11 So what I don't understand is is he alleging -- and first
12 of all -- and this is a little bit outside the scope of
13 the complaint. But BoxDrop Furniture is owned by Daphne
14 Andrew a hundred percent without any -- RSS and BoxDrop
15 don't have any common ownership or anything like that.
16 But I'm just asking for him to tell me is he alleging
17 that there is an alter ego here, that their alter ego is
18 the other. Is he alleging that BoxDrop is an agent of
19 RSS? Just because it's a subsidiary or an affiliate
20 doesn't necessarily mean that BoxDrop is in any way
21 responsible for what's going on. And so I'm just asking
22 for some facts to say what is it that BoxDrop has done to
23 bring us into this litigation because I have a hard time
24 -- if you just put RSS together and don't explain why
25 BoxDrop is connected to RSS specifically -- again, if

1 it's just a subsidiary or an affiliate or a wholly -- or
2 owned in whole or in part -- which is not true. But
3 accepting his allegations as true in the complaint, I
4 don't think that's enough for me to answer the complaint
5 and know why he's bring BoxDrop Furniture into this.

6 He did send a letter, and he referenced that he has
7 some information apparently in his possession today that
8 explains why BoxDrop is a part of this case, but I
9 haven't received it. I don't understand why BoxDrop
10 Furniture is in this case. So that's all I'm asking.

11 MR. BACH: Your Honor, we pled it because we
12 have reason to believe that RSS and BoxDrop are the same
13 or an affiliated entity. And I think ---

14 THE COURT: Well, do you disagree that you just
15 basically brushed over that and that these two are a
16 subsidiary and you don't say -- you don't allege any
17 independent conduct on the part of BoxDrop or the
18 officers, directors or members of that corporation?

19 MR. BACH: Well, we grouped them together based
20 on evidence we had before the pleading was filed, feeling
21 that on a pleading, you know, in a motion to dismiss -- I
22 mean, a great time to ask what evidence we have with the
23 affiliation is in discovery, which we are happy to
24 provide as soon as we get to that stage.

25 THE COURT: Or a more definite and certain

1 statement.

2 MR. BACH: Well, it is. But I don't know that
3 in a pleading -- I mean, I think we have to allege, you
4 know, certain minimum facts. And what we don't know at
5 this stage, and I think what we're entitled to, is we
6 have -- I mean, here is BoxDrop's Facebook page being set
7 up by Darren Conrad after he's been enjoined and found
8 that his territory agreement was enforceable. Here are
9 James Albostoti (phonic) is a dealer of MBA who has one
10 of these territory agreements that we're alleging has
11 been interfered with, writing on BoxDrop's page, "Twenty-
12 four hundred dollar profit a day."

13 THE COURT: Let me just tell you this. I'm
14 going to grant the motion for a more definite and certain
15 statement. Go ahead and amend it. How long do you think
16 you're going to need?

17 MR. BACH: To amend it? Seven. I mean, seven
18 days to -- maybe two weeks just to be safe. Okay.

19 MR. LANDIS: Thank you, Your Honor.

20 THE COURT: All right. Would you prepare me a
21 short order to that effect?

22 MR. LANDIS: Thank you, Your Honor.

23 THE COURT: All right. Anything further from
24 BoxDrop at this time?

25 MR. LANDIS: No, Your Honor.

1 THE COURT: Any other defendants?

2 MR. TOLLISON: No, Your Honor. I didn't hear
3 any more clarity to the issue we were raising with
4 respect to the territory agreement of Darren Conrad. And
5 there was a reference made by Mr. Bach that -- I think,
6 if I understood it correctly -- we've made allegations
7 that Mr. Ashmore's clients have been in violation of
8 other dealer agreements or other dealers subject to
9 territory agreements. And we'll get to that in
10 discovery. But the reason we're here is the pleadings.
11 The pleadings make no reference to some other dealer by
12 name or other dealer. The only thing that's pled in this
13 is my guy's the bad actor. My guy was in violation of
14 the territory agreement per the Florida court, is still
15 in violation per the Florida court if the allegations are
16 accepted as true. I'm not sure ---

17 THE COURT: Well, that's what I have to do is
18 accept them as true.

19 MR. TOLLISON: Absolutely. I want you to. But
20 accepting all of that as true, this matter on my client
21 should be in Florida. It's still pending. It's the same
22 allegations as to my client. Now, he can make those
23 allegations to Mr. Ashmore and them in a different way.
24 I just don't think he sufficiently has done that.

25 THE COURT: Okay. All right. So the motion to

1 dismiss and more definite and certain statement are the
2 only matters before today; is that correct?

3 MR. ASHMORE: Yes, sir.

4 MR. LANDIS: Yes, sir.

5 MR. TOLLISON: Yes, sir.

6 MR. BACH: Yes, sir.

7 THE COURT: All right, guys. I'm going to
8 review this. I'll issue an order. I've given you mine.
9 Just go ahead and circulate it around and make sure ...

10 MR. LANDIS: Yes, Your Honor.

11 MR. ASHMORE: Thank you.

12 THE COURT: Thank you, guys.

13 MR. TOLLISON: Thank you, Judge.

14 MR. BACH: Your Honor, just briefly. And I'm
15 sorry to raise this. And I know we're all lawyers.
16 We're all busy. I did not know that they were planning
17 to argue the forum selection clause issue until yesterday
18 afternoon. If the Court -- you know, to protect myself,
19 I feel like maybe I would like to submit something to the
20 Court.

21 THE COURT: By Friday?

22 MR. BACH: I can do it by Friday.

23 THE COURT: All right.

24 MR. ASHMORE: We'd love the same thing.

25 THE COURT: Let me just tell you. I don't want

1 endless, endless, endless -- it always turns out to be
2 that way.

3 You have one time to respond.

4 Y'all have one time to respond by the following
5 Friday, and that's it.

6 Any more than that, I'm not going there.

7 MR. ASHMORE: We'll just respond to his then.
8 Okay.

9 THE COURT: Sir?

10 MR. ASHMORE: We'll just respond to his brief
11 in short order.

12 THE COURT: Right.

13 MR. ASHMORE: Okay. We can do that because we
14 just actually briefed this same issue recently with Judge
15 Childs. It won't take us long.

16 THE COURT: Okay. Great. Thank you, guys.

17 MR. ASHMORE: Thank you, Your Honor.

18 (WHEREUPON, the hearing concluded at approximately
19 10:27 a.m.)

20 *** END OF REQUESTED TRANSCRIPT OF RECORD ***



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April 21, 2016

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

Re: *Mattress by Appointment, LLC vs. Retail Service Systems, Inc., Boxdrop
Furniture, Inc., Carlton Scott Andrew, and Darren Conrad
C. A. No. 2015-CP-04-02161*

Dear Ms. Kitchings:

Enclosed please find an original and six (6) copies of a return to motion on the above-referenced matter, along with proof of service for the same. We would appreciate your filing the original and returning a clocked copy to us in the envelope provided.

If we may provide you with any additional information, please do not hesitate to call or email.

Sincerely,

ELLER TONNSEN BACH, LLC

Adam C. Bach

abach@etblawfirm.com

ACB/amp
Enclosures

cc: Attorneys for Respondents:
Beattie B. Ashmore
Paul S. Landis
L. Walter Tollison, III

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

R. Lawton McIntosh, Circuit Court Judge

Case No. 2016-000662

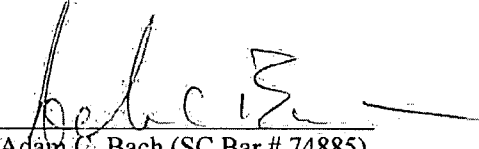
Mattress by Appointment, LLC, a Florida limited liability company
f/k/a Carolina Bedding Direct, LLC, a Florida limited liability company, ...
Appellant,

v.

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

RETURN TO MOTION

April 21, 2016


Adam C. Bach (SC Bar # 74885)
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Attorneys for Appellant

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

The Court of Appeals asked the parties to address the issue of appealability in a letter to counsel dated April 4, 2016. In response, Retail Service Systems, Inc. (“RSS”), and Carlton Scott Andrew submitted a document styled a memorandum but complying with the Appellate Court Rules regarding motions, including the required filing fee. See Rule 240, SCACR. In its memorandum/motion, RSS and Andrew raise two grounds for dismissing the appeal that do not concern whether the order itself is appealable. To the extent the Court of Appeals considers their memorandum/motion as a motion to dismiss the appeal, Mattress by Appointment, LLC (“MBA”), respectfully submits this Return pursuant to Rule 240(e), SCACR.

I. Immediate Appealability of the Order

MBA addressed the substantial rights impacted by the order in a memorandum served on April 14, 2016. MBA will confine its Return to the portions of the memorandum/motion that do not address appealability.

II. Timeliness of the Notice of Appeal

RSS and Andrew argue that the Notice of Appeal was not timely filed because it was filed 24 days after MBA received the Circuit Court’s order denying its motion to reconsider, alter or amend, instead of within 30 days after the challenged order was entered. In so doing, they claim that because the motion to reconsider, alter, or amend is not directed at a final judgment, it is improper and did not stay the deadline for filing a Notice of Appeal.

First, there is no South Carolina authority supporting RSS and Andrew’s argument that a party cannot file a motion to reconsider, alter or amend an interlocutory order. Instead, as stated by the South Carolina Supreme Court, “[t]he trial court interlocutory orders are amendable.” Johnston v. Bowen, 313 S.C. 61, 63, 437 S.E.2d 45, 47 (1993). In Johnston, Bowen filed a motion for summary judgment based on the statute of limitations. Id. The trial court denied the

motion. Id. Bowen filed a motion to reconsider and the trial court amended the order to state that the motion was denied pending discovery, then later granted the motion. Id. Johnston appealed, arguing that the trial court “erred in amending the first order denying a motion for summary judgment in response to Bowen’s motion to reconsider.” Id. The Supreme Court summarily dispensed with this argument, “find[ing] no error” because “interlocutory orders” are amendable. Id.

Denials of motions for summary judgment are unquestionably interlocutory, see id.; U.S. Fidelity & Guaranty Co. v. City of Spartanburg, 267, S.C. 210, 211, 227 S.E.2d 188, 189 (1976) (“an order denying a motion for summary judgment is an interlocutory decision and not directly appealable.”), and the Supreme Court decision’s in Johnston forecloses RSS and Andrew’s argument. Indeed, South Carolina authority has many examples of the Court of Appeals and Supreme Court considering appeals from the denial of motions to reconsider, alter, or amend interlocutory orders. See e.g., Watson v. Underwood, 407 S.C. 443, 457, 756 S.E.2d 155, 162 (Ct. App. 2014) (the issues raised in the [denied motion for summary judgment] motion may be raised again later in the proceedings by a motion to reconsider”); Pocisk v. Sea Coast Const. of Beaufort, 380 S.C. 584, 587, 671 S.E.2d 98, 100 (Ct. App. 2008) (appeal from denial of a motion to reconsider an interlocutory order); Tatnall v. Gardner, 350 S.C. 135, 137, 564 S.E.2d 377, 378 (Ct. App. 2002) (“This is an appeal from an order denying Joy Logan’s motions to reconsider” denial of her motion to amend her answer).

This is consistent with South Carolina’s long held view that “it is proper to view a Rule 59(e) motion not only as a vehicle to request the trial court ‘alter or amend the judgment,’ but also as a vehicle to seek ‘reconsideration’ of issues and arguments.” Elam v. S. Carolina Dep’t of Transp., 361 S.C. 9, 21, 602 S.E.2d 772, 778 (2004). The “wisdom of giving [trial courts] the

opportunity to promptly correct their own alleged errors is all the justification needed for the practice of freely allowing a motion for reconsideration.” *Id.* (quoting Blair v. Equifax Check Svcs. Inc., 181 F.3d 832, 837 (7th Cir. 1999)). Furthermore, “there is nothing inherently unfair in allowing a party one final chance not only to call the court's attention to a possible misapprehension of an earlier argument, but also to revisit a previously raised argument. It is inherently unfair to disallow such an opportunity.” *Id.* at 779.

Additionally, South Carolina does not recognize the “plain error rule” and, therefore, an appellate court cannot “consider and rectify an error not raised by the party below.” Elam, 602 S.E.2d at 780. Because South Carolina does not have the “plain error rule”, it is “doubly important that litigants generally be freely allowed to file a first, written Rule 59(e) motion without concern a later appeal will be deemed untimely.” Elam, 602 S.E.2d at 780. “A great number of reported cases in South Carolina for at least four generations...have emphasized the importance and absolute necessity of ensuring that all issues and arguments are presented to the lower court for its consideration. Issues and arguments are preserved for appellate review only when they are raised to and ruled on by the lower court.” *Id.* at 779-780 (citing to Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) (“It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review.”); Long v. Dunlap, 87 S.C. 8, 68 S.E. 801 (1910) (Supreme Court will not consider any point which was not presented and considered below unless it involves jurisdiction of the court); Gaffney v. Peeler, 21 S.C. 55 (1884) (question of law which was not presented to or passed upon by the trial court cannot be raised on appeal)).

Given this, it is important to clearly enunciate the implication of RSS and Andrew’s argument. The challenged Circuit Court order was issued *sua sponte* and not in response to any

party's motion. See Black's Law Dictionary, 7th Ed. (*Sua Sponte*: Without prompting or suggestion; on its own motion). Because it was issued *sua sponte*, no party addressed, or had the opportunity to address, the order's challenged requirements prior to the order's issuance. If MBA cannot seek reconsideration of the Court's *sua sponte* order, and if it cannot raise an issue on appeal that was not addressed by the trial court, there is no way to challenge the Court's *sua sponte* order. Said differently, if RSS and Andrew are correct and MBA appealed before obtaining a ruling on its motion to reconsider, there would have been nothing for the Court of Appeals to review because South Carolina does not adhere to the "plain error rule" and MBA's exceptions and arguments had not yet been ruled upon by the trial court. Wilke, 497 S.E.2d at 733 ("It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review."). Certainly it is not possible that some orders of the Circuit Court are beyond the reach of appellate review.

This result is impossible in light of S.C. Code § 14-3-330's requirement of immediate appeal of certain interlocutory orders. See e.g., Hagood v. Sommerville, 362 S.C. 191, 198, 607 S.E.2d 707, 710 (2005) ("an order granting a motion to disqualify a party's preferred attorney must be immediately appealed or any later objection in a subsequent appeal will be waived."). If RSS and Andrew are correct, other *sua sponte* orders of a Circuit Court that fall within the ambit of S.C. Code § 14-3-330 cannot be reviewed by the appellate court. If a *sua sponte* order that, for example, issued an injunction, changed the mode of trial, or changed the identity of a defendant – all orders that are interlocutory and must be immediately appealed – cannot be the subject of a motion to reconsider, then because no exception or issue was raised or ruled upon by

the appealing party with respect to the order, these orders cannot be reviewed by the appellate courts.¹

RSS and Andrew cite South Carolina authority for the proposition that the trial court has the power to alter or amend its order. Motion at 18 (“In fact, until the final judgment, it has the power to reconsider, amend, or alter the Order.”). This authority would seem to support MBA’s course of action in filing a motion to reconsider the order.

Additionally, RSS and Andrew cite to federal authority in support of their position that a party cannot ask a trial court to reconsider an interlocutory order. Leaving aside whether this is correct, *see contra Am. Canoe Ass’n v. Murphy Farms, Inc.*, 326 F.3d 505, 514 (4th Cir. 2003) (“Motions for reconsideration of interlocutory orders are not subject to the strict standards applicable to motions for reconsideration of a final judgment.”), federal courts, unlike South Carolina, follow the “plain error rule.” *Tech Sys., Inc. v. Pyles*, 630 F. App’x 184, 187 (4th Cir. 2015). A “plain error” is one that affects a litigant’s “substantial rights.” *Id.* Therefore, if this case were in federal court, no motion to reconsider would be necessary because MBA could appeal the decision under the plain error rule, an avenue unavailable to it in South Carolina court.

Finally, even if RSS and Andrew are correct and the motion to reconsider was improper, no South Carolina court has held that an improper Rule 59 motion impacts the deadlines for appeal as set out in Rule 203, SCACR. The Supreme Court in *Elam* made clear that only a successive Rule 59 motion may not stay the deadline to notice the appeal. 602 S.E.2d at 777. As stated by the Supreme Court, “civil procedure and appellate rules should not be written or interpreted to create a trap for the unwary lawyer or party.” *Id.* at 780. “If a party is unsure

¹ If RSS and Andrew reply that a motion to reconsider one of these interlocutory orders can be filed but does not stay the time for filing a notice of appeal, then appellate review of a *sua sponte* order is dependent on the Circuit Court ruling on the motion to reconsider within 30 days of its original order. Such a rule would give the Circuit Court control over whether its own orders are subject to appellate review.

whether he properly raised all issues and obtained a ruling, *he must* file a Rule 59(e) motion... without concern a later appeal will be deemed untimely.” *Id.* (emphasis added).

Therefore, MBA had no choice but to file a motion to reconsider to make sure “all issues and arguments” were presented to and ruled upon by Circuit Court prior to filing this appeal. Elam, 602 S.E.2d at 780. MBA had no control over the amount of time needed by the Circuit Court to consider and rule on its motion to reconsider. This appeal was filed 24 days after counsel for MBA received the Circuit Court’s order denying its motion to reconsider. The appeal is timely.

III. The Appellant’s Filings Following the Order did not Waive the Appeal

RSS and Andrew argue that by filing a verified second amended pleading as commanded by the order, MBA waived its right to appeal. In support, RSS and Andrew cite solely to authority that concerns interlocutory orders that are not immediately appealable pursuant to S.C. Code 14-3-330. See Memorandum/Motion at 18-20 (citing to Ex Parte Whetstone, 289 S.C. 580, 347 S.E.2d 881 (1986) (order compelling party to participate in discovery); Davis v. Parkview Apartments, 409 S.C. 266, 280, 762 S.E.2d 535, 543 (2014) (order commanding party to provide responses to discovery requests).

Both Ex Parte Whetstone and Davis concern how the appellate court acquires jurisdiction to review orders compelling discovery. When a party wishes to challenge a discovery order, the party is not aggrieved by the order until it fails to comply and is held in contempt. Ex Parte Whetstone, 347 S.E.2d at 581; Davis, 762 S.E.2d at 543 (“to challenge the specific rulings of discovery orders, the normal course is to refuse to comply, suffer contempt, and appeal from the contempt finding.”). No similar defiance is required for an order affecting a substantial right because the right to appeal is granted by statute. Ex parte Capital U-Drive-It, Inc., 369 S.C. 1, 6,

630 S.E.2d 464, 467 (2006) (“The right of appeal arises from and is controlled by statutory law.”); Baldwin Const. Co. v. Graham, 357 S.C. 227, 230, 593 S.E.2d 146, 147 (2004) (“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.”).

The only other basis by which an appeal might be waived by compliance is where compliance with the order would render challenging the order moot. An appeal is moot where some event occurs making it impossible “for the reviewing Court to grant effectual relief.” Collins Music Co. v. IGT, 365 S.C. 544, 549, 619 S.E.2d 1, 3 (Ct. App. 2005). “In civil cases, there are three exceptions to the mootness doctrine.” *Id.* The third exception is where “the decision by the trial court can affect future events or have collateral consequences to the parties, the appellate court can take jurisdiction.” *Id.*; see also State v. Young, 66 S.C. 115, 44 S.E. 586, 588 (1903) (holding that compliance with a writ of mandamus did not render appeal moot).

Here, the Circuit Court’s order affects MBA’s substantial rights and the appeal is authorized by S.C. Code 14-3-330. The appeal is not moot because it sets requirements for the case that continue to affect MBA’s substantial rights into the future and have collateral consequences to MBA. See Order (“Henceforth, all future pleadings, motions, and filings...”); Collins Music Co., 619 S.E.2d at 3. The requirement that a party be held in contempt to seek review of a discovery order is not a medieval test of the party’s resolve but is jurisdictional and, in some instances, compliance would render an appeal moot. Neither jurisdiction or mootness are issues here.

Following the Circuit Court’s order, MBA asked the Circuit Court to stay its ruling pending a ruling on its motion to reconsider. The Circuit Court denied this motion. See Order

Denying Motion to Stay, attached as **Exhibit 1**. Absent a stay from the Circuit Court, the Order was effective and had to be complied with. State v. Highsmith, 105 S.C. 505, 90 S.E. 154, 155 (1916) (“An order of a court or judge which is not void for want of jurisdiction must be respected and obeyed, until vacated or modified by competent authority, even though it may be erroneous.”).

Additionally, RSS and Andrews have filed a second motion to dismiss because they argue that MBA failed to comply with the Court’s order. They cannot argue here that MBA complied while arguing in Circuit Court that MBA did not.

Regardless, this Court has jurisdiction over this appeal because it affects a substantial right and the additional filings do not make it impossible “for the reviewing Court to grant effectual relief.” Collins Music Co., 619 S.E.2d at 3.

CONCLUSION

For the foregoing reasons, RSS and Andrew’s motion to dismiss the appeal should be denied.

Respectfully Submitted;

April 21, 2016


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Attorneys for Appellant

Other Counsel of Record:
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Beattie B. Ashmore
Attorneys for Respondents

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

R. Lawton McIntosh, Circuit Court Judge

Case No. 2016-000662

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

v.

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

PROOF OF SERVICE

I certify that I have served this Return to Motion on the Respondents, Retail Service Systems, Inc., Boxdrop Furniture, Inc., Carlton Scott Andrew, and Darren Conrad by depositing a copy of same in the United States Mail, postage prepaid, on April 21, 2016, addressed to their attorneys of record as follows:

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

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

L. Walter Tollison, III
The Tollison Law Firm
24 Vardry Street, Suite 203
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Facsimile: (864) 312-4191
abach@etblawfirm.com
Attorneys for Appellant

April 21, 2016

Greenville, South Carolina

Exhibit 1

STATE OF SOUTH CAROLINA
COUNTY OF ANDERSON
IN THE COURT OF COMMON PLEAS

FORM 4

JUDGMENT IN A CIVIL CASE

CASE NO. 2015-CP-04-02161

Mattress by Appointment, LLC

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

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:

Attorney for : ☐ Plaintiff ☐ Defendant
or
☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.
- ☐ ACTION DISMISSED (CHECK REASON): ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other
- ☐ ACTION STRICKEN (CHECK REASON): ☐ Rule 40(j), SCRPC; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other
- ☐ DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☐ Statement of Judgment by the Court:

Plaintiff's Motion to Reconsider, Amend or Alter Judgment [from Form 4 Order dated 1/26/16] is held in abeyance until the amended pleadings have been filed and reviewed by the undersigned.

ORDER INFORMATION

This order ☐ ends ☐ does not end the case.

Additional Information for the Clerk : _____

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
		\$
		\$
		\$

If applicable, describe the property, including tax map information and address, referenced in the order: _____

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Circuit Court Judge

2155

Judge Code

Date

①

1

CLERK OF COURT

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

[illegible]

FILED-CLERKS OFFICE
CITY OF LOS ANGELES
JUN 21 1961

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF ANDERSON
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2015-CP-04-2161

Mattress by Appointment LLC

Retail Service Systems Inc.

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:

Attorney for : ☐ Plaintiff ☐ Defendant
or
☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court:

ORDER INFORMATION

PLAINTIFF'S MOTION TO RECONSIDER DENIED WITHOUT A HEARING; NO FORMAL ORDER REQUIRED

This order ☐ ends ☒ does not end the case.

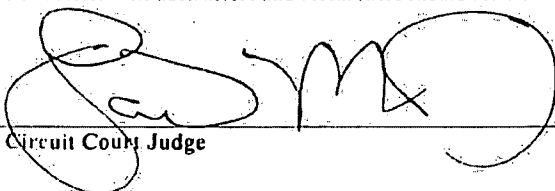
INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
		\$
		\$
		\$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.


Circuit Court Judge

2155
Judge Code

2-23-16
Date

For Clerk of Court Office Use Only

This judgment was entered on the 24th day of Feb, 2016 and a copy mailed first class or placed in the appropriate attorney's box on this 24th day of Feb, 2016 to attorneys of record or to parties (when appearing pro se) as follows:

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT

Court Reporter:

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

FILED-CLERK'S OFFICE