EXHIBIT B

("Formal written order" of the Honorable Jocelyn Newman entered and received by the Appellants on October 24, 2018)

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND Shriners Hospitals for Children; Dorraine Lester; Fred Townsend; and Howard Townsend, Plaintiffs, v. Wells Fargo Clearing Services, LLC d/b/a Wells Fargo Advisors, LLC; Wells Fargo Advisors, LLC; and Jessie Rowe Faircloth, Defendants.	IN THE COURT OF COMMON PLEAS FOR THE FIFTH JUDICIAL CIRCUIT Civil Action No. 2017-CP-40-07131 **ORDER ENTERING DEFAULT AS TO DEFENDANTS WELLS FARGO ADVISORS, LLC AND JESSIE ROWE FAIRCLOTH**

This matter came before the Court for hearing on "Defendants' Motion to Compel Arbitration and to Dismiss," filed on February 1, 2018; "Plaintiffs' Motion for Default Judgment as to Defendants Jessie Rowe Faircloth and Wells Fargo Advisors, LLC," filed on July 27, 2018; and "Defendants' Motion to Strike Plaintiffs' Amended Complaint, Affidavit of Default, and Motion for Default Judgment," filed on July 30, 2018. The hearing on these motions took place at the Richland County Judicial Center on July 31, 2018, with counsel for all parties present.

For the reasons set forth below, Defendants' Motion to Compel Arbitration is DENIED AS MOOT; Plaintiff's Motion for Entry of Default is GRANTED; and Defendants' Motion to Strike is DENIED.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter began on November 27, 2017, with the filing of a Summons and Complaint against Defendants Jesse Rowe Faircloth and Wells Fargo Advisors, LLC (collectively referred to as the "Defaulting Defendants"). In January 2018, Defaulting Defendants accepted service through their attorneys. On January 31, 2018, Defaulting Defendants filed a Motion to Compel

Arbitration and to Dismiss, or Stay the Action.

On July 3, 2018, Plaintiffs filed an Amended Complaint, removing a cause of action and adding as a defendant Wells Fargo Clearing Services, LLC d/b/a Wells Fargo Advisors, LLC. Pursuant to Rule 4 of the SC E-filing Rules, service of the Amended Complaint was effected at the time E-Filing was complete. On July 27, 2018, Plaintiffs filed their Motion for Entry of Default. In response, on July 30, 2018, Defendants filed a Motion to Strike Plaintiffs' Amended Complaint, Affidavit of Default, and Motion for Default Judgment.

Plaintiffs assert that the Amended Complaint is the operative pleading; that Defaulting Defendants failed to timely file any response to the Amended Complaint; and that, as a result, Plaintiffs are entitled to an entry of default. Defaulting Defendants contend that the Amended Complaint is a nullity and not in effect, but to the extent that it is in effect, that an entry of default is inappropriate as Defaulting Defendants have responded to the original Complaint – and, therefore, defended the action – by way of motion. Thus, as an initial matter, the Court must determine which is "the operative pleading" before it at this time.

The South Carolina Rules of Civil Procedure provide the methods by which a party may amend its pleadings. Specifically,

> (a) Amendments. **A party may amend his pleading once as a matter of course at any time before or within 30 days after a responsive pleading is served** ... A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within fifteen days after service of the named amended pleading, whichever period may be the longer, unless the court otherwise orders.

Rule 15(a), SCRCP (emphasis added). Therefore, a party may amend its pleadings as a matter of right prior to or within thirty days of a responsive pleading.

The South Carolina Rules of Civil Procedure further defines pleadings as:

> (a) Pleadings. There shall be a complaint and an answer; and a reply to a counterclaim denominated as such; an answer to a cross-claim, if the answer contains a cross-claim; a third-party complaint, if a person who was not an original party is summoned under Rule 14, and there shall be a third-party answer, if a third-party complaint is served. No other pleadings shall be allowed, except that the court may order a reply to an answer or a third-party answer; and there may be a reply to affirmative defenses as provided in Rule 8(c).

Rule 7(a), SCRCP. By definition, a motion is not a pleading.

The South Carolina Supreme Court has examined this issue in the context of a motion to dismiss and a later amendment to a complaint. In *Bowers v. Robinson*, 311 S.C. 412, 429 S.E.2d 799 (1993), the plaintiff filed a complaint on September 25, the defendant filed a motion to dismiss on November 6, and the plaintiff filed a motion to amend the complaint on January 30. The Supreme Court found the motion to amend unnecessary and held:

> We agree the motion to amend was not necessary. Rule 15(a) allows parties to amend their pleadings once as a matter of course at any time before or within thirty days after a responsive pleading is served. The motion to dismiss did not alter the time allowed to the plaintiff to amend his complaint as a matter of right.

Bowers, 311 S.C. at 414, 429 S.E.2d at 800. As a result, Plaintiffs had the right to amend the complaint and did so, thereby making the Amended Complaint the operative pleading.

It is well-settled in South Carolina that once an amended complaint has been filed, motions directed to the earlier pleading are moot.

> Thus, any questions as to the sufficiency of the First Amended Complaint are now moot. Since responsive pleadings have not yet been filed to the Second Amended Complaint, no question of the sufficiency of that complaint is before us. Where the questions presented by an appeal are moot, the appeal will be dismissed.

Schein v. Lamar, 284 S.C. 252, 255, 325 S.E.2d 573, 574 (Ct. App. 1985). *See also Johnson v. Flakeboard America Ltd.*, 2012 WL 2237004 (D.S.C. March 26, 2012) (holding Defendant's prior similar motion to strike, filed before Plaintiff's Amended Complaint, was now moot). Therefore,

Defendant's Motion to Compel Arbitration and to Dismiss the original Complaint was rendered moot when Plaintiffs filed their Amended Complaint.

Defendants urge this Court to follow certain federal court decisions regarding application of federal rule 15 where it has been held that a response is not necessary to an amended pleading in some instances. However, Defendants' argument disregards the differences between the federal and state rules. South Carolina's version of the rule states, "[a] party **shall plead** in response to an amended pleading ..." Rule 15(a), SCRCP. In contrast, the corresponding federal rule refers to "**any required** response to an amended pleading ..." FED. R. CIV. P. 15(a)(3). In other words, the South Carolina rule is mandatory whereas the federal rule is not mandatory in all situations. South Carolina does not follow the construction of the Federal Rules of Civil Procedure where there is already South Carolina law. *Gardner v. Newsome Chevrolet-Buick, Inc.*, 304 S.C. 328, 330, 404 S.E.2d 200, 201 (1991).

Once the Amended Complaint became the operative pleading, Defaulting Defendants were required to respond within fifteen days. Plaintiffs filed their Amended Complaint on July 3. When calculating the time to respond, Defaulting Defendants were afforded five additional days because they were served by mail under the SC E-Filing Rule 4(e)(4). Therefore, Defendants were required to respond to the Amended Complaint by July 23, which Defendants failed to do. If a party has failed to "plead or otherwise defend" as provided by the South Carolina Rules of Civil Procedure, the defendant is in default. Rule 55(a), SCRCP.

South Carolina courts have characterized the entry of default as a ministerial matter. "Entry of default is a ministerial act which a clerk is required to perform once default is made to appear by the affidavit of the moving party." *Thynes v. Lloyd,* 294 S.C. 152, 153–54, 363 S.E.2d 122, 123 (Ct. App. 1987) (holding that "whether default was actually entered is of no consequence

since the entry of default is a purely ministerial act which the clerk was required to perform once the default was made to appear by the affidavit" of the moving party). Furthermore, an Order entering default is not necessary for the default to be effective. *See Stark Truss Co. v. Superior Const. Corp.*, 360 S.C. 503, 508–09, 602 S.E.2d 99, 102 (Ct. App. 2004).

Defaulting Defendants contend that their Motion to Compel Arbitration and Dismiss, which was filed in response to the original complaint, prevented them from being in default. However, that motion was mooted by Plaintiffs' filing of the Amended Complaint as set forth above.

Further, to the extent that Defaulting Defendants may argue that their Motion to Strike, prevented them from being in default, that argument also fails. Pursuant to *Stark Truss*, Defaulting Defendants' late filing of a Motion to Strike does not satisfy the "plead or otherwise defend" requirement of Rule 55(a) because the filing was not timely. The Court of Appeals held:

> Although Appellants' late answer amounted to a "pleading" filed prior to entry of default, it did not comply with the time requirements of Rule 12(a), SCRCP. Appellants clearly failed to file an answer within thirty days of service of the summons and complaint upon them and they were technically in default. Thus, Appellants' answer was not a valid pleading or defense "as provided by" the Rules of Civil Procedure. A plain reading of Rule 55(a) allows entry of default when a pleading or defense is asserted in a manner noncompliant with the Rules of Civil Procedure. To hold otherwise would render the requirements in Rule 12(a), SCRCP, meaningless. We find the court's entry of default was proper.

Id. at 508–09, 602 S.E.2d at 102.

Other courts considering similar circumstances have reached the same conclusion.[1] A failure to respond to the operative pleading is a failure to plead or otherwise defend in the context of Rule 55(a). Defaulting Defendants failed to respond to Plaintiffs' Amended Complaint within the time period proscribed by Rule 15(a) and are, therefore, in default.

The effect of default is that Defaulting Defendants cannot contest the merits of the case until they are successful in lifting the default. For example, our Supreme Court has said, "If our courts were to allow a defaulting defendant to fully participate in a post-default hearing, we believe there would be no consequence of default." *Limehouse v. Hulsey*, 404 S.C. 93, 116, 744 S.E.2d 566, 578–79 (2013). "It is well settled that by suffering a default, the defaulting party is deemed to have admitted the truth of the plaintiff's allegations and to have conceded liability." *Roche v. Young Bros., Inc., of Florence*, 332, S.C. 75, 81, 504 S.E.2d 311, 314 (1998). "By defaulting, a defendant forfeits his right to answer or otherwise plead to the complaint. In essence, the defaulting defendant has conceded liability. However, a defaulting defendant does not concede the amount of liability." *Howard v. Holiday Inns, Inc.*, 271 S.C. 238, 242, 246 S.E.2d 880, 882 (1978).

IT IS, THEREFORE, ORDERED that Plaintiffs' Motion for Default Judgment as to Defendants Jessie Rowe Faircloth and Wells Fargo Advisors, LLC is GRANTED.

IT IS FURTHER ORDERED that Defendants' Motion to Strike Plaintiffs' Amended Complaint, Affidavit of Default, and Motion for Default Judgment is DENIED.

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[1] A "failure to plead or otherwise defend" within the context of SCRCP 55(a) is either (a) a failure to respond to a pleading or (b) a failure to take appropriate and timely action following the filing of an initial responsive pleading. *See Stark Truss, supra* (holding default judgment appropriate where answer was filed late); *Sundown Operating Co., Inc. v. Intedge Industries, Inc.*, 383 S.C. 601, 681 S.E.2d 885 (2009) (holding entry of default and default judgment were proper for failing to file an answer to the summons and complaint); *Venture Engineering, Inc. v. Avery*, 2008 WL 9832815 (SC Ct. App. 2008) (holding default judgment against a party who failed to answer is only enforceable if amended complaint is properly filed).

IT IS FURTHER ORDERED that Defendants' Motion to Compel Arbitration and to Dismiss is DENIED AS MOOT.

AND IT IS SO ORDERED.

Jocelyn Newman
Presiding Judge

October 24, 2018
Columbia, South Carolina.

Richland Common Pleas

Case Caption: Shriners Hospitals For Children , plaintiff, et al vs Wells Fargo Advisors LLC , defendant, et al

Case Number: 2017CP4007131

Type: Order/Entry of Default

So Ordered

Jocelyn Newman