DICKSON DAVIS LAW FIRM

AMENDED MOTION AND PETITION TO REINSTATE COVER LETTER

February 13, 2019

RECEIVED
FEB 15 2019
SC Court of Appeals

Clerk of Court
South Carolina Court of Appeals
1220 Senate Street
P.O. Box 11629
Columbia, SC 29211

VIA FEDEX

Re : *Roberts et al. v. RTG Furniture Corporation et al.*
Case No. : 2018-CP-23-02230
File Id. : 2017-01-122

Dear Clerk of Court:

As you know, I represent Appellants in this matter. Included is the Motion and Petition to Reinstate Appellants' appeal related to the South Carolina Appellate Court Order issued on January 30, 2019, dismissing the appeal on the basis that a motion to strike is not immediately appealable. Please note that the appeal pertains to Order issued by the Greenville Circuit Court denying Appellants' Motion to Alter or Amend Appellants' Complaint.

I have noted that Exhibit B was filed incorrectly. Please see the Amended Motion and Petition to Reinstate Appeal with the corrected Exhibit B. Included is the following:

(1) Appellants' Amended Motion and Petition for Reinstatement with attendant proof of service; and,
(2) Order from the South Carolina Court of Appeals dismissing Appellants' appeal.

Respectfully submitted this 13 day of February, 2019.

Deborah D. Davis, Esq.
SC Bar No.: 102942
Attorney for Appellants

cc: Frank S. Stern

/ddd

The South Carolina Court of Appeals

Rollie Brian Roberts and Kimber Flynn Roberts,
Appellants,

v.

R.T.G. Furniture Corporation, RTG Furniture Corporation of Georgia, RTC Furniture Corporation of Texas, RTC Furniture Corporation of Texas, L.P., Roomstogo.com, Inc., SE Independent Delivery Services, Inc., Respondents.

Appellate Case No. 2019-000104

ORDER

This appeal arises out of an order of the circuit court denying the appellants' motion to strike. Because a motion to strike is not immediately appealable, this appeal is dismissed. *See Pelfrey v. Bank of Greer*, 270 S.C. 691, 695, 244 S.E.2d 315, 317 (1978) ("Ordinarily, the refusal of a motion to strike is not appealable until final judgment, unless (1) the motion to strike is in the nature of a demurrer or (2) there is an appealable issue before the court justifying the consideration of the motion to strike also in order to avoid unnecessary litigation." (citing *Tate v. Oxner*, 236 S.C. 313, 114 S.E.2d 225 (1960))). The remittitur will be sent as required by Rule 221(b) of the South Carolina Appellate Court Rules.

FOR THE COURT

Columbia, South Carolina

FILED
January 30, 2019

cc:
Deborah Dickson Davis, Esquire
Frank Sanders Stern, Esquire

AMENDED MOTION AND PETITION TO REINSTATE APPEAL

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Letitia H. Verdin, Circuit Court Judge

Case No. 2018-CP-23-02230

ROLLIE BRIAN ROBERTS, KIMBER FLYNN ROBERTS,

Appellants,

v.

R.T.G. FURNITURE CORPORATION, RTG FURNITURE CORPORATION OF GEORGIA, RTG FURNITURE CORPORATION OF TEXAS, RTG FURNITURE OF TEXAS, L.P., ROOMSTOGO.COM, INC., SE INDEPENDENT DELIVERY SERVICES, INC.,

Respondents.

AMENDED MOTION AND PETITION TO REINSTATE APPEAL

Dickson Davis Law Firm, LLC
Deborah D. Davis, Esq.
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439 Congaree Street, Mailbox 6
Greenville, SC 29607
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ATTORNEY FOR APPELLANTS

APPELLANTS' AMENDED MOTION AND PETITION TO REINSTATE APPEAL

Appellants hereby submit this motion and petition to reinstate appeal in response to the Court's Order entered and dated on January 30, 2019 ("Order"), dismissing Appellants' appeal pursuant to: (1) Rule 59(e) of the South Carolina Rules of Civil Procedure for the Court's reconsideration to alter or amend the Court's Order; (2) Rule 221(c) of the South Carolina Appellate Court Rules for a petition when the Court dismisses Appellants' Appeal; and, (3) Rule 260(a) of the South Carolina Appellate Court Rules for a petition to reinstate Appellants' appeal by leave of the Court upon good cause shown herein. This motion for reinstatement is divided into several sections as set forth below. Each section provides multiple grounds for reconsideration of the Court's Order to reinstate the appeal by Appellants making a show of good cause. Rule 260(a), SCACR. Collectively, pursuant to these grounds for reconsideration, Appellants seek rulings on matters that the Court did not address in its Order; Appellants seek the Court's reasons for deciding certain matters where no reasons are given; and Appellants seek for the Court to reconsider its findings and correct its errors based on the record and the law. Appellants show the following:

FACTS

1.

The record will show that, on August 29, 2018, Appellants filed a motion requesting leave of the Greenville County Circuit Court to amend Appellants' complaint and add a cause of action for a violation under the Magnuson-Moss Warranty—Federal Trade Commission Improvement Act ("Magnuson-Moss Warranty Act") prior the parties conducting discovery in the early stages of pre-trial litigation. On August 29, 2018, Appellants filed a motion to strike Respondents' Answer. The Greenville County Circuit Court held a hearing for both Appellants' Motion to Amend or Alter Appellants' Complaint and Appellants Motion to Strike Respondents' Answer on November 29, 2018. After the hearing on November 29, 2018, the Greenville County

Circuit Court issued an order denying Appellants' Notice and Motion to Amend Appellants' Complaint and Appellants Motion to Strike Respondents' Answer: "It is hereby ordered that the Plaintiff's motion to Alter or Amend and the Plaintiff's motion to Strike are hereby denied." Order, *Roberts et al. v. R.T.G. Furniture Corporation et al.*, No. 2018-CP-23-02230 (Judge Letitia H. Verdin, December 12, 2018).

2.

The record will show that, prior to the hearing before the Court on November 29, 2018, Appellants asked Respondents' counsel for written permission to amend Appellants' Amended Complaint on August 22, 2018, before Appellants filed Appellants' Notice and Motion to Amend or Alter Appellants' Complaint on August 29, 2018. Respondents' counsel denied Appellants' request. With supporting legal grounds, Appellants previously requested the Greenville County Court's permission to amend Appellants' Complaint and add a cause of action for a violation under the Magnuson-Moss Warranty Act by making an oral motion in both hearings on August 1, 2018, and November 29, 2018; in Appellants' Response to Respondents' Memorandum of Law in Support of Motion to Compel Arbitration filed on July 27, 2018; and, in Appellants' Response to Respondents' Motion to Dismiss and Memorandum in Support of Appellants' Response filed on June 20, 2018.

3.

The record will show that, at the hearing on November 29, 2018, Respondents raised the uncertainty of a violation of the Magnuson-Moss Warranty Act as a valid cause of action without providing any legal support to the Court. Also, Respondents admitted that Respondents did not know whether Appellants' cause of action for a consumer violation of the Magnuson-Moss Warranty Act was an independent cause of action. Furthermore, Respondents argued the reasoning for being prejudiced from Appellants amending Appellants' Complaint was adding length to Appellants' Complaint with an additional cause of action to Appellants' Complaint and defending lengthy pleadings, motions, or responses. Respondents announced the intent to renew Respondents' motion to compel arbitration again.

4.

By contrast, the record will show Appellants raised legal support in Appellants' Memorandum in Support of Appellants' Motion to Strike Defendants' Answer filed on November 26, 2018, that Appellants are entitled to bring a suit for damages, as well as other legal and equitable relief, for a violation of the Magnuson-Moss Warranty Act:

> Subject to subsections (a)(3) and (e), a consumer who is damaged by the failure of a supplier, warrantor, or service contractor to comply with any obligation under this chapter, or under a written warranty, implied warranty, or service contract, may bring suit for damages and other legal and equitable relief—
> (A) in any court of competent jurisdiction in any State or the District of Columbia; or
> (B) in an appropriate district court of the United States, subject to paragraph (3) of this subsection. 15 U.S.C § 2310(d)(1).

Under the Magnuson-Moss Warranty Act, no informal dispute procedures such as arbitration may be legally binding on any party or third-person to the dispute rendering the failure to comply with the Magnuson-Moss Warranty Act on this issue grounds for proceeding with a civil lawsuit instead of arbitration. 15 U.S.C. §§ 2301 to -12; 15 U.S.C. § 2310(d)(1); 16 C.F.R. § 703.5(j); *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 32-33, 644 S.E.2d 663, 673 (2007).

5.

The record will show that, under Section 1 of Respondents' Dispute Resolution/Arbitration Agreement in Respondents' Sales Order, Respondents' arbitration clause applied to any dispute or claim arising in connection from the sale of furniture and delivery of the same from Respondents to Appellants to binding arbitration:

> YOU AND RTG AGREE THAT ANY DISPUTE OR CLAIM BETWEEN YOU AND RTG OR ANY ROOMS TO GO AFFILIATE OR ANY OF THEIR PARENT COMPANIES, SUBSIDIARIES, DIVISIONS, SHAREHOLDERS, MEMBERS, DIRECTORS, OFFICERS, EMPLOYEES, REPRESENTATIVES, PREDECESSORS, SUCCESSORS, OR ASSIGNS, INCLUDING BUT NOT LIMITED TO ANY DISPUTE OR CLAIM THAT RELATES IN ANY WAY TO ANY PRODUCT OR SERVICE SOLD OR DISTRIBUTED BY RTG, TO ANY TRANSACTION WITH RTG, TO ANY WARRANTY, TO THE TERMS AND CONDITIONS OF SALE, TO THE FINANCING OF ANY

and tread lightly:

> If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits. In the absence of any apparent or declared reason -- such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc. -- the leave sought should, as the rules require, be "freely given." Of course, the grant or denial of an opportunity to amend is within the discretion of the [] Court, but outright refusal to grant the leave without any justifying reason appearing for the denial is not an exercise of discretion; it is merely abuse of that discretion and inconsistent with the spirit of the Federal Rules. *Foman v. Davis*, 371 U.S. 178, 182, 83 S. Ct. 227, 230 (1962).

Furthermore, while "a circuit court's ruling on a Rule 15 motion to amend is within [that court's] discretion, a court's failure to exercise its discretion is itself an abuse of discretion." *Patton*, 420 S.C. at 489-93; *see also Duncan v. CRS Sirrine Eng'rs, Inc.*, 337 S.C. 537, 542, 524 S.E.2d 115, 117-18 (Ct. App. 1999); *Berry v. McLeod*, 328 S.C. 435, 449-50, 492 S.E.2d 794, 802 (Ct. App. 1997); *Forrester*, 295 S.C. at 506-10.

13.

Under the second element of the court granting leave to amend a pleading that does not prejudice the opposing party, the South Carolina Supreme Court outlined the analysis as "whether the defendants were prejudiced by the amendment, or whether there was some other substantial reason to deny it." *Patton*, 420 S.C. at 489-93. The non-moving party has the burden of establishing prejudice from the moving party's motion to amend a pleading. *Collins Entm't, Inc. v. White*, 363 S.C. 546, 562, 611 S.E.2d 262, 270 (Ct. App. 2005). Prejudice to the non-moving party in Rule 15(a) of the South Carolina Rules of Civil Procedure embodies "a lack of notice that the new issue is to be tried and a lack of opportunity to refute it . . . [whereas a]mendments [] conform[ing] to the proof should be liberally allowed when no prejudice to the opposing party will result." *Id.* As an example of a substantial reason to deny a motion to amend a pleading, this Court held that "[p]rejudice occurs when the amendment states a new claim or defense that would require the opposing party to introduce additional or different evidence to prevail in the amended action." *Holland v. Morbark, Inc.*, 407 S.C. 227, 235,

754 S.E.2d 714, 719 (Ct. App. 2014). In *Holland*, the parties had already conducted extensive discovery, and the plaintiff never fully developed the underlying theory in advance prior to making a motion to amend the plaintiff's complaint to add a new cause of action shortly before the eve of trial. 407 S.C. at 233-37. This Court ruled that the defendants were prejudiced by the plaintiff's motion to amend the plaintiff's complaint because the motion afforded the defendants inadequate notice and time to prepare and conduct discovery, and inevitable delays would have resulted accordingly on the eve of trial. *Id.* The South Carolina Supreme Court interpreted that prejudice to the non-moving party exists when the non-moving party faces and suffers a disadvantage defending the merits, but for, the moving party including the amended claim in the original pleading or providing the defendants sufficient time to refute the plaintiff's motion to amend. *Patton*, 420 S.C. at 489-93.

14.

By contrast, the South Carolina Supreme Court clarified that prejudice to the non-moving party does not equate to "the non-moving party [being] forced to defend the merits of a valid claim." *Patton*, 420 S.C. at 489-93; *Forrester*, 295 S.C. at 506-10. In *Patton*, the lower court never did the legal analysis under Rule 15(a) of the South Carolina Rules of Civil Procedure for plaintiff's motion to amend a complaint, and the defendants never argued prejudice properly before the lower court. 420 S.C. at 489-93. Furthermore, the crux of the analysis concerning the prejudice prong under Rule 15(b) of the South Carolina Rules of Civil Procedure is whether the nonmoving party is afforded an opportunity to prepare and develop testimony for the issue that the moving party is raising formally when amending the complaint. *Soil & Material Eng'rs, Inc. v. Folly Assocs.*, 293 S.C. 498, 500-02, 361 S.E.2d 779, 781-82 (Ct. App. 1987). Timeliness of a motion to amend a complaint, even if filed late in trial, is not the standard for the court to determine whether to grant or deny a motion to amend a complaint. *Id.* Rule 15(b) of the South Carolina Rules of Civil Procedure govern the standard for granting or denying a motion to amend a complaint, which does not include a procedural element of timeliness as part of

the analysis. Rather, the court must make a finding that the motion to amend the complaint prejudices the opposing party; failure to do so amounts to an abuse of discretion when denying a motion to amend the complaint based purely on the timeliness of the motion to amend the complaint. *Id.*

In *Soil & Material Eng'rs, Inc.*, the lower court made no finding of prejudice to the nonmoving party when denying a motion to amend a complaint. 293 S.C. at 500-02. Neither did the nonmoving party make a showing of prejudice from a motion to amend a complaint. *Id.* The preliminary discovery requests from the moving party sufficiently alerted the nonmoving party that the moving party may raise an amendment to the complaint. *Id.* The nonmoving party had an opportunity to develop and introduce testimony on the issue raised in the motion to amend the complaint. *Id.* This Court ruled that the lower court abused discretion by making no finding of prejudice from the moving party's motion to amend the complaint when the nonmoving party failed to meet the burden to show prejudice from the motion to amend the complaint. *Id.* Finally, if the nonmoving party fails to raise proper objections to the moving party's motion to amend the complaint under Rule 15(b) of the South Carolina Rules of Civil Procedure, then the nonmoving party waives such objections. *Crestwood Golf Club v. Potter*, 328 S.C. 201, 218, 493 S.E.2d 826, 835-36 (1997).

15.

Secondly, an interlocutory order is immediately reviewable upon appeal if the order affects substantial rights and determines the action in effect that prevents a judgment reviewable upon appeal. *Hagood v. Sommerville*, 362 S.C. 191, 195-97, 607 S.E.2d 707, 709 (2005). Immediate appeals on interlocutory orders are permitted when the substantial right cannot be vindicated after the case concludes on appeal, and the error in the interlocutory order cannot be corrected on appeal subsequent to the conclusion of the underlying litigation. *Breland v. Love Chevrolet Olds, Inc.*, 339 S.C. 89, 93, 529 S.E.2d 11, 13 (2000). While appeals of interlocutory orders are not designed for piecemeal litigation, the issue is determining whether an error in an interlocutory

order prejudices a party to an extent that a new trial or appellate review will not cure the error upon the conclusion of the underlying litigation. *Id.* at 93-94. Furthermore, judgments are construed in its entirety to determine the lower court's intent. When the language is plain and unambiguous, then the literal meaning of the language gives effect to the ruling. *Weil*, 299 S.C. at 90-91.

The finality of the judgment, order, or decree operates, in effect, to dispose of a cause of action in part of in full, or the whole subject-matter, for all parties leaving no further questions or directions for future decisions as to the parties' rights but execution and enforcement of such a determination. *Good v. Hartford Accident & Indem. Co.*, 201 S.C. 32, 41-42, 21 S.E.2d 209, 212 (1942). The manner of the judgment, order, or decree divests some right(s) of the party. *Id.* The two-issue rule applies to a decision that is based on more than on ground whereby "the appellant appeals all grounds because the unappealed ground will become the law of the case." *Jones v. Lott*, 387 S.C. 339, 346, 692 S.E.2d 900, 903 (2010); *Skywaves I Corp. v. Branch Banking & Tr. Co.*, 423 S.C. 432, 451-52, 814 S.E.2d 643, 653-54 (Ct. App. 2018). Moreover, appellate review is permitted when ruling on appeal will avoid unnecessary litigation, the lower court decides the merits of the case, the lower court establishes the law of the case, or any of the above. *See Skywaves I Corp.*, 423 S.C. at 459-61; *see also Watson*, 407 S.C. at 459; *Ferguson v. Charleston Lincoln Mercury, Inc.*, 349 S.C. 558, 565, 564 S.E.2d 94, 98 (2002). Because a denial to amend a complaint to add a new cause of action is not reviewable in a subsequent appeal post-trial, the only time an appellant may challenge the interlocutory order is immediately after the lower court issues the interlocutory order or the issue(s) are not preserved and waived accordingly. *See Arnold*, 309 S.C. at 172; *Weil*, 299 S.C. at 89.

16.

By way of illustration, the South Carolina Supreme Court "repeatedly [has] held that the denial of a party's right to a particular mode of trial is immediately appealable as a substantial right." *Hagood*, 362 S.C. at

196-99. If a plaintiff has the right to a trial by jury on a particular cause of action, then the court must uphold the plaintiff's right to that mode of trial. *See Fass v. Liverpool*, L. & G. Fire Ins. Co., 105 S.C. 364, 369-70, 89 S.E. 1040, 1042 (1916). When a court denies a motion to amend a complaint to add a new cause of action for an improper reason, the denial operates to dismiss the cause of action before a plaintiff ever has a chance to test the plaintiff's claim on the merits or a plaintiff's substantial rights under that cause of action. *See Thornton*, 391 S.C. at 304; *Pruitt v. Bowers*, 330 S.C. 483, 488-89, 499 S.E.2d 250, 253 (Ct. App. 1998); *Collins v. Sigmon*, 299 S.C. 464, 466, 385 S.E.2d 835, 836 (1989); *compare* Rule 12(b) (motion to dismiss), Rule 12(f), SCRCP (motion to strike), Rule 15(a) (motion to amend pleadings prior to final judgment), *with* Rule 15(b), SCRCP (motion to amend pleadings after final judgment). Courts must adhere to "the basic principle . . . that, in order to avoid the danger that [courts] might dispose of viable claims prematurely, courts must allow the parties to develop an adequate record." *Carlson v. Gen. Motors Corp.*, 883 F.2d 287, 293 (4th Cir. 1989).

When a court grants a motion to amend a complaint on proper grounds, the amendments shape and alter the issues to determine the parties' rights before the court and test the merits to a plaintiff's causes of action. *See Dockside Ass'n v. Detyens, Simmons & Carlisle*, 297 S.C. 91, 93-94, 374 S.E.2d 907, 909 (Ct. App. 1988). By contrast, when a court denies a motion to amend a complaint that would shape the issues of the case as well as the mode of trial, then the denial of a motion to amend affects the substantial rights of the plaintiff related to the substantive merits of the amendments to the complaint when proceeding forward with litigation. *See id.* While denying a motion to amend a complaint may not be based on the merits of the proposed amendments to the complaint, the denial of a motion to amend a complaint to add a new cause of action affects the plaintiff's substantive rights related to that cause of action by disposing of viable claims prematurely that ae never fully developed on the record. *See Patton*, 420 S.C. at 489-93; *Carlson*, 883 F.2d at 293.

ARGUMENT

17.

Appellants raise the following exceptions to particular statements, findings, and conclusions in the Order and Appellants respectfully request that the Court reconsider the same based on the record and the evidence and arguments identified herein. The Court's Order issued on January 30, 2019, erroneously dismisses Appellants' appeal on the basis that Appellants' appeal related to an interlocutory order denying Appellants' Motion to Strike Respondents' Answer. Appellants never addressed the issue on appeal regarding the lower court's denial of Appellants' Motion to Strike Respondents' Answer in Appellants' Motion for Reconsideration to Alter or Amend the Judgment filed before the lower court on December 14, 2018. Rather, Appellants' Motion for Reconsideration to Alter or Amend the Judgment addressed the issue of the lower court denying Appellants' Motion to Amend or Alter Appellants' Complaint. This Court's Order entered into on January 30, 2019, does not address the correct issue on appeal.

18.

First, the lower court's order denying Appellants' motion to amend Appellants' complaint to add a cause of action for a violation under the Magnuson-Moss Warranty Act involved the merits of the action that, in effect, determined the dismissal of the cause of action before ever being litigated and foreclosed Appellants from forming the whole cause of action. *Ex Parte Capital U-Drive-It, Inc.*, 369 S.C. at 7. Initially, in the lower court's order on December 12, 2018, the lower court provided no explanation for denying Appellants' motion to amend Appellants' complaint to add a new cause of action despite a strong bias for the lower court to give leave to Appellants' request to amend Appellants' complaint. Such a ruling was a clear abuse of discretion because the lower court exercised no discretion or explanation for denying Appellants' motion to amend Appellants' complaint.

After Appellants filed a motion to reconsider to alter or amend a judgment before the lower court, the

lower court issued an order denying Appellants' motion to amend Appellants' complaint because the motion was procedurally untimely. Under the prejudice prong of Rule 15(a) of the South Carolina Rules of Civil Procedure, Respondents had the burden of showing that Respondents were prejudiced by Appellants' motion to amend Appellants' complaint. Respondents were placed on notice well in advance of multiple requests to the lower court by Appellants to amend the complaint and add a cause of action for a violation under the Magnuson-Moss Warranty Act. The parties have only just begun preliminary discovery. The parties have not taken any depositions yet to develop any testimony. The parties are well in the early stages of litigation affording Respondents plenty of time to develop testimony and prepare for defending against a cause of action for a violation under the Magnuson-Moss Warranty Act. Respondents never provided any supporting arguments or proper objections as to being prejudiced by Appellants' motion to amend Appellants' complaint. Hence, Respondents have waived Respondents' objections of any prejudice from Appellants' motion to amend Appellants' complaint. Timeliness of a motion to amend a complaint, in a conclusive statement in one sentence without more, is not a proper analysis by the lower court of the prejudice prong under Rule 15(a) of the South Carolina Rules of Civil Procedure. Failure to conduct a proper analysis of prejudice to Respondents from Appellants' motion to amend Appellants' complaint is also an abuse of discretion and misapplication of the law.

The issue is circular where Appellants face a "catch-22" situation. Ultimately, the lower court's order establishes and applies erroneous principles of law that affect the merits of the case and deprives Appellants any benefit of a final hearing or subsequent appeal post-trial. *Tatnall*, 350 S.C. at 138. Because Respondents failed to show prejudice from Appellants' motion to amend Appellants' complaint, and the lower court denied Appellants' motion to amend Appellants' Complaint to add a cause of action for a violation under the Magnuson-Moss Warranty Act, Appellants cannot file another motion to amend Appellants' complaint to add the same cause of action before, during, or after trial. *Compare Thornton*, 391 S.C. at 301-05 (order granting a

motion to strike a cause of action prevents the nonmoving party from raising the cause of action again and removes a material issue from the case because the evidence submitted before a jury is limited to the pleadings), *with Arnold*, 309 S.C. at 172 (ruling that amending the complaint to add a new cause of action post-trial is barred by Rule 15(b), SCRCP). Hence, Appellants must preserve the issue in a subsequent appeal at the time the lower court denies Appellants' motion to amend Appellants' complaint to add a cause of action for a violation under the Magnuson-Moss Warranty Act because the issue is not preserved for review in a post-trial appeal. Rule 15(b), SCRCP; *Noisette*, 304 S.C. at 58; *Arnold*, 309 S.C. at 172. Therefore, the court's denial prevents "the issue from being litigated on the merits, and prevent[s] the party from seeking to correct any errors in the order during or after trial." *Thornton*, 391 S.C. at 304.

19.

Secondly, the lower court's order denying Appellants' Motion to Alter or Amend Appellants' Complaint affects Appellants' substantial rights by determining Appellants' rights under a cause of action for a violation of the Magnuson-Moss Warranty Act that is not available for subsequent appellate review post-trial under Rule 15(b) of the South Carolina Rules of Civil Procedure. *Hagood*, 362 S.C. at 195-97; *Breland*, 339 S.C. at 93. The lower court's language that Appellants' motion to amend Appellants' complaint as procedurally untimely is plain and unambiguous. *Weil*, 299 S.C. at 90-91. The finality of the lower court's order divests Appellants of the right to allege a new cause of action. As such, Appellants have had no opportunity to test the merits of this cause of action or develop the record accordingly. The finality of the lower court's order divests Appellants of the right to proceed with Appellants lawsuit because Respondents' Sales Order violates the Magnuson-Moss Warranty Act on its face compels arbitration as binding and unreviewable by a court or jury. The Court may not "enforce a contract which is violative of public policy, statutory law, or provisions of the Constitution." *Simpson*, 373 S.C. at 33. Hence, the Magnuson-Moss Warranty Act governs regardless of whether Appellants

pled a violation of the Magnuson-Moss Warranty Act specifically in Appellants' complaint under principals of supremacy of federal law and federal preemption. *Id.*

When a motion to compel arbitration is at issue, then Appellants' mode of trial is clearly called into question regarding the waiver of the right to a jury trial. *See Fass*, 105 S.C. at 369-70. The Magnuson-Moss Warranty Act grants Appellants the right to file a civil suit under federal law because of Respondents' failure to comply with the requirements of the Magnuson-Moss Warranty Act. 15 U.S.C § 2310(d)(1). In that context, a ruling on denying a motion to amend a complaint to add a violation under the Magnuson-Moss Warranty Act based on being procedurally untimely touches a substantive matter and Appellants' rights under federal law. Appellants have a substantive right to file a civil suit under the Magnuson-Moss Warranty Act and request a jury trial versus proceeding with arbitration. *See Collins*, 299 S.C. at 466 ("It follows that the trial judge should generally not consider these substantive arguments at the mere amendment stage."); *Fass*, 105 S.C. at 371.

Therefore, the denial of a motion to amend a complaint for Appellants to add a violation under the Magnuson-Moss Warranty Act operates to divest Appellants' rights under the Magnuson-Moss Warranty Act to select the mode of trial and request a trial by jury instead of proceeding with arbitration when Respondents are clearly in violation of the Magnuson-Moss Warranty Act. *Good*, 201 S.C. at 41-42. Appellants are not required to proceed with arbitration before filing a lawsuit accordingly. Therefore, the lower court's order denying Appellants' motion to amend Appellants' complaint also affects Appellants' mode of trial when Appellants have requested a jury trial in this case. Respondents have attempted to compel arbitration twice in this case. Unnecessary litigation has occurred already when Respondents' are in violation of the Magnuson-Moss Warranty Act. Appellate review will avoid further unnecessary litigation on this issue.

CONCLUSION

These grounds for appeal have resulted in unnecessary litigation over the clear application of the law in

South Carolina and under the Magnuson-Moss Warranty Act. The lower court definitively ruled on the merits of litigation for Appellants to introduce a new cause of action and established the law in this case erroneously, which has, in effect, divested Appellants of said cause of action and the ability to present the issue in a subsequent appeal post-trial. Hence, the lower court's determination became a binding adjudication as the law established in the order would have become the established law of the case had Appellants not filed an appeal. A new trial will not cure Appellants' rights. Proceeding with litigation and trial may constitute a waiver of substantial rights in a cause of action for a violation under the Magnuson-Moss Warranty Act. Therefore, the finality of the order involves the merits and substantially affects the rights of Appellants.

WHEREFORE, for all the reasons set forth above: this motion be granted; this appeal is reinstated; upon reinstatement, the order dismissing this appeal is reversed; and, and such other and further relief as the Court deems just and proper.

Respectfully submitted this 13 day of February, 2019.

DICKSON DAVIS LAW FIRM, LLC

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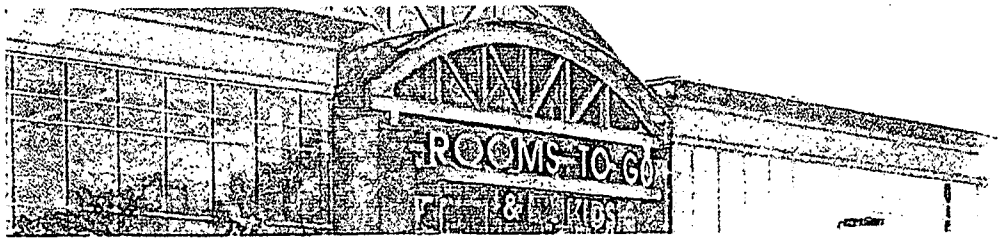
ATTORNEY FOR APPELLANTS

South Carolina
Date: February 13, 2019

EXHIBIT A



ROOMS TO GO | ROOMS TO GO Kids Teens

ROOMS TO GO - GREENVILLE
1025 WOODRUFF RD. STE E101, GREENVILLE, SC 29607 (864) 987-0400

Store #: 1901 **Order #:** 12210959

Order Date: 08/06/2017
Sales Person Name: JASON LAMBES (038558)

Revise Order #: 1
08/06/2017 01:02 PM 038558

Sold To: ROLLIE ROBERTS | 102 SANDERLING DR GREENVILLE, SC 29607 | Home Tel No (864) 525-1177 Business Tel No (864) 275-3048
Delivery/Pickup: 08/16/2017 | See Instructions Below

Description	SKU No.	QTY	Unit Amount	Total Amount
Your Room Includes	1049215P		$1,799.99	$1,799.99
RAF SOFA - *GRAY/DESERT*	12392154	1		
FORCE FIELD PROTECTION		1	$49.99	$49.99
LAF SOFA W/RETURN - *GRAY/DESIREE*	12492156	1		
FORCE FIELD PROTECTION		1	$59.99	$59.99
OTTOMAN - *GRAY/DESIREE*	10492142	1	$299.99	$299.99
FORCE FIELD PROTECTION		1	$19.99	$19.99

cocktail 6
Ottoman
1259215 8
399.99

Sales Total	$2,229.95
Delivery/Setup	$119.98
Subtotal	$2,349.93
Sales Tax	
SALES TAX 6%	$141.00
Total	$2,490.93

Payment Information

JCB ·····3709 Auth Num. 062220 Debit	$261.00
Deposit	$2,490.93
	$0.00

Deposit History

08/06/2017	SYNCHRONY	$2,229.93
08/06/2017	DEBITCARD	$261.00

Delivery/Pickup Instructions

Delivery Type DELIVERY Wed | FORESTER WOODS ESTATES

TERMS AND CONDITIONS OF SALE, LIMITED PRODUCT WARRANTY, AND DISPUTE RESOLUTION/ARBITRATION AGREEMENT

The Terms and Conditions of Sale and Dispute Resolution/Arbitration Agreement below are binding agreements between you and the Rooms To Go affiliate making this sale, which is referred to as "RTG," "we" or "us." "You" means any person or entity who signs this Sales Order or on whose behalf it is signed and any privies, and any person or entity who receives, accepts, or uses the purchased products or services. All such persons and entities are expressly intended beneficiaries of the Dispute Resolution/Arbitration Agreement. The Limited Product Warranty is a binding agreement between the original purchaser and RTG. The Terms and Conditions of Sale, Limited Product Warranty and Dispute Resolution/Arbitration Agreement are expressly intended for the benefit of all Rooms To Go affiliates and their parent companies, subsidiaries, divisions, shareholders, members, directors, officers, employees, representatives, predecessors, successors, and assigns. These three agreements may not be changed except by a signed written agreement. If any part of any of these three agreements is found invalid or unenforceable, then the other parts shall remain in full force and effect, except that if any part of Section 2 of the Dispute Resolution/Arbitration Agreement is found invalid or unenforceable, then Sections 1 and 3 of the Dispute Resolution/Arbitration Agreement will be null and void.

TERMS AND CONDITIONS OF SALE

1. REFUND POLICY. A total refund is available only if you cancel the sale within 48 hours of the date of purchase. Refunds may be issued via a credit to your charge account or by check, at our discretion. If you do not cancel the sale within 48 hours, only 80% of the purchase price will be refunded. No refunds are available and sales cannot be cancelled after merchandise has been delivered in good condition. (Refund Cancellation rights do not apply to Express/Next Day Delivery orders).
2. At any time after the purchase, we can correct mistakes in pricing or arithmetic made in computing the purchase price.
3. You must make any change of the delivery address or change in the order either in person or by telephone and the change will be binding only if we confirm the change before delivery. Changes may delay the delivery date.
4. Merchandise sold "AS IS" is not eligible for return, exchange, allowance, refund or service. All "AS IS" sales are FINAL. Merchandise sold "AS IS" is not covered by the Limited Product Warranty below or any other warranty, express or implied.
5. Merchandise marked "Partial Assembly Required" (disassembled) or "Assembly Required" is delivered in factory-packed cartons for assembly by purchaser.
6. We retain title to all furnishings until delivered to you and paid for in full.
7. Certain returns and exchanges, including for mattresses and box springs, may require that you pay a "pickup and redelivery fee" or other fee to cover costs of pickup and delivery from your home or re-stocking.
8. If we have to pay any monies or hire an attorney to collect payment from you, we can recover from you all of our collection costs including the fees of our attorney.
9. Merchandise purchased for commercial settings is not covered by the Limited Product Warranty below or any other warranty, express or implied.
10. For takeaway items, you are solely responsible for loading/transporting merchandise. You hold us harmless for any and all damage/injury to vehicles, merchandise or you during loading/transport.
11. You agree that we may share information you provide to us at the time of sale to process your order (including, without limitation, sharing your information with a company that delivers your merchandise to you) and with our third party marketing service providers, for product research and improvement and to help us target our marketing efforts. This information may include your name, contact information, and purchase history. By voluntarily providing your information to us and completing your purchase, you consent to our use of your information as described.

LIMITED PRODUCT WARRANTY ("LIMITED WARRANTY")

We warrant that the purchased merchandise will be free from defects in material and workmanship for a period of ONE YEAR from the date of delivery. This Limited Warranty applies to the original purchaser only, and only for merchandise which has remained at the original non-commercial delivery site. To obtain service under this Limited Warranty, the original purchaser must give us written notice of the defect within the one year warranty period. Service under this Limited Warranty may be obtained by returning to the store where the furniture was purchased or calling 1-800-766-6786. This Limited Warranty does not cover: 1) wear, fading, or shrinkage of any fabrics; 2) damage due to alterations, misuse, abuse, or accidents; 3) damage or discoloration caused by sunlight or artificial light; 4) natural variations in the color or graining of leather, wood or wood products; and 5) ridges or rough areas in marble or variations in its color or graining. If the purchased furnishings are not free from defects in material and workmanship for the duration of this Limited Warranty, we will at our option, either (i) refund the purchase price in exchange for return of the merchandise, or (ii) repair or replace the non-conforming merchandise. Except to the extent expressly prohibited by law, we are not liable for any consequential or incidental damages for breach of this or any other warranty. Some states do not allow the exclusion or limitation of incidental or consequential damages, so the above limitation or exclusion may not apply. All disputes arising under this Limited Warranty are subject to the Dispute Resolution/Arbitration Agreement.

THERE ARE NO EXPRESSED OR IMPLIED WARRANTIES WHICH EXTEND BEYOND THE LIMITED WARRANTY DESCRIBED ABOVE. SOME STATES DO NOT ALLOW LIMITATIONS ON HOW LONG AN IMPLIED WARRANTY LASTS, SO THE ABOVE LIMITATION MAY NOT APPLY. THIS WARRANTY GIVES THE ORIGINAL PURCHASER SPECIFIC LEGAL RIGHTS, AND THE ORIGINAL PURCHASER MAY ALSO HAVE OTHER RIGHTS WHICH VARY FROM STATE TO STATE.

DISPUTE RESOLUTION/ARBITRATION AGREEMENT: READ CAREFULLY – THIS AGREEMENT AFFECTS YOUR RIGHTS

1. Mandatory Arbitration: YOU AND RTG AGREE THAT ANY DISPUTE OR CLAIM BETWEEN YOU AND RTG OR ANY ROOMS TO GO AFFILIATE OR ANY OF THEIR PARENT COMPANIES, SUBSIDIARIES, DIVISIONS, SHAREHOLDERS, MEMBERS, DIRECTORS, OFFICERS, EMPLOYEES, REPRESENTATIVES, PREDECESSORS, SUCCESSORS, OR ASSIGNS, INCLUDING BUT NOT LIMITED TO ANY DISPUTE OR CLAIM THAT RELATES IN ANY WAY TO ANY PRODUCT OR SERVICE SOLD OR DISTRIBUTED BY RTG, TO ANY TRANSACTION WITH RTG, TO THE LIMITED WARRANTY, TO THE TERMS AND CONDITIONS OF SALE, TO THE FINANCING OF ANY PURCHASE FROM RTG, OR TO THE COLLECTION OR STORAGE OF PERSONAL INFORMATION, INCLUDING DISPUTES OR CLAIMS UNDER FEDERAL OR STATE STATUTES OR TORT LAW ("DISPUTE") MUST BE RESOLVED EXCLUSIVELY THROUGH FINAL AND BINDING ARBITRATION, AND NOT BY A COURT OR JURY, EXCEPT THAT YOU OR RTG MAY ASSERT CLAIMS IN SMALL CLAIMS COURT IF THE CLAIMS QUALIFY FOR SMALL CLAIMS COURT AND THE MATTER PROCEEDS ONLY ON AN INDIVIDUAL (NOT A CLASS OR REPRESENTATIVE) BASIS. This Dispute Resolution/Arbitration Agreement ("Agreement") applies to Disputes arising before, on, or after the date of this Sales Order, regardless of whether the Limited Warranty is in effect.

You and RTG waive the right to a trial by jury and any right to have a Dispute heard in court. In arbitration, Disputes are resolved by a neutral arbitrator instead of a judge or jury, discovery is more limited than in court, and the arbitrator's decision is subject to limited review by courts. The arbitrator can award on an individual basis the same damages and relief as a court, including monetary damages, injunctive relief, and declaratory relief. Judgment on the arbitrator's award may be entered in any court having jurisdiction thereof. A single arbitrator with the American Arbitration Association ("AAA") will conduct the arbitration, and the award may not exceed the relief allowed by applicable law. The arbitration will be conducted in the county of your residence or another mutually agreed location. The AAA's Consumer Arbitration Rules will apply. If AAA will not apply those rules, then AAA's Commercial Arbitration Rules will apply. The AAA's rules and a form that can be used to initiate arbitration proceedings are available at www.adr.org or by calling 1-800-778-7879. You and RTG agree that if for any reason AAA will not conduct or becomes unavailable to conduct the arbitration, then a court may appoint a substitute arbitrator, and further agree that the choice of AAA as a forum is not integral to the Agreement.

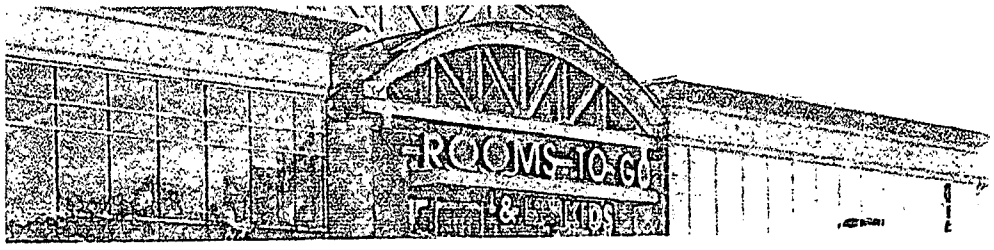
The Federal Arbitration Act ("FAA") applies to this Agreement and governs its interpretation and enforcement. The arbitrator will decide all issues relating to the interpretation, scope, and application of this Agreement, the Terms and Conditions of Sale, and the Limited Warranty, except that a court will resolve any question regarding the validity or enforceability of Section 2 of the Agreement. The term "Dispute" and the requirement to arbitrate will be broadly interpreted. The Agreement will survive termination of the Limited Warranty.

2. Arbitration Class Action Waiver: You and RTG agree that the arbitration will be conducted solely on an individual basis and not on a class, representative, consolidated, or private attorney general basis. A Dispute may not be consolidated with a claim brought or discovery by any person or entity that is not a party to the arbitration proceeding. The arbitrator may not award relief to any person or entity other than a party to the arbitration proceeding and may only award such relief as is necessary to provide relief to a party to the arbitration proceeding. If a court deems any portion of this Section 2 invalid or unenforceable, then Sections 1 and 3 of the Agreement will be null and void.

3. Fees and Costs in Arbitration: If your total damage claims are $25,000 or less, not including your attorneys' fees: (1) the arbitrator may award you your reasonable attorneys' fees, expert fees, and costs if you prevail in the arbitration; (2) the arbitrator may not award RTG its attorneys' fees, expert fees, or costs unless the arbitrator determines that your claim was frivolous or brought in bad faith; and (3) RTG will bear all filing fees and administrative fees and either reimburse you for any such fees that AAA requires you to pay upon initiating arbitration or, if you send a written request to Legal Department, 400 Perimeter Center Terrace, Suite 800, Atlanta, GA 30346 before you initiate arbitration, pay to AAA any such fees that AAA requires to be paid upon initiation of arbitration. If your total damage claims are more than $25,000, not including your attorneys' fees, then the arbitrator may award the prevailing party all or a portion of its reasonable attorneys' fees, expert fees, and costs. In arbitrations conducted under AAA's Consumer Arbitration Rules, (a) RTG will bear the arbitrator's fees and expenses, and (b) where no disclosed claims or counterclaims exceed $25,000, the Dispute shall be resolved by the submission of documents only/desk arbitration, except that any party may ask for a hearing or the arbitrator may decide that a hearing is necessary. Except as otherwise provided herein, all filing fees, administrative fees, and arbitrator fees and expenses will be paid in accordance with the applicable AAA rules.

4. Non-Arbitration Class Action and Jury Waiver: You and RTG agree that if for any reason a Dispute proceeds in court rather than arbitration: (1) you and RTG waive any right to a jury trial; (2) the Dispute will proceed solely on an individual, non-class, non-representative basis; and (3) neither you nor RTG may be a class representative or class member or otherwise participate in any class, representative, consolidated, or private attorney general proceeding.

Para encontrar la traducción de estos términos y condiciones, incluyendo el acuerdo de resolución de disputa, favor dirigirse a www.roomstogo.com



ROOMS TO GO

ROOMS TO GO Kids Teens

ROOMS TO GO - GREENVILLE
1025 WOODRUFF RD. STE E101, GREENVILLE, SC 29607 (864) 987-0400

Store #: 1901

Order #: 12210959

Terms and Conditions of Sale, Limited Product Warranty, and Dispute Resolution/Arbitration Agreement.

Promotion Type: Equal Payment No Interest | Promotion Period: until 08/2020 | Promotion APR: 0.00% | Purchase APR: 29.99% (v) | Account # XXXXXXXXXXXXX247 | Auth: 006443 | (v) - Variable rates subject to change with market, based on prime rate

Under this promotion, no interest will be assessed on your promotional purchase balance until paid in full. During the Promotional Period, equal monthly payments are required and will be equal to the initial promo purchase amount divided by the number of months in the Promotional Period. The equal monthly payment will be rounded up to the next highest whole dollar and may be higher than the minimum payment that would be required if this was a non-promotional purchase.

I AGREE TO PAY ALL CHARGES ACCORDING TO THE TERMS OF THE CARD ISSUER AGREEMENT. I AGREE TO THE TERMS AND CONDITIONS OF SALE, LIMITED PRODUCT WARRANTY, AND DISPUTE RESOLUTION/ARBITRATION AGREEMENT.

08/06/2017

Rooms To Go v3.2.0.1

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5. Merchandise marked "Partial Assembly Required" (disassembled) or "Assembly Required" is delivered in factory-packed cartons for assembly by purchaser.
6. We retain title to all furnishings until delivered to you and paid for in full.
7. Certain returns and exchanges, including for mattresses and box springs, may require that you pay a "pickup and redelivery fee" or other fee to cover costs of pickup and delivery from your home or re-stocking.
8. If we have to pay any monies or hire an attorney to collect payment from you, we can recover from you all of our collection costs including the fees of our attorney.
9. Merchandise purchased for commercial settings is not covered by the Limited Product Warranty below or any other warranty, express or implied.
10. For takeaway items, you are solely responsible for loading/transporting merchandise. You hold us harmless for any and all damage/injury to vehicles, merchandise or you during loading/transport.
11. You agree that we may share information you provide to us at the time of sale to process your order (including, without limitation, sharing your information with a company that delivers your merchandise to you) and with our third party marketing service providers, for product research and improvement and to help us target our marketing efforts. This information may include your name, contact information, and purchase history. By voluntarily providing your information to us and completing your purchase, you consent to our use of your information as described.

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The Federal Arbitration Act ("FAA") applies to this Agreement and governs its interpretation and enforcement. The arbitrator will decide all issues relating to the interpretation, scope, and application of this Agreement, the Terms and Conditions of Sale, and the Limited Warranty, except that a court will resolve any question regarding the validity or enforceability of Section 2 of the Agreement. The term "Dispute" and the requirement to arbitrate will be broadly interpreted. The Agreement will survive termination of the Limited Warranty.

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Para encontrar la traducción de estos términos y condiciones, incluyendo el acuerdo de resolución de disputa, favor dirigirse a www.roomstogo.com

EXHIBIT B

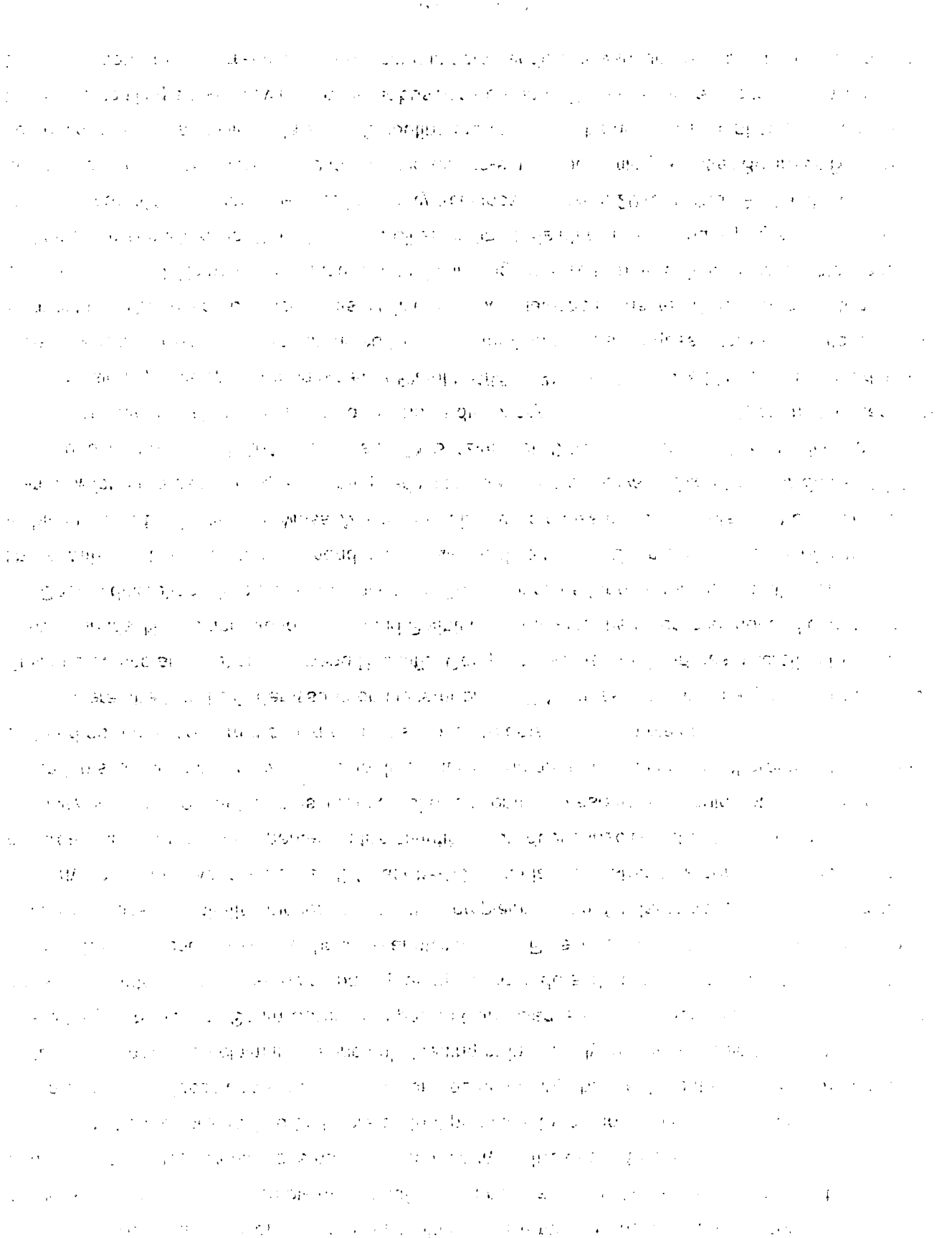
STATE OF SOUTH CAROLINA **COUNTY OF GREENVILLE**	**IN THE COURT OF COMMON PLEAS** **FOR THE THIRTEENTH JUDICIAL CIRCUIT**
ROLLIE BRIAN ROBERTS, KIMBER FLYNN ROBERTS, Plaintiff(s), v. **R.T.G. FURNITURE CORPORATION, RTG FURNITURE CORPORATION OF GEORGIA, RTG FURNITURE CORPORATION OF TEXAS, RTG FURNITURE OF TEXAS, L.P., ROOMSTOGO.COM, INC., SE INDEPENDENT DELIVERY SERVICES, INC.,** Defendant(s).	2018CP2302230 COMMON PLEAS CIVIL CASE NO. **PLAINTIFFS' NOTICE AND MOTION FOR RECONSIDERATION TO ALTER OR AMEND A JUDGMENT**

TO: R.T.G. FURNITURE CORPORATION
RTG FURNITURE CORPORATION OF GEORGIA
RTG FURNITURE CORPORATION OF TEXAS
RTG FURNITURE OF TEXAS, L.P.
ROOMSTOGO.COM, INC.
SE INDEPENDENT DELIVERY SERVICES, INC.

PLEASE TAKE NOTICE that Plaintiffs hereby submit this motion for reconsideration to alter or amend the Court's Order entered and dated on December 12, 2018 ("Order"), pursuant to rule 59(e) of the South Carolina Rules of Civil Procedure. This motion for reconsideration is divided into several sections as set forth below. Each section provides multiple grounds for reconsideration of the Court's Order. Collectively, pursuant to these grounds for reconsideration, Plaintiffs seek rulings on matters that the Court did not address in its Order; Plaintiffs seek the Court's reasons for deciding certain matters where no reasons are given; and Plaintiffs seek for the Court to reconsider its findings and correct its errors based on the record and the law. Plaintiffs' show the following:

FACTS

On December 12, 2018, the Court issued an Order denying Plaintiffs' Notice and Motion to Amend Plaintiffs' Complaint filed on August 29, 2018, in a hearing before the Court for the same motion on November 29, 2018: "It is hereby ordered that the Plaintiff's motion to Alter or Amend and the Plaintiff's motion to Strike are hereby denied." On August 29, 2018, Plaintiffs submitted an amended complaint before the Court with the following cause of action:



presentation, the cause of action contains the same applicable facts related to the same transaction or series of occurrences for other causes of action such as property damages, negligence, breach of contract accompanied by a fraudulent act, breach of fiduciary duty, negligence per se, consumer code violation regarding personal information of consumers, negligent supervision, civil conspiracy, and unfair trade practices act. The amended complaint streamlined the causes of action. The facts are relatively straightforward. Defendants have had plenty of advance notice on Plaintiffs' multiple requests for the Court's leave to amend Plaintiffs' Complaint to add a violation of the Magnuson-Moss Warranty Act well before trial with adequate time to prepare and conduct discovery.

Just because Defendants intend to renew Defendants' Motion to Compel Arbitration, Plaintiffs' amending Plaintiffs' Complaint to add a violation under the Magnuson-Moss Warranty Act would prevent and hinder Defendants' Motion to Compel Arbitration. However, such a result would not be a proper analysis under the prejudice prong because that analysis would be on the merits of Plaintiffs' cause of action versus a proper analysis on whether the non-moving party is prejudiced to some disadvantage to adequately prepare for litigation within the scope of fair notice, timeliness, and conserving judicial resources. Defendants' only arguments for prejudice were, in effect, complaints of the burden associated with defending valid claims by enumerating the number of pages and paragraphs in pleadings or responsive pleadings, the number of causes of action, and generally non-relevant issues to the analysis of establishing the burden of prejudice. As in *Patton*, defendants' counsel is merely complaining about the burden of defending a valid claim, which has no bearing on the prejudice analysis under Rule 15(a) of the South Carolina Rules of Civil Procedure.

Plaintiffs have requested the Court's leave to amend Plaintiff's Complaint in good faith on several occasions with undue prejudice to Defendants. Plaintiffs' Complaint was amended once within thirty days of filing the law suit to correct typos. Plaintiffs have not had any opportunity to amend Plaintiffs' Complaint as Defendants' counsel has refused to give written consent, and the Court has not given Plaintiffs' leave to amend Plaintiffs' Complaint since August of 2018. Because Defendants suffer no prejudice, nor provide some other substantial reason for a significant disadvantage in litigation irrespective to the merits of the cause of action, Plaintiffs hereby move this Court to amend the Court's Order and grant Plaintiffs leave to amend Plaintiffs' Complaint. S.C.R.C.P. Rules 15(a), 59(e).

II. PLAINTIFFS HAVE REQUESTED TO AMEND PLAINTIFFS' COMPLAINT WITH A VALID CAUSE OF ACTION UNDER THE MAGNUSON-MOSS WARRANTY ACT

While the Court's discretion to deny a motion to amend a pleading is rarely disturbed on appeal, if the denial of a motion to amend a complaint is based on the cause of action not being allowable under a state or federal statute, and that cause of action is allowable under a state or federal statute, then the Court's denial may be held to an abuse of discretion standard. *See Robbins v. First Fed. Sav. Bank*, 294 S.C. 219, 224-25, 363 S.E.2d 418, 421-22 (Ct. App. 1987). In *Robbins*, the court found that

the lower court's denial of a motion to amend the plaintiff's complaint was an abuse of discretion because the cause of action "was based solely on [the judge's] determination that prejudgment interest was not allowable under the statute [related to a bank's conversion of money]." 294 S.C. at 224-25. The court ruled that the related statute permitted a cause of action for the conversion of money by the bank, including prejudgment interest from the time of conversion, and "the trial judge erred in denying [the plaintiff's] motion to amend as [the judge] was under a misapprehension of the law." *Id.* Generally, courts want to avoid the danger of preventing or disposing of viable claims prematurely by allowing the parties to develop the record adequately. *See Carlson v. Gen. Motors Corp.*, 883 F.2d 287, 293 (4th Cir. 1989). In *Carlson*, the lower court denied plaintiffs' motion to amend the complaint concerning a violation of the Magnuson-Moss Warranty Act because the court's order frustrated and threatened plaintiffs' ability to obtain class certification when dismissing a substantial number of plaintiffs from the case. *Id.* at 289.

Here, the Court's denial of Plaintiffs' Notice and Motion to Amend Plaintiffs' Complaint operates in such a manner to prevent a viable cause of action from ever being litigated or Plaintiffs being able to test the claim and develop the record to do so. A violation under the Magnuson-Moss Warranty Act is a valid cause of action. *See Naparala v. Pella Corp.*, 153 F. Supp. 3d 884, 887-88 (D.S.C. 2015). For example, in *Naparala*, Count VIII in the plaintiff's complaint enumerates the allegations for a violation under the Magnuson-Moss Warranty Act. *Id.* The purpose of the Magnuson-Moss Warranty Act is to prevent deceptive and misleading practices by sellers of goods to consumers regarding written and implied warranties. *Chavis v. Fid. Warranty Servs.*, 415 F. Supp. 2d 620, 622 (D.S.C. 2006). The Magnuson-Moss Warranty Act defines a consumer as a buyer of consumer products or related service contract that are tangible personal property "normally used for personal, family, or household purposes." 15 U.S.C. § 2301(1), (3); 16 C.F.R. § 703.1(b). A warrantor is a supplier, who makes consumer products available to consumers, that gives or offers either written warranties or becomes obligated under implied warranties when selling consumer products. 15 U.S.C. § 2301(4)-(5); 16 C.F.R. § 703.1(d). Service contracts relate to warrantor providing maintenance and repair of the product sold by the warrantor. 15 U.S.C. § 2301(8).

By contrast, the Magnuson-Moss Warranty Act permits the Federal Trade Commission ("FTC") "to prescribe the rules necessary to achieve [the] objectives [under the Magnuson-Moss Warranty Act]." *Laing v. Volkswagen of America*, Inc., 180 Md.App.136, 154-56, 949 A.2d 26, 36-39 (2008); 15 U.S.C. § 2302(b). The FTC defined and expanded the meaning of a service contract as "an agreement which calls for some consideration in addition to the purchase price of the consumer product, or which is entered into at some date after the purchase of the consumer product to which it applies . . . ." 16 C.F.R. § 700.11. The statutory interpretation of the Magnusson-Moss Warranty Act, and correlating

rules promulgated by the FTC, is fairly cut and dry with the language being very straightforward—that is, the Magnusson-Moss Warranty Act generally speaks for itself. A consumer bringing a private enforcement of any provision regarding a supplier, warrantor, or service contractor's noncompliance with any obligation under the Magnuson-Moss Warranty Act must show that the consumer sustained actual damages that was proximately caused by the noncompliance with the Magnuson-Moss Warranty Act. *Atchole v. Silver Spring Imps., Inc.*, 379 F. Supp. 2d 797, 802 (D. Md. 2005). Under the South Carolina Uniform Commercial Code, the consumer has a duty to inform and notify the seller of any breach within a reasonable time after the consumer discovered, or should have discovered, that breach. S.C. Code Ann. § 36-2-607(3)(a). As a general policy, the idea of pre-suit notice enables the seller the opportunity to cure the breach, places the seller on notice of potential or forthcoming litigation, or staves off stale claims by having a terminal point in time regarding liability. *See Dilly v. Pella Corp.*, No. 2:14-mn-00001-DCN, 2016 U.S. Dist. LEXIS 234, at *33-34 (D.S.C. Jan. 4, 2016).

Here, a federal statute permits a consumer to bring a cause of action for a violation of the Magnuson-Moss Warranty Act against any supplier, warrantor, or service contractor who fails to comply with the obligations under the Magnuson-Moss Warranty Act or "under a written warranty, implied warranty, or service contract . . . in any court of competent jurisdiction in any State . . . ." 15 U.S.C. § 2310(d)(1); *Misel v. Mazda Motor of Am., Inc.*, 420 F. App'x 272, 273 (4th Cir. 2011); *Chavis*, 415 F. Supp. 2d at 622 (discussing requirement of individual claims being more than $25.00, and all claims amounted together being more than $50,000.00). Plaintiffs provided pre-suit notice through a demand letter that went unanswered until Plaintiffs filed a complaint with the Better Business Bureau, upon which Plaintiffs disputed signing any delivery receipt that barred Plaintiffs from recovering from property damages caused by Rooms to Go. Plaintiffs' Amended Complaint, Exhibit F. When the Better Business Bureau closed the complaint, Plaintiffs filed a lawsuit subsequently thereafter. Plaintiffs have previously argued the grounds of Defendants' Sales Order regarding the subject matter transaction between Defendant **RTG FURNITURE CORPORATION OF GEORGIA** and Plaintiffs that violated the Magnuson-Moss Warranty Act on its face by Defendants' own contractual language in Plaintiffs' Response to Defendants' Memorandum of Law in Support of Motion to Compel Arbitration filed on July 27, 2018, and Plaintiffs' Memorandum in Support of Plaintiffs Motion to Strike Defendants' Answer filed on November 26, 2018. The terms and conditions of the sale of furniture and furniture delivery and installation services from Rooms to Go were never provided to Plaintiffs until after the transaction was completed that also violates the Magnuson-Moss Warranty Act. 15 U.S.C. § 2302(b); *see* 16 C.F.R. § 701.3; *Atchole*, 379 F. Supp. 2d at 801-02. Because Plaintiffs presented a valid cause of action under the Magnuson-Moss Warranty Act, Plaintiffs hereby move this Court to amend the Court's Order and grant Plaintiffs leave to amend Plaintiffs' Complaint. S.C.R.C.P. Rules 15(a), 59(e).

A. DEFENDANTS MAY NOT RELY UPON A FORGED DELIVERY RECEIPT TO DISCLAIM CONSEQUENTIAL OR INCIDENTAL DAMAGES FROM THE DELIVERY OF FURNITURE TO PLAINTIFFS' RESIDENCE SOLD IN CONNECTION WITH THE SALE OF FURNITURE

To reiterate, warranties for the sale of goods are either implied or express warranties. *See* S.C. Code Ann. §§ 36-2-313 to -318. The Magnuson-Moss Warranty Act applies federal minimum standards to express warranties. 15 U.S.C. §§ 2301-2304; *see Laing*, 180 Md.App. at 154-56. By contrast, the Magnuson-Moss Warranty Act does not apply federal minimum standards to implied warranties. *Laing*, 180 Md.App. at 154-56. The analysis for breach of limited or implied warranties under state law within the context of the Magnuson-Moss Warranty Act requires a dual analysis under both federal and state law. *Id.*; *see Doll v. Ford Motor Co.*, 814 F. Supp. 2d 526, 545 (D. Md. 2011). State law governs actions for breach of limited or implied warranties, of which the plaintiff must prove under state law to maintain a violation under the Magnuson-Moss Warranty Act. *Godawa v. Dixie Camper Sales of S.C., Inc.*, No. 6:16-1101-HMH, 2016 U.S. Dist. LEXIS 72441, at *9 (D.S.C. June 2, 2016); *Doll,* 814 F. Supp. 2d at 545; *Laing*, 180 Md.App. at 154-56. However, the Magnuson-Moss Warranty Act primarily supplements state law with respect to limited or implied warranties but may preempt state law in narrow circumstances. *See Laing*, 180 Md.App. at 154-56. With respect to preemption, the Magnuson-Moss Warranty Act invalidates "[a] disclaimer, modification, or limitation [of implied warranties] made in violation of this section . . . for purposes of this chapter and State law." 15 U.S.C. § 2308(c). The below examples alone warrant that Plaintiffs are not required to arbitrate Plaintiffs' claims accordingly under the Magnuson-Moss Warranty Act. Because Plaintiffs provided sufficient and adequate notice of Plaintiffs' intent to amend Plaintiffs' complaint, and Plaintiffs developed the theory of a cause of action for a violation under the Magnuson-Moss Warranty Act, Plaintiffs hereby move this Court to amend the Court's Order and grant Plaintiffs leave to amend Plaintiffs' Complaint. S.C.R.C.P. Rules 15(a), 59(e).

First, the Magnuson-Moss Warranty Act prohibits seller restrictions on disclaimers or modifications of any implied warranty to a consumer when entering into a service contract within ninety (90) days thereafter from the date of sale with the consumer regarding the consumer product sold. 15 U.S.C. § 2308(a)-(c); *see also* 16 U.S.C. § 700.11 (defining service contracts broadly). Specifically, the Magnuson-Moss Warranty Act states:

> No supplier may disclaim or modify (except as provided in subsection (b) of this section) any implied warranty to a consumer with respect to such consumer product if (1) such supplier makes any written warranty to the consumer with respect to such consumer Product, or (2) at the time of sale, or within 90 days thereafter, such supplier enters into a service contract with the consumer which applies to such consumer product. 15 U.S.C. § 2308(a).

Moreover, if a contract includes both the sale of a good and a service sold in connection with the sale of that good, then this hybrid contract is subject to the predominant factor test as to whether the sale of services is exempt from the application of the South Carolina Uniform Commercial Code. *See*

Plantation Shutter Co. v. Ezell, 328 S.C. 475, 478-480, 492 S.E.2d 404, 406-407 (Ct. App. 1997); *Kline Iron & Steel Co. v. Gray Communications Consultants, Inc.*, 715 F. Supp. 135, 139 (D.S.C. 1989). *Bonebrake v. Cox*, 499 F.2d 951, 959-60 (8th Cir. 1974). Hence, if the predominant factor of the transaction renders the sale of goods with the services sold in connection with the sale of goods as incidental to the transaction, then the South Carolina Uniform Commercial Code does apply. *Plantation Shutter Co.*, 328 S.C. at 478-79. The South Carolina Uniform Commercial Code defines implied warranties that arise from a course of dealing: "Unless excluded or modified (Section 36-2-316) other implied warranties may arise from course of dealing or usage of trade." S.C. Code Ann. § 36-2-314(3). The South Carolina Uniform Commercial Code also states that "an implied warranty can also be excluded or modified by course of dealing or course of performance or, between merchants, by usage of trade." S.C. Code Ann. § 36-2-316.

Furthermore, two separate contracts executed that related to the same subject matter and the same parties are construed and considered as part and parcel of one contract as a whole. *Hous. Auth. of Columbia v. Cornerstone Hous., L.L.C.*, 356 S.C. 328, 336, 588 S.E.2d 617, 621 (Ct. App. 2003). However, the terms and conditions of the contract for the sale of goods may be formed by the parties' conduct even when the writings of the parties do not otherwise establish a contract. S.C. Code Ann. § 36-2-207(3). By contrast, additional terms to the contract are proposals in addition to the contract that do not automatically become part of the contract between merchants and consumers. *Cf.* S.C. Code Ann. § 36-2-207(2). With contracts for the sale of goods between merchants and consumers, the parties must agree to the additional terms in the writings. S.C. Code Ann. § 36-2-207(3). Modifications to the contract do not require consideration and may be made verbally or orally provided that modifications of the contract remain valid under the Statute of Frauds. S.C. Code Ann. § 36-2-209; S.C. Code Ann. § 36-2-201(1). For the sale of goods priced at $500.00 or more, a contract is unenforceable unless "some writing [is] sufficient to indicate that a contract for sale has been made between the parties and *signed by the party against whom enforcement is sought or by his authorized agent or broker.*" S.C. Code Ann. § 36-2-201 (emphasis added).

Here, the sale of delivery services by Defendants in the subject matter transaction represents a miniscule 4.82% of the total sales price of $2,490.93, thereby indicating that the sale of furniture delivery and installation services is merely incidental to the sale of furniture. The contract language of the terms and conditions within the Sales Order indicated that the transaction was for the sale of goods with respect to referring to Plaintiffs as the original purchaser of furniture; Plaintiffs as the person who receives, accepts, or uses products or services purchased from Rooms to Go, including furniture or furniture delivery and installation services; and, warranties peculiar to the sale of furniture and services sold in connection with the sale of furniture. Rooms to Go simply sold delivery services in connection

with the sale of furniture merely as a convenience to its customers that was incidental to the sale of goods. Therefore, the South Carolina Uniform Commercial Code applies and governs the breach of express or implied warranties with respect to consequential and incidental damages from the implied warranties related to the future performance from the sale of furniture delivery and installation services in consumers' homes that was sold in connection with and incidental to selling furniture.

The crux of the case arises from Defendant **S.E. INDEPENDENT DELIVERY SERVICES, INC.**, causing property damage to Plaintiffs' residence when delivering furniture for Defendant **RTG FURNITURE CORPORATION OF GEORGIA** and any or all of Defendants submitting a forged delivery receipt to Plaintiffs during the resolution of a Better Business Bureau complaint. Plaintiffs have a long-standing history of being customers of any and all of Defendants, collectively referred to as "Rooms to Go." Hence, a course of dealing existed between Rooms to Go and Plaintiffs under the South Carolina Commercial Code. *See* S.C. Code Ann. § 36-1-303 (defining a course of dealing as "a sequence of conduct concerning previous transactions between the parties to a particular transaction that is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct"). Plaintiffs were accustomed to: (1) purchasing furniture delivery and installation services, which was part of the basis of the bargain to purchase furniture from Rooms to Go; and, (2) signing a delivery receipt on a digital pad after Defendants delivered furniture to Plaintiffs' residence, which notated whether property damage occurred. When Plaintiffs called Rooms to Go to report property damages to Plaintiffs' residence, Defendants' contact discussing resolving the dispute with Plaintiffs was Tatjana McCormick, whose title was In Home Damage Claim Liaison, in the In Home Damage Department for Rooms to Go regarding Plaintiffs' In Home Damage Claim No. 12210959 with Rooms to Go. Plaintiffs' Amended Complaint, Exhibit E.

Defendants' Sales Order was part and parcel to the delivery receipt, and both operated to form the contract that concerned the same subject matter. In Defendants' Sales Order, the terms and conditions of the Sales Order only becomes legally binding when: (1) the original purchaser signs the Sales Order; and, (2) whomever receives, accepts or uses on the behalf of the original purchaser the furniture or furniture delivery and installation services sold. Plaintiffs' Memorandum in Support of Plaintiffs Motion to Strike Defendants' Answer, Exhibit D (emphasis added). The delivery receipt again reiterated the terms and conditions of the sale, including the arbitration and delegation clauses, which was required to comply with the Magnuson-Moss Warranty Act. Here, Plaintiffs were never afforded the opportunity to sign a delivery receipt nor ever signed a delivery receipt. Plaintiffs only discovered the delivery receipt as a forgery when receiving a copy from Defendants during a dispute resolution with the Better Business Bureau, upon which served as the sole basis for Defendants denial of Plaintiffs'

claims with Rooms to Go for property damages to Plaintiffs' residence because the delivery receipt also indicated, allegedly, that no property damage occurred during the furniture delivery and installation.

Defendants' Sales Order disclaimed implied warranties at the time of sale with respect to the actual product(s) and service(s) purchased from Rooms to Go under the Limited Product Warranty or any other warranty:

> LIMITED PRODUCT WARRANTY "(LIMITED WARRANTY")
> We warrant that the purchased merchandise will be free from defects in material and workmanship for a period of ONE YEAR from the date of delivery. This Limited Warranty applies to the original purchaser only, and only for merchandise which has remained at the original non-commercial delivery site. To obtain service under this Limited Warranty. the original purchaser must give us written notice of the defect within the one year warranty period. Service under this Limited Warranty may be obtained by returning to the store where the furniture was purchased or calling I-800-766-6786. This Limited Warranty does not cover: 1) wear, fading, or shrinkage of any fabrics; 2) damage due to alterations, misuse, abuse, or accidents; 3) damage or discoloration caused by sunlight or artificial light; 4) natural variations in the color or graining of leather, wood or wood products; and 5) ridges or rough areas in marble or variations in its color or graining. If the purchased furnishings are not free from defects in material and workmanship for the duration of this Limited Warranty, we will at our option, either (i) refund the purchase price in exchange for return of the merchandise, or (ii) repair or replace the non-conforming merchandise. *Except to the extent expressly prohibited by law, we are not liable for any consequential or incidental damages for this or any other warranty. Some states do not allow for the exclusion or limitation of incidental or consequential damages, so the above limitation or exclusion may not apply. All disputes arising under this Limited Warranty are subject to the Dispute Resolution/Arbitration Agreement. THERE ARE NO EXPRESSED OR IMPLIED WARRANTIES WHICH EXTEND BEYOND THE LIMITED WARRANTY DESCRIBED ABOVE. SOME STATES DO NOT ALLOW LIMITATION'S ON HOW LONG AN IMPLIED WARRANTY LASTS, SO THE ABOVE LIMITATION MAY NOT APPLY. THIS WARRANTY GIVES THE ORIGINAL PURCHASER SPECIFIC LEGAL RIGHTS, AND THE ORIGINAL PURCHASER MAY ALSO HAVE OTHER RIGHTS WHICH VARY FROM STATE TO STATE.* Plaintiffs' Memorandum in Support of Plaintiffs Motion to Strike Defendants' Answer, Exhibit D (emphasis added).

Standing alone, this provision violates the Magnuson-Moss Warranty Act because Rooms to Go cannot disclaim any implied warranties with respect to the sale of furniture delivery and installation services at the time of the sale or within ninety days thereafter. 15 U.S.C. § 2308(a). Additionally, the Magnuson-Moss Warranty Act supersedes state law with respect to disclaimers of implied warranties rendering disclaimers, modifications, or limitation ineffective under the Magnuson-Moss Warranty Act and state law. 15 U.S.C. § 2308(c).

Defendants' limited warranty and arbitration clause, including the delegation clause, attempted to disclaim and limit both express and implied warranties related to furniture sold by Defendants as well as incidental and consequential damages from the delivery and installation of the same. Upon delivery of furniture to Plaintiffs, Defendants were supposed to present to Plaintiffs a delivery receipt on a digital

pad that included fine print offering the following terms and conditions of the written contract subsequently thereafter from the Sales Order:

> I agree to the Rooms to Go Terms and Conditions of Sale, Limited Product Warranty, and Dispute Resolution/Arbitration Agreement that are available at roomstogo.com and are also contained on the reverse side of each page of the Sales Order provided in the Store and, if an email of the Sales Order was requested or received, in the email itself or the PDF of the Sales Order attached to such email. I acknowledge receipt of the merchandise delivered to me today (subject to any exceptions noted above). Plaintiffs' Amended Complaint, Exhibit D.

Moreover, the delivery receipt included a contractual modification in writing as to whether property damage occurred during the delivery of the furniture by Defendants, or that Defendant's agent. ***Id.*** If Plaintiffs never signed the delivery receipt, then the contractual modification concerning implied disclaimers of property damage from selling furniture delivery and installation services as consequential damages is invalid because the sale of furniture and property damages certainly exceeded $500.00 and the modification in the delivery receipt violates the Statute of Frauds.

Therefore, even the limited warranty provision in the Sales Order was invalid under the Magnuson-Moss Warranty Act because Defendants disclaimed implied warranties before, during, or after the sale at the time of executing the Sales Order in non-compliance with the restrictions against disclaiming implied warranties. 15 U.S.C. § 2308(a), (c). Defendants entered into a service contract to deliver and install furniture at Plaintiffs' residence at the time of the sale of furniture to Plaintiffs and within ninety (90) days from the sale. **Defendants obtaining a signed delivery receipt, therefore, was essential for binding Plaintiffs to the terms and conditions of the Sales Order, including the arbitration and delegation clauses, upon delivery and installation of furniture to consumers' residence for Defendants to maintain compliance with the Magnuson-Moss Warranty Act.** If Plaintiffs never signed the delivery receipt, then the Sales Order never became binding to form a contract and the Sales Order is in noncompliance with the Magnuson-Moss Warranty Act—blatantly falling on its face. Nor did a valid, binding contract exist pursuant to the Sales Order alone.

B. DEFENDANTS MAY NOT IMPOSE ANY CHARGES ON CONSUMERS TO INITIATE ARBITRATION PROCEEIDINGS

Second, the FTC interpreted the Magnuson-Moss Warranty Act and required that "the remedy under a full warranty must be provided to the consumer without charge." 16 C.F.R. § 700.9. The FTC imposed onto warrantors the minimum requirement for informal dispute settlement procedures, including arbitration, that warrantors may not charge consumers any fee for the use of the arbitration process when designated as the informal dispute settlement procedures. 16 C.F.R. § 703.3. But, under Section 3 of Defendants' Dispute Resolution/Arbitration Agreement in the Sales Order, Defendants' arbitration clause requires consumers with claims in excess of $25,000.00 to pay upfront to initiate arbitration proceedings:

> 3. Fees and Costs in Arbitration: If your total damage claims are $25,000.00 or less, not including your attorneys' fees: (1) the arbitrator may award you your reasonable attorneys' fees, expert fees, and costs if you prevail in the arbitration; (2) the arbitrator may not award RTG its attorneys' fees, expert fees, or costs unless the arbitrator determines that your claim was frivolous or brought in bad faith; and, (3) RTG will bear all filing fees and administrative fees and either reimburse you for any such fees that AAA requires you to pay upon initiating arbitration or, if you send a written request to Legal Department, 400 Perimeter Center Terrace, Suite 800, Atlanta, GA 30346 before you initiate arbitration, pay to AAA any such fees that AAA requires to be paid upon initiation of arbitration. *If your total damage claims are more than $25,000.00, not including your attorneys' fees, then the arbitrator may award the prevailing party all or a portion of its reasonable attorneys' fees, expert fees, and costs. In arbitrations conducted under AAA's Consumer Arbitration Rules, (a) RTG will bear the arbitrator's fees and expenses, and (b) where no disclosed claims or counterclaims exceed $25,000, the Dispute shall be resolved by the submission of documents only/desk arbitration, except that any party may ask for a hearing or the arbitrator may decide that a hearing is necessary. Except as otherwise provided herein, all filing fees, administrative fees, and arbitrator fees and expenses will be paid in accordance with the applicable AAA rules.* Plaintiffs' Memorandum in Support of Plaintiffs Motion to Strike Defendants' Answer, Exhibit D (emphasis added).

Hence, any ambiguity in this provision is strictly construed against the drafter in favor of the non-drafter. Rooms to Go is willing to pay costs to initiate for consumers upfront when writing to the "Legal Department" upon request when property damages are less than $25,000.00, but not for consumers when property damages are more than $25,000.00 violating the Magnuson-Moss Warranty Act.

C. DEFENDANTS MAY NOT HOLD ANY ARBITRATION PROCEEDING AS LEGALLY BINIDNG ON ANY CONSUMER PARTY TO THE TRANSACTION

Third, no informal dispute procedures such as arbitration may be legally binding on any party or third-person to the dispute allowing parties to the dispute to bring a civil suit with all the materials submitted during the arbitration process being admissible as evidence in the dispute. *See* 16 C.F.R. § 703.5(j). Therefore, arbitration clauses concerning written warranties in consumer transactions for the sale of goods are not legally binding on consumers under the Magnuson-Moss Warranty Act. *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 32-33, 644 S.E.2d 663, 673 (2007); 15 U.S.C. §§ 2301 to -12. Under Section 1 of Defendants' Dispute Resolution/Arbitration Agreement in the Sales Order, Defendants' arbitration clause applied to any dispute or claim arising in connection from the sale of furniture and delivery of the same from Defendants to Plaintiffs to binding arbitration:

> YOU AND RTG AGREE THAT ANY DISPUTE OR CLAIM BETWEEN YOU AND RTG OR ANY ROOMS TO GO AFFILIATE OR ANY OF THEIR PARENT COMPANIES, SUBSIDIARIES, DIVISIONS, SHAREHOLDERS, MEMBERS, DIRECTORS, OFFICERS, EMPLOYEES, REPRESENTATIVES, PREDECESSORS, SUCCESSORS, OR ASSIGNS, INCLUDING BUT NOT LIMITED TO ANY DISPUTE OR CLAIM THAT RELATES IN ANY WAY TO ANY PRODUCT OR SERVICE SOLD OR DISTRIBUTED BY RTG, TO ANY TRANSACTION WITH RTG, TO ANY WARRANTY, TO THE TERMS AND CONDITIONS OF SALE, TO THE FINANCING OF ANY PURCHASE FROM RTG, TO THE COLLECTION OR STORAGE OF PERSONAL INFORMATION, OR TO THE TERMS OF USE OR THE PRIVACY POLICY, INCLUDING DISPUTES OR CLAIMS UNDER FEDERAL OR STATE STATUTES OR TORT

> LAW ("DISPUTE") *MUST BE RESOLVED EXCLUSIVELY THROUGH FINAL AND BINDING ARBITRATION, AND NOT BY A COURT OR JURY*, EXCEPT THAT YOU OR RTG MAY ASSERT CLAIMS IN SMALL CLAIMS COURT IF THE CLAIMS QUALIFY FOR SMALL CLAIMS COURT AND THE MATTER PROCEEDS ONLY ON AN INDIVIDUAL (NOT A CLASS OR REPRESENTATIVE) BASIS. Plaintiffs' Memorandum in Support of Plaintiffs Motion to Strike Defendants' Answer, Exhibit D (emphasis added).

Defendants' arbitration provision triggers the protections of the Magnuson-Moss Warranty Act. For claims exceeding the jurisdiction of magistrate courts in South Carolina, Defendants subject consumers in South Carolina to legally binding arbitration. Consequently, Defendants' arbitration provision directly violates the Magnuson-Moss Warranty Act rendering the provision unconscionable and unenforceable as a violation of public policy. *See Carlson v. Gen. Motors Corp.*, 883 F.2d 287, 289-91 (4th Cir. 1989).

Moreover, ambiguous or conflicting terms in a contract are construed strictly against the drafter of the contract, who is ultimately responsible for the verbiage, and construed liberally in favor of the party who did not write the contract. *Canal Ins. Co. v. Nat'l House Movers, LLC*, 414 S.C. 255, 265-66, 777 S.E.2d 418, 424 (Ct. App. 2015). Here, Defendants drafted the Sales Order and verbiage in the delivery receipt. Hence, Defendants' noncompliance with Defendants' own contractual terms is also a violation of the Magnuson-Moss Warranty Act that is self-defeating when Defendants' contractual language negates Sections 1 and 3 in turn of the Dispute Resolution/Arbitration Agreement:

> The Terms and Conditions of Sale and Dispute Resolution/Arbitration Agreement below are binding agreements between you and the Rooms to Go affiliate making this sale, which is referred to as "RTG," "we" or "us." "You" means any person or entity who signs this Sales Order or on whose behalf it is signed and any privies, and any person or entity who receives, accepts, or uses the purchased products or services. All such persons and entities are expressly intended beneficiaries of the Dispute Resolution/Arbitration Agreement. The Limited Product Warranty is a binding agreement between the original purchaser and RTG. The Terms and Conditions of Sale, Limited Product Warranty and Dispute Resolution/Arbitration Agreement are expressly intended for the benefit of all Rooms To Go affiliates and their parent companies, subsidiaries, divisions, shareholders, members, directors, officers, employees, representatives, predecessors, successors, and assigns. These three agreements may not be changed except by a signed written agreement. I*f any part of these three agreements is found invalid or unenforceable, then Sections 1 and 3 of the Dispute Resolution/Arbitration Agreement will be null and void.* Exhibit 1 (emphasis added). Plaintiffs' Memorandum in Support of Plaintiffs Motion to Strike Defendants' Answer, Exhibit D (emphasis added); 15 U.S.C. 2310(d)(1).

Section 1 of the arbitration provision in the Sales Order further stated: "This Dispute Resolution/Arbitration Agreement ("Agreement") applies to Disputes arising before, on, or after the date of this Sales Order, regardless of whether the Limited Warranty is in effect . . . The term "Dispute" and the requirement to arbitrate will be broadly interpreted. The Agreement will survive the termination of the Limited Warranty." Plaintiffs' Memorandum in Support of Plaintiffs Motion to Strike Defendants' Answer, Exhibit D. Defendants' Sales Order violates the Magnuson-Moss Warranty Act and is self-

defeating to compel arbitration based on Defendants' own contractual language warranting noncompliance under the Magnuson-Moss Warranty Act for failure to adhere to Defendants' terms.

III. THE PARTIES NEED CLARIFICATION ON THE COURT'S LANGUAGE REGARDING DISCOVERY FROM THE COURT'S ORDER ISSUED ON AUGUST 1, 2018

The Order issued by the Court on December 12, 2018, does not clarify the confusion among the parties regarding the scope of discovery. On September 11, 2018, Defendants' counsel sent Plaintiffs' counsel a Rule 11 notice concerning the difference of opinion interpreting the Court's Order issued on August 1, 2018, of which the parties' confusion on the scope of discovery is amicable and courteous by all accounts between the parties' counsel. Exhibit B. Defendants claimed that the Court's Order on August 1, 2018, prohibited the parties from doing anything else but limited discovery on the matter of determining which Plaintiff signed the delivery receipt, including Plaintiffs filing a Motion to Strike Defendants' Answer or fully participating in Plaintiffs' discovery requests as "Defendants object on the basis that the information sought is outside the scope of limited discovery permitted by Judge Verdin's Order dated on August 1, 2018." Plaintiffs' Memorandum in Support of Plaintiffs Motion to Strike Defendants' Answer, Exhibit A. Rule 26(b)(1) under the South Carolina Rules of Civil Procedure permits discovery regarding any unprivileged matter relevant to the subject matter in the pending action that is reasonably calculated to lead toward the discovery of admissible evidence.

Limitations on discovery do not stop the litigation process. Defendants filed an answer on August 17, 2018. Plaintiffs had a deadline of thirty (30) days to file a motion to strike on the pleading to preserve Plaintiffs arguments on the record. S.C.R.C.P. Rule 12(f). Failure to make a timely motion to strike Defendants' Answer amounts to a waiver of Plaintiffs rights to preserve the issue for appellate review. *Tucker v. Doe*, 413 S.C. 389, 396 n.1, 776 S.E.2d 121, 125 (Ct. App. 2015); *Fowler v. Floyd*, 204 S.C. 118, 124, 28 S.E.2d 641, 644 (1944); *Tittle v. Kennedy*, 71 S.C. 1, 7, 50 S.E. 544, 546 (1905) (holding that a motion to strike is the "proper remedy for disposing of irrelevant or redundant matter contained in a pleading"). Hence, Defendants' Rule 11 letter was unwarranted. The Court has not elaborated on its decision to limit the scope of discovery pursuant to Rule 26(a), nor have Defendants filed a protective order under Rule 26(c) of the South Carolina Rules of Civil Procedure. Discovery has barely begun with preliminary discovery, and the limitation on discovery as to Plaintiffs determining liable parties for the forgery of the delivery receipt, which is vehemently disputed by Plaintiffs, would naturally have different parameters for discovery than Defendants' single-track case theory dependent on the suggestion that Plaintiff **KIMBER FLYNN ROBERTS** signed the delivery receipt.

Moreover, as Defendants have most of the evidence concerning past signing history by Plaintiffs when purchasing or delivering furniture in the past, and Plaintiffs do not have access to that information because it has been lost, destroyed, or never provided to Plaintiffs by Defendants, then Plaintiffs have a "substantial need of the materials in the preparation of [Plaintiffs'] case and that

[Plaintiffs are] unable without undue hardship to obtain the substantial equivalent of the materials by other means." S.C.R.C.P. Rule 26(b)(3). The parties are required to supplement requests for discovery on an ongoing basis until trial under Rules 33, 34, and 36 "so that information sought, which comes to the knowledge of a party, or his representative or attorney, after original answers have been submitted, shall be promptly transmitted to the other party." S.C.R.C.P. Rule 26(e). Learning the chain of custody concerning Defendants' creation, possession, and storage of such information related to the delivery receipt in question is also relevant to determine at what time the forged signature was submitted to Rooms to Go after Rooms to Go delivered furniture to Plaintiffs' residence. Plaintiffs needed previous signing history from Defendants to submit the same to Plaintiffs' expert witness for further comparison. Defendants have all employment information for the delivery crew involved in the property damages from Rooms to Go delivering and installing furniture at Plaintiffs' Residence. The personnel files concerning those involved in the chain of custody related to the delivery receipt is also relevant to determine at what point the forged signature was submitted, stored, by whom, and any disciplinary action or criminal history for said employees, representative, agents, and so forth. The parties have yet to enter into depositions at this time. Plaintiffs needed information from Defendants as to the delivery crew to send a notice of deposition that Plaintiffs only received in November of 2018, and of which only two persons involved in the incident were identified while two other individuals remain unidentified. Plaintiffs hereby move this Court to amend the Court's Order and clarify the Court's language in the Order issued by the Court on August 1, 2018 to assist the parties understanding of the limited scope of discovery, if applicable. S.C.R.C.P. Rules 15(a), 59(e).

WHEREFORE, Plaintiffs request that this Motion be granted and the Court amend its Order and Judgment in accordance with the above-requested relief, the Court hold a hearing on this Motion, the Court give leave to amend this motion as required, the Court give leave for Plaintiffs to amend Plaintiffs' Complaint as requested, and such other and further relief as the Court deems just and proper. At this time, Plaintiffs expressly reserve all rights without prejudice or waiver of the same with respect to the preserving other legal arguments and grounds within Plaintiffs Motion to Strike Defendants' Answer.

Respectfully submitted this 14 day of December , 2018 .

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/s/ Deborah D. Davis, Esq.
Deborah D. Davis, Esq.
SC Bar No.: 102942
Attorney for Plaintiffs

EXHIBIT A

Deborah Davis

From: Deborah Davis
Sent: Monday, August 27, 2018 2:09 PM
To: 'Stern, Frank S'
Subject: RE: Roberts et al. v. Rooms to Go: File amended complaint

Hey Frank,

Thank you. I will file the motion requesting the leave of court to amend my complaint in that case.

Please note that while I have been out of the office for most of July, I will respond to your questions on a first come first serve basis. Please call or text me directly if you need a more urgent response as I process your inquiry or request.

Best Regards,

Deborah D. Davis, Esq.
Attorney at Law

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www.dicksondavislaw.com

864.729.3424 tel
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d.davis@dicksondavislaw.com

From: Stern, Frank S <FStern@TurnerPadget.com>
Sent: Monday, August 27, 2018 10:47 AM
To: Deborah Davis <d.davis@dicksondavislaw.com>
Subject: RE: Roberts et al. v. Rooms to Go: File amended complaint

Deborah,

Sorry for the delay, I was out of the office Thursday and Friday. Unfortunately, I cant consent to the amended complaint. I need to preserve my Rule 11 arguments and consenting would likely waive those arguments.

Thanks,

Frank Stern

Turner | Padget

Frank Stern
Associate
PO Box 1509 | Greenville, SC 29602
200 East Broad Street, Suite 250 | Greenville, SC 29601
864-552-4636 | Fax 864-282-5997
fstern@turnerpadget.com
vCard | Location

From: Deborah Davis [mailto:d.davis@dicksondavislaw.com]
Sent: Wednesday, August 22, 2018 9:14 AM
To: Stern, Frank S
Subject: Roberts et al. v. Rooms to Go: File amended complaint

Hey Frank,

I just realized that I had accidentally filed my email notice from the court about the order prematurely via email. I apologize for the oversight and I have received your answer. My intent was to file the amended complaint before you filed the answer and I do apologize on that end.

Would you consent to me filing an amended complaint or would you rather me file a motion to ask the court's leave to do so. I just need to add the Magnuson Moss Warranty Act violation and correct some verbiage, not not major substantive changes with respect to your Answer.

I will of course allow for any extension you need to file an amended Answer in response as you may need and notify the court of the same for us. I know you had a lot going on in September. Whatever extension you may need I will be more than happy to work with you in that regard.

I appreciate the consideration. Thank you.

Also, I will be moving my office in September to the back offices at the Dennison Law Firm and I'll let you know the change of address at that time.

Deborah D. Davis, Esq.
Managing Attorney

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EXHIBIT B

Turner | Padget

Frank S. Stern, Esquire
E-Mail: FStern@turnerpadget.com
Direct Dial: 864-552-4636
Direct Fax: 864-282-5997

September 11, 2018

Debora D. Davis, Esq.
Dickson Davis law Firm, LLC
439 Congaree Road
Mailbox 6
Greenville, SC 29607

Re: Roberts et al. v. Rooms to Go, et al.
Docket No.: 2018-CP-23-2230
TPGL File No.: 15560.00101

Dear Deborah:

I am receipt of your recent Motion to Strike and Motion to Amend Complaint and have reviewed the motions. I have also reviewed and Answered your First Amended Complaint. Please review your current pleadings and filings, as well as any future filings, to ensure their compliance with S.C.R.C.P. Rule 11. If Rule 11 violations occur, I must file a motion to recover attorney's fees to protect the interests of my client. Please let this letter serve as the court-required consultation. I appreciate in advance your courtesies and look forward to hearing from you soon. If you have any questions, please call me at your convenience.

With kind regards, I am

Sincerely,

TURNER PADGET GRAHAM & LANEY, P.A.

Frank S. Stern

FS
Enclosures

STATE OF SOUTH CAROLINA **COUNTY OF GREENVILLE**	**IN THE COURT OF COMMON PLEAS** **FOR THE THIRTEENTH JUDICIAL CIRCUIT**
ROLLIE BRIAN ROBERTS, KIMBER FLYNN ROBERTS, Plaintiff(s), v. **R.T.G. FURNITURE CORPORATION, RTG FURNITURE CORPORATION OF GEORGIA, RTG FURNITURE CORPORATION OF TEXAS, RTG FURNITURE OF TEXAS, L.P., ROOMSTOGO.COM, INC., SE INDEPENDENT DELIVERY SERVICES, INC.,** Defendant(s).	2018CP2302230 COMMON PLEAS CIVIL CASE NO. **CERTIFICATE OF SERVICE**

The undersigned hereby certifies that I served a copy of the foregoing **PLAINTIFFS' NOTICE AND MOTION FOR RECONSIDERATION TO ALTER OR AMEND A JUDGMENT** in this action dated December 14, 2018, on December 14, 2018, upon the adverse party electronically to the following:

R.T.G Furniture Corp. et al.
c/o Frank S. Stern, Esq.
Turner Padget Graham and Laney P.A.
200 East Broad Street, Suite 250
P.O. Box 1509
Greenville, SC 29602

I have served a copy of the foregoing by one of the following methods:

- [ ] (1) Delivering a copy personally to the adverse party;
- [ ] (2) Mailing a copy to the adverse party's last known address, by depositing the copy in the U.S. Mail in an envelope with sufficient postage affixed;
- [ ] (3) Delivering it by commercial delivery service in accordance with Rule 4(d)(9), SCRCP; or,
- [X] (4) Other pursuant to Rule 5(b)(1), SCRCP: electronic filing.

Respectfully submitted this 13 day of December, 2018.

/s/ Deborah D. Davis, Esq.
Deborah D. Davis, Esq.
Attorney for Plaintiffs

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PROOF OF SERVICE OF AMENDED MOTION AND PETITION TO REINSTATE APPEAL

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Letitia H. Verdin, Circuit Court Judge

Case No. 2018-CP-23-02230

ROLLIE BRIAN ROBERTS,
KIMBER FLYNN ROBERTS,

Appellants,

v.

R.T.G. FURNITURE CORPORATION, RTG FURNITURE CORPORATION OF GEORGIA, RTG FURNITURE CORPORATION OF TEXAS, RTG FURNITURE OF TEXAS, L.P., ROOMSTOGO.COM, INC., SE INDEPENDENT DELIVERY SERVICES, INC.,

Respondents.

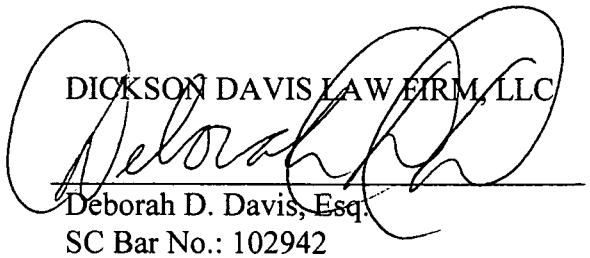
PROOF OF SERVICE

I certify that I have served the Amended Motion and Petition to Reinstate Appeal on Respondents **R.T.G. FURNITURE CORPORATION ET AL.** electronically and by depositing a copy of it in the United States Mail, postage prepaid, on February 13, 2019, addressed to the attorney of record, to the following address(es):

R.T.G Furniture Corp. et al.

c/o Frank S. Stern, Esq.
Turner Padget Graham and Laney P.A.
200 East Broad Street, Suite 250
P.O. Box 1509
Greenville, SC 29602

Respectfully submitted this 13 day of February, 2019.



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ATTORNEY FOR APPELLANTS