

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
In the Court of Common Pleas for the Ninth Circuit

J.C. Nicholson, Jr., Circuit Court Judge

Appellate Case No. 2017-002481

RECEIVED
JUL 25 2018
SC Court of Appeals

AEP2, LLC f/k/a 2AM Group, LLC.....Respondent

v.

BMW of North America, LLC.....Appellant

RECORD ON APPEAL

Barnwell Whaley Patterson & Helms, LLC
M. Dawes Cooke, Jr.
Anna L. Strandberg
P.O. Drawer H
Charleston, SC 29402
(843) 577-7700

Jackson Lewis
Ashley Abel
15 South Main Street, Ste. 700
Greenville, SC 29601
(843) 232-7000

Attorneys for Appellant

Pope Parker Jenkins, P.A.
Thomas H. Pope
P.O. Box 190
Newberry, SC 29108
(803) 276-2532

John P. Freeman
200 W. Highland Dr., Unit 107
Seattle, WA 98119
(803) 361-6934

Attorneys for Respondent

INDEX

Orders

| | |
|---|----|
| 3/24/2017 Order of Entry of Default | 5 |
| 3/28/2017 Notice of Entry of Order/Judgment Pursuant to Rule 77, SCRCF | 6 |
| 5/3//2017 Order of Remand of United States District Court dated 4/20/2017 | 7 |
| 7/12/2017 Order Denying Motion to Set Aside Entry of Default..... | 8 |
| 10/4/2017 Order Denying Defendant's Motion for Reconsideration | 18 |
| 11/2/2017 Order of Default Judgment | 20 |
| 11/27/2017 Order of Default Judgment | 24 |

Pleadings

| | |
|--|----|
| 2/8/2017 Summons and Complaint..... | 28 |
| EXHIBIT 1 – Services Agreement – Ontario RDC..... | 32 |
| EXHIBIT 2 – Correspondence from Western Conference of Teamsters Pension Trust to 2AM Group LLC dated November 20, 2014..... | 49 |
| 2/21/2017 Affidavit of Service dated February 10, 2017 | 52 |
| 3/24/2017 Affidavit of Default and Application for Entry of Default..... | 53 |
| 3/24/2017 Notice to State Court of Defendants' Removal to Federal Court..... | 54 |

Motions

| | |
|---|----|
| 3/28/2017 Plaintiff's Motion to Remand | 55 |
| 3/28/2017 Plaintiff's Memorandum in Support of Motion to Remand | 57 |
| EXHIBIT A – South Carolina Secretary of State Listing for BMW of North America, LLC | 61 |
| EXHIBIT B – Affidavit of Service..... | 63 |
| EXHIBIT C – Affidavit of Default and Application for Entry of Default filed 3/24/2017... | 67 |

| | |
|--|-----|
| EXHIBIT D – Order of Entry of Default..... | 70 |
| 4/20/2017 Motion for Damages Hearing | 72 |
| 5/1/2017 Defendant’s Motion to Set Aside Entry of Default | 74 |
| EXHIBIT 3 – Proposed Answer | 81 |
| Affidavit of Richard Spitaleri dated 4/25/2017 | 85 |
| Affidavit of Ashley Abel dated 4/25/2017..... | 87 |
| 5/2/2017 Defendant’s Response to Plaintiff’s Motion for a Hearing on Damages | 90 |
| Affidavit of Ashley Abel dated 5/1/2017..... | 96 |
| 6/8/2017 Plaintiff’s Memorandum in Opposition to BMW’s Motion to Set Aside Default and Memorandum in Support of Plaintiffs’ Motion for Damages Hearing..... | 98 |
| EXHIBIT 1 – Affidavit of Thomas H. Pope III dated June 6, 2017..... | 112 |
| Attachment 1 – Defendant’s Consent to Remand to State Court..... | 114 |
| Attachment 2 – Order Remanding Case to State Court | 116 |
| Attachment 3 – Emails Between Thomas H. Pope III and Ashley B. Abel | 118 |
| Attachment 4 – BMW’s List of Corporate Counsel | 121 |
| EXHIBIT 2 – Affidavit of R. Bruce Wallace dated May 24, 2017 | 122 |
| Exhibit A – Draft Assignment, Assumption, and Consent Agreement | 126 |
| Exhibit B – Notice of Deposition of Courtney Anderson..... | 130 |
| Exhibit C – Email from Richard Spitaleri of BMW of North America..... | 139 |
| Exhibit D – Email to Richard Spitaleri of BMW of North America | 142 |
| EXHIBIT 3 – Stipulation of Counsel and Consent Order of Stay in <u>AEP2, LLC v. Buxton</u> , 2016-CP-10-02014 dated May 19, 2017..... | 171 |
| EXHIBIT 4 – Affidavit of Frederick Jekel dated April 14, 2017..... | 175 |

Exhibit A – Order of Stay in AEP2, LLC v. Harris, 2017-CP-10-00622 dated April 5, 2017.....177

6/13/2017 Memorandum in Opposition to Plaintiff’s Motion for Damages Hearing and Reply Memorandum in Support of Defendant’s Motion to Set Aside Default Judgment179

Second Affidavit of Richard Spitaleri dated June 12, 2017.....187

Exhibit A – Correspondent from Western Conference of Teamsters Pension Trust to BMW of North America, LLC dated October 26, 2011192

Second Affidavit of Ashley B. Abel dated June 12, 2017196

8/8/2017 Defendant’s Motion for Reconsideration198

8/9/2017 Notice of Appearance of M. Dawes Cooke, Jr. for BMW of North America203

8/9/2017 Notice of Motion and Motion to Alter or Amend Judgment or for Relief from Judgment Pursuant to Rules 59(e) and 60(b)(1), SCRCF204

Third Affidavit of Richard Spitaleri dated October 5, 2017209

10/12/2017 Supplemental Affidavit of Bruce Wallace dated September 25, 2017218

Exhibit A – Subpoena *duces tecum* to BMW of North America, LLC dated 3/7/2017 ..220

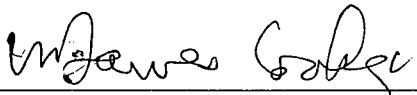
Exhibit B – Emails Between Courtney Anderson and Walter F. Harris.....226

Transcripts

6/12/2017 Transcript of Hearing before the Honorable J.C. Nicholson, Jr.230

10/12/2017 Transcript of Damages Hearing before the Honorable John C. Hayes, III.....265

July 1, 2018


Barnwell Whaley Patterson & Helms, LLC
M. Dawes Cooke, Jr.
Anna L. Strandberg
P.O. Drawer H
Charleston, SC 29402
(843) 577-7700

(continued on next page)

Jackson Lewis
Ashley Abel
15 South Main Street, Ste. 700
Greenville, SC 29601
(843) 232-7000

Attorneys for Appellant

STATE OF SOUTH CAROLINA)
)
 COUNTY OF CHARLESTON)
)
 AEP2, LLC f/k/a 2AM GROUP,)
 LLC,)
)
 Plaintiff,)
)
 v.)
)
 BMW OF NORTH AMERICA,)
 LLC,)
)
 Defendant.)
 _____)

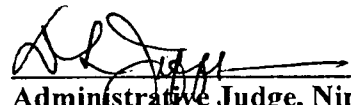
COURT OF COMMON PLEAS
 Civil Action No. 2017 CP-10-644

FILED
 2017 MAR 24 AM 9:59
 JULIE J. ARMSTRONG
 CLERK OF COURT
 BY _____

ORDER OF ENTRY OF DEFAULT

Having reviewed the Affidavit of Default and Application for Default Judgment in the above entitled action, it appears that the defendant has failed to file an Answer or otherwise appear in this matter within the time prescribed by the South Carolina Rules of Civil Procedure. Therefore, pursuant to Rule 55(b) of the South Carolina Rules of Civil Procedure, the default is hereby entered against the defendant herein, and the Clerk of Court is hereby directed to make such entry upon the calendar or file book. This Court will set a hearing on damages in the near future.

AND IT IS SO ORDERED.



 Administrative Judge, Ninth Judicial Circuit
 The Honorable Deanna L. Jefferson

3/23, 2017
 Charleston, SC

JULIE J. ARMSTRONG
CLERK OF COURT, C.P. & G.S.
100 BROAD STREET, SUITE 108
CHARLESTON, SC 29401-2258
RETURN SERVICE REQUESTED



clerkofcourt.charlestoncounty.org



17



ASHLEY BRYAN ABEL
15 S MAIN ST STE 700
GREENVILLE SC 29601-2793

NOTICE OF ENTRY OF JUDGMENT/ORDER PURSUANT TO RULE 77 SCRPC

Order/Entry of Default

CASE NO: 2017CP1000644
AEP2 LLC VS BMW of North America LLC

This judgment was entered on the 24th day of March, 2017, and notice mailed first class on Tuesday, March 28, 2017, to all counsel of record and/or all parties entitled to receive notice.

You may view and download this document at <http://clerkofcourt.charlestoncounty.org> or obtain a copy in person at the Clerk of Court's Office during regular Charleston County business hours.

A TRUE COPY
ATTEST: ROBIN L. BLUME, CLERK

2017 CP-10-644

BY



IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

DEPUTY CLERK

AEP2, LLC f/k/a 2AM Group, LLC)

C/A No: 2:17-cv-0781 DCN

Plaintiff,)

-vs-)

BMW of North America, LLC)

Defendant.)

ORDER

BY

JULIE J. ARMSTRONG
CLERK OF COURT

2017 MAY -31 PM 2:29

FILED



This matter is before the court upon plaintiff's motion to remand this case to state court. This motion was filed on March 28, 2017. On April 11, 2017, defendant filed its response, stating that it do not oppose plaintiff's motion to remand. It is therefore

ORDERED that plaintiff's motion to remand to state court is **GRANTED**. This action is hereby remanded to the Court of Common Pleas for Charleston County, South Carolina.

IT IS SO ORDERED.



David C. Norton
United States District Judge

April 20, 2017
Charleston, South Carolina

STATE OF SOUTH CAROLINA)
)
 COUNTY OF CHARLESTON)
)
 AEP2, LLC f/k/a 2AM GROUP,)
 LLC,)
)
) *Plaintiff,*)
)
) v.)
)
) BMW OF NORTH AMERICA,)
) LLC,)
)
) *Defendant.*)

COURT OF COMMON PLEAS
 Civil Action No. 2017 CP-10-0644

**ORDER DENYING MOTION TO
 SET ASIDE ENTRY OF DEFAULT**

FILED
 2017 JUL 21 PM 2:03
 JULIE J. ARMSTRONG
 CLERK OF COURT

This matter came before the Court for a hearing on BMW's motion to set aside the entry of default and Plaintiff's motion for a damage hearing on June 13, 2017. Present at the hearing were Thomas H. Pope III and John P. Freeman, counsel for Plaintiff AEP2 and Ashley B. Abel, counsel for Defendant BMW. Also present was Arthur E. Perry, on behalf of the Plaintiff.

gcm

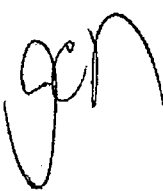
The Summons and Complaint in this case were filed on February 8, 2017. BMW was served on February 10, 2017 with the Summons and Complaint via its agent for service of process, CT Corporation, Inc. BMW is admittedly in default. By Order dated March 23, 2017, The Honorable Deadre Jefferson issued an Order entering default against BMW. After the period for answering the Complaint had expired, BMW filed a notice of removal of the case to U.S. District Court for the District of South Carolina on March 23, 2017. On April 20, 2017, the Plaintiff filed its motion for a damages hearing. On April 26, 2017, BMW filed a motion to set aside the entry of default.

At the hearing in this matter on June 13, 2017, this Court heard and considered argument on the Defendant's motion to set aside the entry of default. Included in the record were the following documents: BMW's motion to set aside entry of default (with exhibits); affidavit of

BMW corporate counsel, Richard Spitaleri; affidavit of Ashley Abel; Plaintiff's motion to set damages hearing; BMW's response to the Plaintiff's motion for damages hearing; Plaintiff's memorandum in opposition to BMW's motion to set aside entry of default (with exhibits and affidavits); BMW's memorandum in opposition to the Plaintiff's motion for damages hearing and in support of motion to set aside default; second affidavit of Spitaleri; and second affidavit of Ashley Abel.

This Court has considered all of the filings of both the Defendant and the Plaintiff. The Court has also carefully considered the arguments of counsel at the hearing. For the reasons set forth herein, BMW's motion to set aside the entry of default is denied.

BACKGROUND FACTS

 Commencing in January 2012, 2AM Group, LLC began managing the BMW Warehouse in Ontario, California. All employees at the BMW Warehouse were members of the Teamsters Local 495. Plaintiff had 5-year Service Agreement to run said warehouse. AEP2, LLC is the successor to 2AM Group, LLC which sold its assets in February 2014 to a company named Sustained Quality, LLC. In November 2014, Plaintiff learned from the Conference of Teamsters Pension Trust (CTPT) that as a result of the sale of assets, it owed the Teamsters a withdrawal liability of \$605,699.06. The Complaint asserts that as a result of the Services Agreement between 2AM Group, LLC and BMW that BMW had a duty to indemnify 2AM Group for "any withdrawal liability" which was incurred during the term of that Service Agreement. Plaintiff alleges further in the Complaint that it has paid the full withdrawal liability to the CTPT and that BMW is obligated to fully indemnify Plaintiff for same (\$605,699.06), plus prejudgment interest.

In 2016, Plaintiff sued SC attorney, James Buxton, alleging professional negligence for failing to advise it about, or protect it from, the withdrawal liability issue. Late in discovery in

that case, documents were revealed indicating that BMW possibly had a contractual duty to indemnify Plaintiff for the withdrawal liability under the 2011 Service Agreement and/or the 2014 Assignment, Assumption and Consent Agreement. Discovery in late 2016 showed also the possibility that Plaintiff's corporate attorney, Walter Harris, may have been negligent for failing to counsel Plaintiff about the withdrawal liability. Suit was commenced against attorney Harris on February 7, 2017 (Case No. 2017-CP-10-626). Both the Buxton suit and the Harris suit have been stayed pending resolution of this BMW suit by court orders which are included in this record. The day after the Harris suit was filed, Plaintiff filed its Summons & Complaint against BMW herein based on documents produced late in the Buxton case. Judge Thomas L. Hughston's Order of Stay in the Harris case noted that: "...the result in the BMW case will obviate and likely make moot the issues in the instant [Harris] case."

FACTS RELEVANT TO BMW'S MOTION

AM
The Summons and Complaint were served on BMW on February 10, 2017. On March 23, 2017, BMW filed its notice of removal in the United States District Court for the District of South Carolina. BMW's notice of removal was not timely, as it was outside the time in which BMW was required to respond to the Complaint. In the federal court, the Plaintiff moved to remand the case, and the Court granted its motion¹ based on the consent from BMW that it was, in fact, served with the Summons & Complaint through its registered agent on February 10, 2017. BMW's motion to set aside the entry of default (with attached proposed but unsigned Answer) was filed 43 days after BMW was in default.

BMW agrees that Rule 55, SCRCP, applies to its motion but argues that it has "good cause" for default to be set aside. BMW further contends that its motion to set aside default is timely, that

¹ A certified copy of the Order of Remand was mailed by the Clerk of the United States District Court to the Charleston County Clerk of Court and it was filed in this Court on May 3, 2017.

it has a meritorious defense, and that Plaintiff would not be prejudiced by lifting default. Hence, BMW maintains it should prevail on this motion. In support of the motion, BMW submitted affidavits of Richard Spitaleri, one of BMW's 15 general counsel in New Jersey who said that the basis for good cause was that the Summons & Complaint were "lost in the proverbial shuffle." As explained below BMW's lost-in-the-shuffle defense is inadequate.

As reflected by the record, Bruce Wallace, counsel for Defendant James Buxton in the case of AEP2 v. Buxton, et al. (Case No. 2016-CP-10-204), was proposing in March 2017 to take the deposition of Courtney Anderson, a BMW general counsel. Mr. Wallace's affidavit reflects that he received a call from Mr. Spitaleri on February 21, 2017 and that Mr. Spitaleri wanted to know what Mr. Wallace would ask BMW counsel Anderson at the deposition. In this call, Mr. Wallace, a member of the Charleston Bar, reported that in his 30-minute conversation with Spitaleri he (Wallace) specifically informed Spitaleri that he intended to ask attorney Anderson at her deposition to confirm that BMW had a duty to indemnify Plaintiff AEP2 for the withdrawal liability incurred by Plaintiff when the assets of AEP2's predecessor, 2AM Group, LLC, were sold in 2014 to Sustained Quality, LLC. Further on the same day (February 21), Mr. Wallace sent a date stamped copy of the Summons & Complaint that Plaintiff had filed against BMW via email to Mr. Spitaleri which clearly reflected that the original Summons & Complaint were filed on February 8, 2017.

In Paragraph 6 of Spitaleri's second affidavit, he states that the Complaint was forwarded to him on February 13, 2017. Spitaleri also admitted that Mr. Wallace emailed a copy of the Complaint to him on February 21, per his request. However, BMW and Mr. Spitaleri contend that the Complaint was "lost in the proverbial shuffle" and/or was not assigned to outside counsel for

a prompt response because of a "clerical error." This Court finds that neither excuse constitutes good cause under Rule 55, SCRPC.

According to BMW, its failure to answer the Complaint was due to a minor technical error. See Defendant's Motion to Set Aside Default, at 4, "Defendant's conduct amounts only to an omission caused by a clerical person's carelessness." However, the so-called "clerical person" was in truth BMW's own in-house legal counsel who was charged with handling the company's legal process. As is apparent from Mr. Spitaleri's affidavits, his job at BMW's corporate counsel's office² was to assign law suits against BMW to outside counsel for defense. Even if the first copy of the Summons and Complaint had been "lost," Mr. Spitaleri was placed on inquiry notice when he fortuitously got the second copy of the Complaint via email from Mr. Wallace on February 21. There is no basis in the record for him to have been "confused" or to have caused him not to take the reasonable step of immediately ascertaining the date of service. This case does not involve mere innocuous "clerical error." Despite repeatedly receiving copies of the Summons and Complaint, Mr. Spitaleri elected to ignore the legal process served on his client; he was careless in the extreme.

The facts indicate that instead of acting diligently, Mr. Spitaleri turned a blind eye to his job functions and to the Summons and Complaint in this case, despite being twice copied with the legal process and despite being a lawyer who was charged by BMW with handling suits against BMW.³ Whatever intra-corporate protocols BMW had for handling filed pleadings were ignored.

² There are 15 BMW corporate counsel at the BMW headquarters in New Jersey.

³ In the first Spitaleri affidavit, he states that BMW has "internal requirements and protocols in place to facilitate timely responses to legal process" (Paragraph 5). BMW did not provide a copy of such protocols or explain how they applied to this case or how they were not followed.

Local South Carolina counsel, Ashley Abel, had no role to play in the default of BMW, as the affidavits clearly indicate that Abel was told by Spitaleri that service of the Complaint was on February 21. There is no reason to believe that Mr. Spitaleri made any diligent effort to ascertain when service was effected. BMW's corporate legal office never contacted its agent for service CT Corporation, the Clerk of Court of Charleston County, or Plaintiff's counsel to learn the date of service. Contact with any of these would have been a simple and quick way to ascertain that service was on February 10. Mr. Spitaleri clearly turned a blind eye to the obvious, despite having the contents of the Complaint explained to him and despite receiving the Complaint on February 13 and February 21. If Mr. Spitaleri misfiled the suit papers served on him by Plaintiff and emailed to him by Mr. Wallace, that misunderstanding or misfiling does not equal good cause for relief from entry of default. BMW has no good cause for getting relief under Rule 55.

**APPLICABLE STANDARD FOR RELIEF
FROM AN ENTRY OF DEFAULT UNDER RULE 55**

Our Supreme Court recently reiterated the standard for a party seeking relief from an entry of default. In White Oak Manor, Inc., v. Lexington Insurance Company, 407 S.C. 1, 753 S.E.2d 587 (2014), our Supreme Court ruled as follows:

The standard for granting relief from an entry of default under Rule 55(c) is "mere good cause." "This standard requires a party seeking relief from an entry of default under rule 55(c) to provide an explanation for the default and give reasons why vacation of the default entry would serve the interests of justice." Sundown Operating Co. v. Intedge Indus., Inc., 383 S.C. 601, 607, 681 S.E.2d 885, 888 (2009).

'Once a party has put forth a satisfactory explanation for the default, the trial court must also consider: (1) the timing of the motion for relief; (2) whether the defendant has a meritorious defense; and (3) the degree of prejudice to the Plaintiff if relief is granted.' *Id.* at 607-08, 681 S.E.2d at 888. (emphasis added).

In the White Oak case, the circuit court found and concluded that the defendant had provided no reasonable explanation for why it failed to respond to the initial complaint and noted that the only excuse offered was that Defendant Lexington had “lost the pleadings.” The circuit court concluded that ground was insufficient and denied the motion.

On appeal to the Court of Appeals, the decision was reversed. Our Supreme Court reversed the Court of Appeals opinion and affirmed the circuit court’s order denying the motion to set aside the default. In that case, Defendant Lexington had taken the position that it had replied promptly after discovering the default, that it had presented evidence of meritorious defense and alleged that the Plaintiff would not suffer prejudice if the relief was granted. The Supreme Court nonetheless affirmed the lower court order, finding that there was no error in the lower court’s holding that losing the complaint was not good cause and that the circuit court acted within its discretion in concluding that losing a complaint was not a satisfactory explanation for failing to timely respond.

BMW finds itself in a dilemma created by its own in-house counsel’s failure to make any one of three inquiries that would have led him to know that service was on February 10. BMW filed notice of removal 43 days after service. As the moving party seeking relief from default, BMW has the burden of providing an explanation for the default.⁴ It has not discharged that burden.

As explained by the Supreme Court of South Carolina in White Oak Manor, id., a determination of “good cause” under Rule 55, SCRPC, requires first that the defaulting party must

⁴ The June 12, 2007, affidavit of Mr. Spitaleri claims that he was “confused” by the fact that the Complaint in this case was similar to the deposition subpoena which Bruce Wallace had served on BMW in the Buxton case. Spitaleri’s affidavit says he is responsible for “managing litigation brought against BMW” (paragraph 1). He clearly should know the difference between a subpoena in AEP2, LLC v. Buxton (Case No. 2016-CO-10-02014) and a Complaint in AEP2 vs. BMW North America (Case No. 2017-CP-10-00644). Among other things, the defendants and case numbers are totally different. I find and conclude that there was no basis upon which BMW’s general counsel could have been confused. There is no support in this record for BMW’s contention that there is good cause under Rule 55.

provide a justifiable explanation for the default and give reasons why vacation of the default entry would serve the interests of justice. In the instant case, BMW has failed to show good cause under Rule 55 and this Court so finds and concludes.

The White Oak case is the culmination of many appellate decisions in South Carolina where our appellate courts have steadfastly applied Rule 55, SCRPC, to reject motions to set aside default where the defaulting party has not been diligent in responding timely to lawsuits. In an earlier case, Roche v. Young Brothers, Inc., 318 S.C. 207, 456 S.E.2d 897 (1995), the Supreme Court ruled that "losing a summons and complaint within the corporation" was not a ground to set aside default. Id. at 212, 456 S.E.2d at 900. In that case, the Supreme Court reinstated the entry of default and remanded the case for a damages hearing. The ruling of Roche makes it clear that our Supreme Court has already established that the excuse that a complaint was "lost within a corporation" is not good cause under Rule 55.

Being careless in handling suit papers does not equal good cause for relief from default. In Richardson v. PV, Inc., 383 S.C. 610, 682 S.E.2d 263 (2009), the Supreme Court held that the insurance company's negligence in failing to timely answer was imputed to the insured and was not "good cause." The courts in this state have consistently held that "the negligence of an attorney or an insurance company is imputable to a defaulting litigant." Richardson, 682 S.E.2d at 267, citing Roberts v. Peterson, 292 S.C. 149, 355 S.E.2d 280 (Ct.App. 1987). In Roberts, a motion to set aside was filed two months after entry of default; the lower court order finding no "good cause" and denying the motion was affirmed.

In Sundown Operating Co. v. Intedge Industries, Inc., 383 S.C. 601, 681 S.E.2d 885 (2009), the defendant forwarded the complaint to its insurance agent two weeks after notifying the agent

of the suit. The lower court denied the motion to set aside default. The Court of Appeals affirmed, and the Supreme Court affirmed on the ground that the defaulting defendant failed to show good cause. It specifically ruled as follows:

“... we do not believe that petitioner meets even the most minimal showing of good cause and is therefore not entitled to relief from the entry of default.” *Id.* at 607, 681 S.E.2d 888 (emphasis added).

It is clear from the four decisions of our Supreme Court cited above, covering 1995 through 2014, that BMW’s motion is based on facts (intra-corporate negligence) that do not constitute good cause. BMW has not presented to this Court a single reported case supporting relief from default where the defaulting party contended the papers were “lost in the proverbial shuffle.”

Our appellate courts have consistently held that if the trial court determines that the defaulting party has failed to establish a satisfactory explanation for the default, its decision will not be reversed for failing to make a specific finding of fact on the record for each of the three factors identified in Sundown Operating Co. v. Intedge Indus., Inc., 383 S.C. 601, 607, 681 S.E.2d 885, 888 (2009),⁵ if there is sufficient evidentiary support on the record for the finding of the lack of good cause. *Id.* at 608.

The affidavit of Bruce Wallace, submitted by Plaintiff, is most telling. He had a 30-minute telephone call with BMW’s in-house counsel more than two weeks before BMW’s Answer was due in which he fully explained to BMW counsel why he believed it was liable to indemnify Plaintiff and how he expected to depose BMW’s in-house lawyer on that issue. In the instant case, the good cause requirement has not been met; BMW has established no satisfactory explanation for the default. BMW’s neglect was inexcusable.

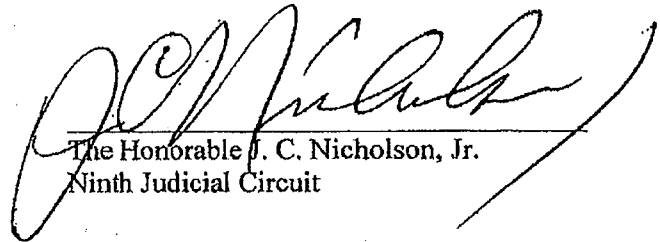
⁵ In that case, the Supreme Court provided that once a party puts forth a satisfactory explanation for the default, the next step for the trial court is to also consider: “(1) the timeliness of the motion for relief; (2) whether the defendant has a meritorious defense; and, (3) the degree of prejudice to the Plaintiff if relief is granted.” *Id.* at 888.

The Plaintiff's motion for a damages hearing is granted. This Court will set a hearing in the next sixty (60) days after conferring with counsel for the parties.

THEREFORE, IT IS ORDERED as follows:

- (a) Good cause to set aside the default has not been shown and BMW's motion to set aside the entry of default is therefore denied;
- (b) Plaintiff's motion to set a damages hearing is granted.

AND IT IS SO ORDERED.



The Honorable J. C. Nicholson, Jr.
Ninth Judicial Circuit

Charleston, S.C.
July 20, 2017

AEP2, LLC, f/k/a 2AM Group, LLC
PLAINTIFF(S)

BMW of North America
DEFENDANT(S)

| | |
|---------------|--|
| Submitted by: | Attorney for : <input type="checkbox"/> Plaintiff <input type="checkbox"/> Defendant |
| | or <input type="checkbox"/> Self-Represented Litigant |

DISPOSITION TYPE (CHECK ONE)

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

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

IT IS ORDERED AND ADJUDGED: See attached order (formal order to follow) Statement of Judgment by the Court: Defendant's Motion for Reconsideration filed on August 8, 2017, and Defendant's Motion to Alter or Amend Judgment or for Relief from Judgment, filed on August 9, 2017, are respectfully denied without a rehearing.

ORDER INFORMATION

This order ends does not end the case.

Additional Information for the Clerk : _____

INFORMATION FOR THE JUDGMENT INDEX

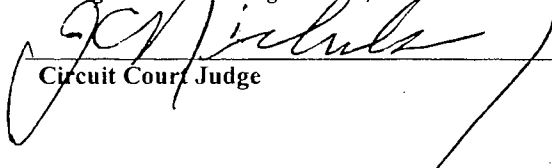
Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

| Judgment in Favor of (List name(s) below) | Judgment Against (List name(s) below) | Judgment Amount To be Enrolled (List amount(s) below) |
|--|--|---|
| N/A | | |
| If applicable, describe the property, including tax map information and address, referenced in the order: N/A | | |

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

Note: Title abstractors and researchers should refer to the official court order for judgment details.

E-Filing Note: In D-Filing counties, the Court will electronically sign this form using a separate electronic signature page.


Circuit Court Judge

2117
Judge Code

09/28/2017
Date

FILED
2017 OCT -4 AM 11:50
JULIE A. STRONG
CLERK OF COURT

For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 20____ and a copy mailed first class or placed in the appropriate attorney's box on this _____ day of _____, 20____ to attorneys of record or to parties (when appearing pro se) as follows:

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT

Court Reporter:

E-Filing Note: In E-Filing counties, the date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgement to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.

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

FORM 4

JUDGMENT IN A CIVIL CASE

CASE NO. 2017- CP-10-0644

AEP2, LLC f/k/a 2AM GROUP LLC

BMW OF NORTH AMERICA, LLC

PLAINTIFF(S)

DEFENDANT(S)

| | |
|---------------|--|
| Submitted by: | Attorney for : <input type="checkbox"/> Plaintiff <input type="checkbox"/> Defendant |
| | or <input type="checkbox"/> Self-Represented Litigant |

DISPOSITION TYPE (CHECK ONE)

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

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

IT IS ORDERED AND ADJUDGED: See attached order (formal order to follow) Statement of Judgment by the Court: Order of judgment on damages hearing

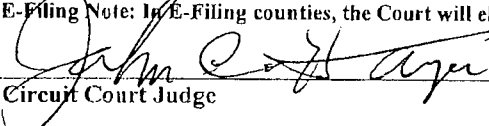
ORDER INFORMATION

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

| INFORMATION FOR THE JUDGMENT INDEX | | |
|--|--|--|
| Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below. | | |
| Judgment in Favor of (List name(s) below) | Judgment Against (List name(s) below) | Judgment Amount To be Enrolled (List amount(s) below) |
| AEP2, LLC f/k/a 2AM GROUP LLC | BMW OF NORTH AMERICA, LLC | \$ 647,309.06 |
| | | \$ |
| | | \$ |
| If applicable, describe the property, including tax map information and address, referenced in the order: | | |

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

E-Filing Note: In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.


 Circuit Court Judge

2017
 Judge Code

10/30/17
 Date

FILED
 2017 NOV -2 PM 2:15
 JULIE J. ADAMS
 CLERK OF COURT

STATE OF SOUTH CAROLINA)
)
 COUNTY OF CHARLESTON)
)
 AEP2, LLC f/k/a 2AM GROUP, LLC,)
)
 Plaintiff,)
)
 v.)
)
 BMW OF NORTH AMERICA, LLC,)
)
 Defendant.)
 _____)

IN THE COURT OF COMMON PLEAS
 Civil Action No. 2017-CP-10-0644

ORDER OF DEFAULT JUDGMENT

FILED
 2017 NOV -2 PM 2:15
 JUDITH ARMSTRONG
 CLERK OF COURT

This matter came before the Court for a damages hearing on October 12, 2017. Present at the hearing were counsel for the parties, John P. Freeman, Esquire, for the plaintiff, and Ashley B. Abel, Esquire, and M. Dawes Cooke, Jr., Esquire, for the defendant. By previous Orders of this Court, the motion of BMW of North America, LLC (“BMW”) to set aside the entry of default was denied (Order of Honorable J. C. Nicholson dated July 21, 2017), and BMW’s motions to reconsider and to alter or amend dated September 8, 2017 were also denied (Order of Honorable J. C. Nicholson dated September 28, 2017).

The only issue to come before this Court at the hearing was the amount of damages owed by BMW to Plaintiff AEP2, LLC (“AEP”) by virtue of BMW’s default in responding to the Complaint.

Plaintiff presented two witnesses on the issue of damages, Denise Haden, Executive Assistant of plaintiff company, and Dr. Oliver G. Wood, Jr., economist. This Court took the testimony of both witnesses and allowed BMW to cross-exam each witness. This Court finds that both witnesses were competent and provided relevant, convincing testimony.




Based on the record of this case, BMW is deemed to have admitted the allegations of the Complaint in which AEP alleges that BMW owes AEP a duty to indemnify it for all amounts that AEP paid in withdrawal liabilities (an amount in excess of \$605,000) as the result of its sale of assets to a third party (Sustained Quality, LLC) in 2014.

This Court finds that AEP made payments to the Western Conference Teamsters Pension Trust for the withdrawal liability which it incurred as follows:

| | | |
|-----|--------------------|--------------|
| (a) | January 12, 2015 | \$24,684.85 |
| (b) | February 17, 2015 | \$24,684.85 |
| (c) | March 11, 2015 | \$24,684.85 |
| (d) | April 16, 2015 | \$24,684.85 |
| (e) | May 11, 2015 | \$24,684.85 |
| (f) | June 11, 2015 | \$24,684.85 |
| (g) | July 6, 2015 | \$24,684.85 |
| (h) | August 10, 2015 | \$24,684.85 |
| (i) | September 18, 2015 | \$24,684.85 |
| (j) | November 18, 2015 | \$24,684.85 |
| (k) | November 18, 2015 | \$24,684.85 |
| (l) | December 7, 2015 | \$24,684.85 |
| (m) | January 4, 2016 | \$309,450.86 |

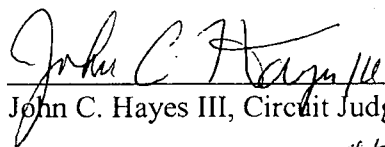
AEP's payments for the withdrawal liabilities that it incurred to the pension trust totaled \$605,669.06. This Court finds and concludes that plaintiff's payments were for amounts that are sums certain (i.e., liquidated amounts) and that AEP is entitled to prejudgment interest under New Jersey law. The Court determines that interest should run on the amount of withdrawal liability to be indemnified, \$605,669.06 from the date of plaintiff's first payment, which was made on January 12, 2015. The amount of prejudgment interest, calculated at an interest rate of 2.5%, is thus determined to be \$41,640.



THEREFORE IT IS ORDERED that Plaintiff AEP2, LLC f/k/a 2AM GROUP, LLC, is entitled to judgment against BMW of North America, LLC for damages asserted as a result of the actions in the Complaint as of October 12, 2017, for damages and prejudgment interest.

IT IS ALSO ORDERED that judgment in favor of Plaintiff AEP2, LLC against BMW of North America, LLC be entered in the total amount of \$647,309.06. The Clerk of Court shall enter judgment against BMW of North America, LLC in this amount.

AND IT IS SO ORDERED.



John C. Hayes III, Circuit Judge

HC

Charleston, South Carolina
October 13, 2017

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

FORM 4

JUDGMENT IN A CIVIL CASE
 CASE NO. 2017- CP-10-0644

AEP2, LLC f/k/a 2AM GROUP LLC

BMW OF NORTH AMERICA, LLC

PLAINTIFF(S)

DEFENDANT(S)

| | |
|---------------|--|
| Submitted by: | Attorney for : <input type="checkbox"/> Plaintiff <input type="checkbox"/> Defendant |
| | or <input type="checkbox"/> Self-Represented Litigant |

DISPOSITION TYPE (CHECK ONE)

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

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

IT IS ORDERED AND ADJUDGED: See attached order (formal order to follow) Statement of Judgment by the Court: Order of judgment on damages hearing

ORDER INFORMATION

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

| INFORMATION FOR THE JUDGMENT INDEX | | |
|--|--|--|
| Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below. | | |
| Judgment in Favor of (List name(s) below) | Judgment Against (List name(s) below) | Judgment Amount To be Enrolled (List amount(s) below) |
| AEP2, LLC f/k/a 2AM GROUP LLC | BMW OF NORTH AMERICA, LLC | \$ 633,206.06 |
| | | \$ |
| | | \$ |
| If applicable, describe the property, including tax map information and address, referenced in the order: | | |

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

E-Filing Note: In E-filing counties, the Court will electronically sign this form using a separate electronic signature page.

John H. Hager
 Circuit Court Judge

2017
 Judge Code

11/26/17
 Date

FILED
 2017 NOV 27 AM 9:40
 JULIE J. ANASTASIOU
 CLERK OF COURT

STATE OF SOUTH CAROLINA)
)
 COUNTY OF CHARLESTON)
)
 AEP2, LLC f/k/a 2AM GROUP, LLC,)
)
 Plaintiff,)
)
 v.)
)
 BMW OF NORTH AMERICA, LLC,)
)
 Defendant.)

IN THE COURT OF COMMON PLEAS
 Civil Action No. 2017-CP-10-0644

ORDER OF DEFAULT JUDGMENT

FILED
 2017 NOV 27 AM 9:39
 JULIE M. GIBBONS
 CLERK OF COURT
 BY _____

This matter came before the Court for a damages hearing on October 12, 2017. Present at the hearing were counsel for the parties, John P. Freeman, Esquire, for the plaintiff, and Ashley B. Abel, Esquire, and M. Dawes Cooke, Jr., Esquire, for the defendant. By previous Orders of this Court, the motion of BMW of North America, LLC (“BMW”) to set aside the entry of default was denied (Order of Honorable J. C. Nicholson dated July 21, 2017), and BMW’s motions to reconsider and to alter or amend dated September 8, 2017 were also denied (Order of Honorable J. C. Nicholson dated September 28, 2017).

The only issue to come before this Court at the hearing was the amount of damages owed by BMW to Plaintiff AEP2, LLC (“AEP”) by virtue of BMW’s default in responding to the Complaint.

Plaintiff presented two witnesses on the issue of damages, Denise Haden, Executive Assistant of plaintiff company, and Dr. Oliver G. Wood, Jr., economist. This Court took the testimony of both witnesses and allowed BMW to cross-exam each witness. This Court finds that both witnesses were competent and provided relevant, convincing testimony.



Based on the record of this case, BMW is deemed to have admitted the allegations of the Complaint in which AEP alleges that BMW owes AEP a duty to indemnify it for all amounts that AEP paid in withdrawal liabilities (an amount in excess of \$605,000) as the result of its sale of assets to a third party (Sustained Quality, LLC) in 2014.

This Court finds that AEP made payments to the Western Conference Teamsters Pension Trust for the withdrawal liability which it incurred as follows:

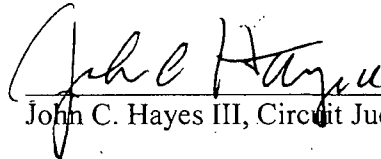
| | | |
|-----|--------------------|--------------|
| (a) | January 12, 2015 | \$24,684.85 |
| (b) | February 17, 2015 | \$24,684.85 |
| (c) | March 11, 2015 | \$24,684.85 |
| (d) | April 16, 2015 | \$24,684.85 |
| (e) | May 11, 2015 | \$24,684.85 |
| (f) | June 11, 2015 | \$24,684.85 |
| (g) | July 6, 2015 | \$24,684.85 |
| (h) | August 10, 2015 | \$24,684.85 |
| (i) | September 18, 2015 | \$24,684.85 |
| (j) | November 18, 2015 | \$24,684.85 |
| (k) | November 18, 2015 | \$24,684.85 |
| (l) | December 7, 2015 | \$24,684.85 |
| (m) | January 4, 2016 | \$309,450.86 |

AEP's payments for the withdrawal liabilities that it incurred to the pension trust totaled \$605,669.06. This Court finds and concludes that plaintiff's payments were for amounts that are sums certain (i.e., liquidated amounts) and that AEP is entitled to prejudgment interest under New Jersey law. The Court determines that interest should run on the amount of withdrawal liability to be indemnified, \$605,669.06 from the date plaintiff's payments were made. The amount of prejudgment interest, calculated at an interest rate of 2.25%, is thus determined to be \$ 27,537.

THEREFORE IT IS ORDERED that Plaintiff AEP2, LLC f/k/a 2AM GROUP, LLC, is entitled to judgment against BMW of North America, LLC for damages asserted as a result of the actions in the Complaint as of October 12, 2017, for damages and prejudgment interest.

IT IS ALSO ORDERED that judgment in favor of Plaintiff AEP2, LLC against BMW of North America, LLC be entered in the total amount of \$633,206.06. The Clerk of Court shall enter judgment against BMW of North America, LLC in this amount.

AND IT IS SO ORDERED.



John C. Hayes III, Circuit Judge

Charleston, South Carolina
October 7th 2017
Douch

STATE OF SOUTH CAROLINA)

COURT OF COMMON PLEAS

COUNTY OF CHARLESTON)

Civil Action No: 17-CP-10-1044

AEP2, LLC f/k/a 2AM GROUP,
LLC,

Plaintiff;

v.

BMW OF NORTH AMERICA,
LLC;

Defendant.


**SUMMONS
(JURY TRIAL DEMANDED)**

FILED
2017 FEB - 8 PM 2:58
JULIE J. ANDERSON
CLERK OF COURT

TO THE ABOVE NAMED DEFENDANT AND HIS ATTORNEY:

YOU ARE HEREBY SUMMONED and required to answer the Complaint in this action of which a copy is herewith served upon you, and to serve a copy of your Answer on the subscriber at his office, Post Office Box 190, Newberry, South Carolina, 29108, within thirty (30) days after the service hereof, exclusive of the day of such service; and if you fail to answer the Complaint within the time aforesaid, the Plaintiff will apply to the Court for the relief demanded in the Complaint.

POPE & HUDGENS
1508 College Street - PO Box 190
Newberry, South Carolina 29108
Tel: (803) 276-2532; Fax: 803-276-8684

By: 
Thomas H. Pope, III - SC Bar #4508
Attorneys for Plaintiff

February 7, 2017

STATE OF SOUTH CAROLINA)

COURT OF COMMON PLEAS

COUNTY OF CHARLESTON)

Civil Action No. 17-040-044

AEP2, LLC f/k/a 2AM GROUP, LLC)

Plaintiff,

v.

BMW OF NORTH AMERICA, LLC)

Defendant.

COMPLAINT
(JURY TRIAL DEMANDED)

FILED
2017 FEB - 8 PM 12:58
CLERK OF COURT
BMW

Plaintiff, AEP2, LLC f/k/a 2AM Group, LLC (referred to as "Plaintiff"), brings this civil action against the Defendant, BMW of North America, LLC (referred to as "BMW"), for declaratory and other relief arising out of a contractual indemnity obligation owed by BMW. Plaintiff respectfully complains and alleges as follows.

General Allegations

1. Plaintiff is a limited liability company organized and existing under the laws of the State of South Carolina and having its office in Charleston County, South Carolina.

2. Defendant BMW is a Delaware limited liability company, with its principal place of business at 300 Chestnut Ridge Road, Woodcliff Lake, NJ, 07675.

3. In 2011, Plaintiff entered into a Services Agreement with BMW. Attached as Exhibit 1 is a copy of the Services Agreement. Under section 16(c) of the Services Agreement, BMW is obligated to indemnify Plaintiff for any potential withdrawal liability Plaintiff incurred to the Western Conference of Teamsters Pension Fund. This agreement was executed in November 2011 in Charleston County, South Carolina.

4. Attached as Exhibit 2 is the notice received by Plaintiff from the Western Conference of Teamsters Pension Fund. The Exhibit 2 notice reflects that Plaintiff is being assessed liability of \$605,669.06 arising out of the potential withdrawal liability for which BMW owes an indemnity obligation. The union contract and related pension obligation assumed by Plaintiff when it became a BMW supplier saddled Plaintiff with potential and actual withdrawal liability of over \$605,000. Indemnity is thus called for under Exhibit 1, section 16(c).

5. To date, BMW has not provided indemnity under section 16(c).

COUNT I
(Declaratory Judgment)

6. Paragraphs 1 through 5 are incorporated by reference.

7. There is an actual and justiciable controversy between the parties over the existence and extent of BMW's indemnity duty owed to Plaintiff.

8. By reason of this actual and justiciable controversy, Plaintiff is entitled to a declaratory judgment resolving all issues, claims and disputes related to its indemnity rights under Exhibit 1, section 16(c).

COUNT II
(Damages)

9. Plaintiff repeats Paragraphs 1 through 8.

10. Plaintiff is informed and believes that under the said agreement BMW owes indemnity to Plaintiff in an amount up to \$605,669.06.

11. By virtue of the foregoing, Plaintiff is entitled to judgment against BMW for the amount established, plus prejudgment interest and costs.

WHEREFORE, Plaintiff prays for relief against Defendant BMW as follows:

- 1: Entry of an Order declaring the amount of BMW's indemnity obligation to Plaintiff and ordering payment thereof;
- 2: Entering judgment in favor of Plaintiff against BMW for actual damages, plus prejudgment interest;
- 3: Costs of this action; and;
- 4: Other further relief as is just and proper.

By: 

Thomas H. Pope III - SC Bar No. 4508

POPE AND HUDGENS, P.A.

Post Office Box 190

1508 College Street

Newberry, SC 29108

Telephone: 803-276-2532; Fax: 803-276-8684

Email: thpope@popeandhudgens.com

John P. Freeman - SC Bar No. 2128

2329 Wilmot Avenue

Columbia, SC 29205-3164

Telephone: 803-254-4667; Fax: 803-753-9870

Email: jfremanusc@gmail.com

Attorneys for Plaintiff

February 7, 2017

SERVICES AGREEMENT - ONTARIO RDC

1. RECITAL

- a. This Agreement, dated as of _____ (the Effective Date) is between BMW of North America, LLC a limited liability company, with its principal place of business at 300 Chestnut Ridge Road, Woodcliff Lake NJ, 07675 (BMW NA) and 2AM Group, LLC ("2AM" or "SUPPLIER"), a limited liability company with its principal place of business at 201 Commerce St., Duncan, SC, 29334.
- b. This RDC location in Ontario, CA has been previously operated solely by BMW N.A. under a previous collective bargaining agreement between BMW NA and Local 495, as defined below, such agreement to have expired on August 31, 2011; said agreement was extended through February 28, 2012.
- c. BMWNA has offered to 2AM and 2AM has accepted, the opportunity to supervise and manage operations and logistics management at the above location, as such, 2AM has agreed to assume and become a signatory to the new CBA (as defined below) with Local 495.

2. TERM

- a. The term of this agreement shall commence on January 1, 2012 and shall expire on December 31, 2016. It is the intent of the parties that this services agreement ("Services Agreement") be coterminous with the collective bargaining agreement ("CBA") between 2AM and Teamsters Automotive, Industrial and Allied Local 495 ("Local 495"), said agreement dated _____, 2011. As such, this Services Agreement shall commence on the effective date of the CBA and shall terminate and expire on the date of expiration of the CBA, unless terminated earlier consistent with the terms and conditions set forth herein. The terms and conditions of the CBA shall be incorporated hereunder and attached hereto, said CBA to be attached as Exhibit A.
- b. The parties agree that in the event any term or provision set forth in this Service Agreement is in conflict with a term or provision set forth in the aforementioned CBA, the applicable term or provision set forth in the CBA shall be supersede and pre-empt the contradictory term in this Service Agreement.
- c. Notwithstanding the above, in the event BMW should, in its absolute discretion to do so, determine to relocate the PDC (as defined in Section 3 below) to a location other than the present PDC site set forth in Section 3 below, 2AM shall be afforded the opportunity to relocate and supervise, manage and administer logistics and fulfillment operations at the PDC at such new location for the term of the Agreement, provided 2AM shall not be in default of the terms and conditions of this Agreement; except, in the event BMW shall determine, in its absolute discretion, to merge operations of the PDC with operations at BMW's parts distribution facility located in Stockton CA at one location, upon the date that operations cease and terminate at the PDC, this Agreement shall conclude, expire and terminate. In the event of such merger, provided 2AM is not in default of the terms and conditions of this Agreement, 2AM shall be afforded the opportunity to respond to a request for proposal to operate, administer and manage logistics and fulfillment operations at said new, consolidated parts distribution facility.

3. SCOPE

Exhibit I

- a. 2AM shall be appointed to be the designated operator for the purpose of supervising, managing and administering logistics and fulfillment operations at BMW's parts distribution facility ("PDC"), located at 1150 S. Milliken Ave., Ontario, CA. For the purposes of this Agreement, SUPPLIER shall perform the functions and duties identified in BMW's RFP dated _____ ("RFP"); and to realize continuous improvement in providing the services. SUPPLIER shall use commercially reasonable efforts to look for ways to improve the efficiency of the services provided and will implement identified efficiency, even though identified efficiency is not outlined and described in the RFP. The purpose of SUPPLIER is to provide the general services identified in the RFP in the most commercially efficient and effective manner possible. BMW NA is entering into this Agreement with SUPPLIER because SUPPLIER possesses the knowledge and expertise to provide the services described in the RFP. If SUPPLIER takes exception to any additional responsibilities and efficiencies not described in the RFP, then SUPPLIER can request a meeting with BMW NA. The RFP shall be attached hereto and incorporated hereunder as Exhibit B.
- b. Any mutually-agreed-upon attachments issued by BMW NA on and after the date of this Agreement(s) shall expressly reference this Agreement or its terms and conditions.
- c. Quick and smooth communications are of significant importance to both BMW NA and SUPPLIER. This refers to answering questions, supplying documents and responding to complaints during the process of providing the services. To the extent that BMW NA may be in a position to resolve any operational problems, SUPPLIER will inform BMW NA.
- d. SUPPLIER is responsible to ensure that its duties under this Agreement shall continue without interruption. If SUPPLIER is unable to ensure that its duties under this Agreement continue without interruption, SUPPLIER shall be considered in substantial breach of this Agreement and BMW NA will have the right to terminate this Agreement. SUPPLIER will pay any costs arising from such a breach.
- e. If SUPPLIER is providing product(s) along with Services, this Agreement shall also include and incorporate by reference BMW NA's Purchase Order Terms and Conditions, if so appropriate, whether or not BMW NA's Purchase Order Terms and Condition is expressly referenced hereunder. Said Purchase Order Terms and Conditions for Investments and Consumables are detailed in Exhibit C attached hereto and incorporated hereunder. If there is any conflict between Exhibit C, and the terms of this Agreement, the terms of this Agreement apply.
- f. Unless otherwise agreed to by both parties in writing, any terms and Condition in SUPPLIER's forms that is inconsistent with or additional to any term or condition in this Agreement is hereby material and is objected to, and shall not be applicable to a transaction within the scope of this Agreement.

4. SAFETY AND HOUSEKEEPING

- a. If SUPPLIER is performing the services at BMW NA, SUPPLIER has the obligation of maintaining a high level of cleanliness in all areas of its operating environment. SUPPLIER shall perform audits to evaluate housekeeping conditions in the facilities used by SUPPLIER and shall immediately advise BMW NA in writing of any physical safety hazard related to facilities or equipment provided by BMW NA.

- b. SUPPLIER's personnel performing and providing services at any BMW NA facility must attend BMW NA's Safety Orientation prior to the placement of any SUPPLIER employees at BMW NA.
- c. SUPPLIER is responsible to ensure SUPPLIER's personnel are aware and knowledgeable of BMW NA's safety requirements. SUPPLIER can coordinate safety meetings at any time with BMW NA.
- d. If SUPPLIER will be working on-site at BMW NA for a period of greater than 90 days, SUPPLIER shall maintain on-site at BMW NA a current OSHA 300 Log (summary of workplace injuries and illnesses covering SUPPLIER's employees) for review by BMW NA as requested.
- e. SUPPLIER will also provide to BMW NA upon request, SUPPLIER's current Worker's Compensation Experience Modification Factor for SUPPLIER's company.

5. WARRANTY

- a. SUPPLIER represents and warrants that it may enter into this Agreement, that it has obtained all necessary approvals to do so and that all Services rendered hereunder shall comply with all specifications and guidelines referenced in the Agreement and the attached RFP of this Agreement.
- b. All employees supplied by the SUPPLIER hereunder shall be qualified and competent, having all the skills and abilities necessary to perform the services specified in the RFP.
- c. SUPPLIER warrants that the service performed by and deliverables delivered by SUPPLIER shall be free from significant errors and from defects in workmanship and materials and shall be no less than common industry standards. SUPPLIER further warrants that the services to be performed by SUPPLIER shall be performed in a timely and professional manner by qualified SUPPLIER employees and will not violate or infringe upon the rights of third parties, including property, contractual employment, trade secrets, proprietary information, non-disclosure rights and any trademark, copyright or patent rights.

6. STAFF OF SUPPLIER

- a. SUPPLIER must ensure that all individuals working for SUPPLIER, including SUPPLIER's subcontractor(s) under this Agreement have all appropriate licenses, training and certifications necessary to perform the services.
- b. SUPPLIER employees must comply with all BMW NA rules, policies, orders and/or requests relating to performance, electronic communications, security, safety, appearance, dress and/or conduct and shall at all times respect and abide by the policies and codes of conduct, including without limitation those relating to alcohol, drugs, safety, security, smoking, controlled substances, and/or weapons. For any reason, or for no reason, upon BMW NA's request, any SUPPLIER employee will be promptly removed from the performance under this Agreement and may be restricted from further eligibility to work on BMW NA's premises.
- c. SUPPLIER shall ensure that qualified and trained staff is engaged for the services to be performed. SUPPLIER is responsible to ensure that it has engaged a sufficient number of personnel to satisfy its obligations, and if working on site at BMW NA that it has engaged a sufficient number of on-site management to supervise personnel.

- d. SUPPLIER will employ a progressive discipline matrix intended to correct sub-standard employee behavior and performance in the areas of safety, productivity, and quality standards.

7. COMPENSATION

- a. SUPPLIER will provide the services as specified in the Exhibit D, attached hereto and incorporated hereunder.
- b. The compensation rates, as identified in Exhibit D, will be reviewed as agreed to by BMW NA and SUPPLIER, but not more often than annually for any upward adjustment, unless specified differently in said attachment. SUPPLIER agrees to use all commercially reasonable efforts to employ methods to reduce the overhead and direct cost to ensure total billing compensation remains competitive.
- c. The parties agree and acknowledge that certain financial issues are still remaining outstanding, including, but not necessarily limited to, costs arising out of certain benefit and compensation costs, and the administrative support related to those issues arising out of the CBA. The parties agree that Exhibit D shall be amended, modified and updated within fifteen (15) business days of the date of execution of this Agreement to reflect the finalization of said costs.

8. ADJUSTMENT OF COMPENSATION

- a. Upon the occurrence of any of the acts or omissions listed below, there shall be an equitable downward adjustment of SUPPLIER's charges to fairly reflect the reduced value of the services provided. This downward adjustment shall be determined by mutual Agreement to the contracting parties. Pending final Agreement on the amount of such downward adjustment, BMWNA may deduct from the monthly invoicing the sum of fifty (\$50) dollars for each occurrence per day per incident. If no mutual Agreement is reached within two (2) months after deduction, the amount actually deducted by BMW NA shall be deemed acceptable to both parties. This section will include, but not be limited to, the following acts or omissions:
- i. Failure to provide the number of personnel in order to perform the Services as specified in the RFP.
 - ii. Failure to produce documentation concerning pre-employment drug testing and criminal background checks prior to assignment to BMW NA.
 - iii. Failure to furnish all equipment and material necessary for the performance of the services as specified in the Agreement.
 - iv. Failure to comply with BMW NA's safety requirements when on site at BMW NA.
 - v. Failure to assign correctly dressed employees.
 - vi. Nothing in this section shall limit the right of BMW NA to seek legal remedies in the event SUPPLIER non-performance results in actual damage(s) exceeding amount withheld from billing. Any failure on the part of BMW NA to require performance of the provisions of this section shall in no way affect the right of BMW NA to enforce the provisions on subsequent occurrences.

Notwithstanding the above, the implementation of the penalties and adjustments as set forth above in this Section 8 shall not be implemented until calendar year 2013, commencing on January 1, 2013.

9. PAYMENT AND INVOICING

- a. All rates for Services hereunder are listed in Exhibit D.
- b. If SUPPLIER submits any Invoice for charges that are three months or older, BMW NA has the right to refuse payment; provided however, that such invoice has not been previously presented to, or issues with respect to such invoice have not been previously addressed with BMW NA.
- c. SUPPLIER shall submit monthly invoices reflecting the charges as agreed to in Exhibit D. All such invoices shall be subject to review and approval by BMW NA. Within thirty (30) days after the receipt of the invoice by BMW NA, BMW NA shall pay SUPPLIER all invoiced items that are approved and undisputed.
- d. Payment will not be made unless a BMW NA purchase order number is referenced on the invoice. Invoices must be delivered to BMW NA's facility manager, and mailed to: BMW of North America, LLC, ATTN: Accounts Payable Department, 300 Chestnut Ridge Road, Woodcliff Lake, NJ, 07675.
- e. Should it become necessary for SUPPLIER employees to travel to other BMW NA sites, SUPPLIER shall schedule, arrange, approve, and procure all travel related requirements, billing those costs back to BMW during the month in which the travel is completed.

10. INSURANCE

- a. SUPPLIER shall procure and maintain insurance, in accordance with the amounts and coverages as set forth in this section, at SUPPLIER's sole expense, with reputable and financially responsible insurance companies having an A.M. Best rating of A- or better, insuring against any and all public liability, including injuries or death to SUPPLIER's employees or other persons and damage to property, arising from or related to the Services or SUPPLIER's performance hereunder and shall furnish to BMW NA certificates or memoranda of such insurance and renewals thereof signed by the issuing company or other information respecting such insurance at any time promptly upon request of BMW NA. Such certificates will list BMW NA as the certificate holder and provide for cancellation only subsequent to thirty days prior written notice to BMW NA.
- b. SUPPLIER shall show the following as minimum limits of insurance:
 - i. General liability (per occurrence, coverage to include completed and ongoing operations):
\$5,000,000.00
 - ii. Worker's Compensation (as defined by Florida law):
Statutory Limits
 - iii. Employer's Liability:
\$1,000,000.00

iv. Auto Liability (combined single limit per accident, covering all vehicles operated by: \$1,000,000.00)

c. BMW NA's examination of, or failure to request or demand, any evidence of insurance shall not constitute a waiver of this insurance requirement and the existence of any insurance shall not limit SUPPLIER's obligation under any provision hereof.

d. Additional Insured / Waiver of Subrogation

i. BMW of North America, LLC, their respective parent and/or subsidiary, related or affiliated companies, shall be listed as an Additional Insured with respect to liability arising from ongoing and completed operations performed under this Agreement by the SUPPLIER as respects General Liability, Excess Liability, and Auto Liability coverages.

ii. A waiver or subrogation, except for damages caused by BMW of North America's sole negligence, will be granted favoring BMW of North America, LLC, their respective parent and/or subsidiary, related or affiliated companies, and their agents, employees or assigns, for as respects General Liability, Excess Liability, and Auto Liability policies.

e. Nothing in this INSURANCE section shall be construed as limiting SUPPLIER's liability to BMW NA or as limiting BMW NA's rights or remedies against SUPPLIER.

11. BADGING/BUILDING REQUIREMENTS, DRUG FREE FACILITY, AND BACKGROUND CHECKS

a. BMW NA shall provide continuous access (but not exclusive access) to SUPPLIER on January 2, 2012 for carrying out its duties and responsibilities hereunder. BMW NA requires that its personnel and those personnel authorized by BMW NA be permitted to enter any and all facilities at any time, with or without advance notice. Keys to enter the facility, as well as security codes, shall be provided to the individuals named on Exhibit E, attached hereto and incorporated hereunder.

b. SUPPLIER is responsible for maintaining the facility in good working condition and will be responsible for repairing or replacing items that are damaged due to the actions of its employees. This includes, but is not limited to, damage occurring to storage racks, shelves, drawers, mezzanine units, dock doors, light fixtures, furniture, fences, bathrooms, and interior and exterior portions of the building, etc.

c. During the performance of Services, SUPPLIER agrees to prohibit SUPPLIER employee(s) and subcontractor employee(s) from engaging in the illegal use, sale, possession, transfer or purchase of drugs at any time; prohibit use or possession of alcohol on BMW NA premises and; prohibit SUPPLIER and subcontractor employee(s) from working under the influence of illegal drugs, controlled substances and alcohol. It is the specific responsibility of the SUPPLIER, and SUPPLIER agrees to monitor compliance with this obligation.

d. SUPPLIER's and subcontractor's employment policies shall provide for SUPPLIER's and subcontractor's right to test and discipline (up to and including terminating) its employees for use of illegal drugs, controlled substances, and alcohol. SUPPLIER and/or subcontractor shall, at SUPPLIER's expense, conduct illegal drug, controlled substance and alcohol testing on its employees performing Services, and furnish proof of negative test results to BMW NA if requested to do so.

e. As a minimum, all drug testing requirements for this Agreement shall be by a certified independent laboratory, not an on-site instant test. The test transaction shall follow the legally defensible chain of custody and quality standards that meet NIDA (National Institute on Drug Abuse) testing requirements. If on-site requirements will be less than ninety (90) days, drug testing can be a urinalysis test. If on-site requirements are more than ninety (90) days, the testing will be by means of hair analysis (radioimmunoassay) testing, and said testing will consist of all classes of substances mandated for screening by NIDA. The test will assure that the employee(s) is free of cocaine and crack, opiates such as heroin, PCP (angel dust), cannabinoids (marijuana), amphetamines, plus barbiturates and others. Notwithstanding the above, in the event the terms and provisions set forth above in this Section 11 (e) are in conflict with the provisions applicable to substance abuse testing set forth in the CBA, the terms and provisions of the CBA shall supersede and pre-empt the terms set forth in this Section 11 (e) herein.

f. SUPPLIER's employment policies shall provide for SUPPLIER's performance of pre-employment, annual, and reasonable cause controlled substance and alcohol testing and provide disciplinary measures (up to and including terminating) for its employees testing positive for use of controlled substances and alcohol:

i. Pre-employment: SUPPLIER shall not assign onto BMW NA's premises any SUPPLIER or subcontractor employee(s) without said employee having successfully passed illegal drug, controlled substance and alcohol testing and has furnished documentation to the BMW NA Facility Manager or designee that such employee has, within thirty (30) days prior to such assignment, successfully passed illegal drug, controlled substance and alcohol screening testing. Verification of the negative test shall be provided to BMW NA's Facility Manager or designee prior to the initial assignment of said employee. The drug testing results shall be presented at orientation or submitted to BMW NA no later than the afternoon prior to orientation. Failure to do so will prevent site access. SUPPLIER will maintain results of testing on file.

ii. Annual: SUPPLIER and subcontractor shall provide documented proof that on an annual basis SUPPLIER will randomly drug test 50% of all SUPPLIER and subcontractor employees assigned to the BMW NA premises and be able to provide documented proof that these employees have successfully passed an annual illegal drug, controlled substance and screening test within 365 days prior to the date of the request. If documented proof cannot be produced such employee shall be immediately removed from assignment to BMW NA.

iii. Reasonable Cause: Upon a reasonable cause, SUPPLIER and subcontractor shall under their existing policy, conduct illegal drug, controlled substance and alcohol testing on its employees performing services who are assigned to the BMW NA premises. ZAM shall test by urine, blood analysis or by hair analysis (radioimmunoassay) testing, and said testing will consist of all classes of substances mandated for screening by NIDA. The test will assure that the applicant is free of cocaine and crack, opiates such as heroin, PCP (angel dust), cannabinoids (marijuana), amphetamines, plus barbiturates and others.

g. BACKGROUND CHECKS: SUPPLIER must perform a criminal background check on all employees assigned to BMW NA for more than 90 days (including those of any SUPPLIER sub-contractor's) and must engage any person who has a felony conviction involving violence, theft, dishonesty, or other moral turpitude. General guidelines for rejecting SUPPLIER employees with prior criminal convictions are murder, assault and battery,

rape, child abuse, spousal abuse, manufacturing and distribution of drugs, or any convictions of violent nature. There are no statutes of limitation on violent crimes. SUPPLIER should maintain results of testing on file in case of an audit by BMW NA.

11. RETURN AND DEACTIVATION OF BADGES

1. SUPPLIER is responsible for the following:

- 1. Notifying BMW's facility manager whenever changes occur that require the badge to be deactivated or deleted from the system.**
- 2. Returning these badges to BMW NA. The badges can be returned in person to BMW's facility manager or can be mailed to: BMW NA RDC, 1150 South Milliken Ave., Ontario, CA.**

12. FORMER EMPLOYEES OF BMW NA

a. During the performance of this Agreement, SUPPLIER agrees to the following:

- i. SUPPLIER shall not have any former employee of BMW NA render any service at BMW NA without prior written authorization from the BMW NA.**

13. EQUAL OPPORTUNITY AND EMPLOYMENT LAWS AND REGULATIONS

a. During the performance of the Agreement, SUPPLIER agrees to the following:

- i. SUPPLIER will not discriminate against any employee or applicant for employment because of race, color, religion, sex, age, national origin, disability, or veteran status. SUPPLIER will ensure that employees and applicants for employment are treated without regard to their race, color, religion, sex, age, national origin, disability or veteran status. Such action shall include, but not be limited to, the following: employment, upgrading, demotion, or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. SUPPLIER agrees to post in conspicuous places, available to employees and applicants for employment, notices to be provided by an appropriate agency of the federal, state and local governments regarding nondiscrimination in employment.**
- ii. SUPPLIER will, in all future solicitations or advertisements for employees to perform services hereunder for BMW NA, state that all qualified applicants will receive consideration for employment without regard to race, color, religion, sex, age, national origin, disability or veteran status.**
- iii. SUPPLIER will comply with all state and federal employment laws, rules, regulations and orders.**
- iv. In the event of SUPPLIER's noncompliance with the Equal opportunity conditions of this Agreement or with any employment laws, rules, regulations or orders, BMW NA may cancel, terminate or suspend this Agreement in whole or in part.**

14. COMPLIANCE WITH LAWS

- a. During the performance of this Agreement, SUPPLIER agrees to fully comply with all laws, rules, regulations, and/or ordinances of all governments and all agencies thereof, and shall in all things hold BMW NA harmless from all costs, fines, penalties, expenses (including attorney's fees), and/or damages that may directly or indirectly arise as a result of SUPPLIER's failure or alleged failure to comply with any of same.
- b. SUPPLIER is responsible for complying with all employment, environmental, safety, health and all other legal requirements for its operations under this Agreement. BMW NA does not condone or encourage violations of law. If SUPPLIER observes that any activity required herein is at variance with applicable law, SUPPLIER shall immediately advise BMW NA in writing and any changes to the Services shall be mutually agreed upon. Otherwise, SUPPLIER is responsible for all costs, fines, penalties, or assessments attributable to violations of law, including those which may be assessed against BMW NA as a result of SUPPLIER's conduct of the Services or related activities performed by SUPPLIER hereunder.

15. WORK FOR HIRE

- a. Except as otherwise agreed, with respect to all tangible or intangible property that is created or generated by SUPPLIER personnel working solely and directly in the course of SUPPLIER's performance under this Agreement, including, but not limited to printed materials, artwork, plates, audiovisual materials, software, negatives, mechanicals, and photographs, SUPPLIER acknowledges and agrees that all results of work performed or goods supplied hereunder by employees and contractors of SUPPLIER whom are working solely and directly in support of BMW NA, whether created by or at the direction of SUPPLIER, constitute "works made for hire" which have been specially ordered or commissioned by BMW NA within the meaning of the United States Copyright Act (the "Copyright Act"). SUPPLIER further acknowledges and agrees that BMW NA is and shall be considered the author of such works for all purposes and the sole and exclusive owner throughout the world of all of the rights, including copyright, in and to the works arising from or created as a result of SUPPLIER's performance of services and/or provisions of goods hereunder. To the extent that the works or any part thereof shall be deemed by a court of competent jurisdiction or any government agency not to be a "work made for hire" within the meaning of the Copyright Act, the provisions of this Agreement shall control and, for the consideration set forth herein, SUPPLIER hereby irrevocably and absolutely assigns sets over and grants to BMW NA, its successors and assigns, all rights, title and interest in the works subject to any written limitations in a separate Agreement under which the goods are purchased. SUPPLIER also acknowledges and agrees that BMW NA shall be the sole and exclusive owner through the world of any and all patentable inventions, trade secrets, and technical know-how created by the SUPPLIER, or its employees or contractors, and of any and all trademarks and service marks, along with the associated goodwill generated by or arising solely and directly from SUPPLIER's performance hereunder. This paragraph specifically does not apply to any tangible or intangible property that is created or generated by those SUPPLIER personnel whom are not working solely and directly for BMW NA and which is created or generated as SUPPLIER's initiative but which may be used in support of BMW NA.

16. LIABILITY AND INDEMNIFICATION

- a. SUPPLIER assumes full and complete liability for all injuries to, or death of, any person including SUPPLIER's personnel and for damages to property, including property of BMW NA, arising from or associated with the

presence of SUPPLIER's personnel on BMW NA's premises in connection with the services furnished under this Agreement. SUPPLIER further agrees to defend, indemnify and hold harmless BMW NA, its partners, successors, assigns, heirs, legal representatives, officers, directors, employees and agents from all suits for such injuries, death or damages whether or not such claims are valid and all claims, losses, expenses including judgments, settlements and attorney's fees, or liabilities, injuries, damages, claims and suits whether legally liable or not, which may arise as a result of the breach of this Agreement or the conduct of SUPPLIER, its officers, employees, and agents in the course of or in connection with providing these services or the claims of any SUPPLIER employee or applicant relating to his or her employment. This obligation shall include, but not be limited to, the burden and expense of defending all claims, suits and administrative proceedings provided that counsel has relevant expertise and does not represent any party or interest adverse to or in competition with BMW NA or its affiliates, even if such claims, suits, or proceedings are groundless, false or fraudulent; and conducting all negotiations of any description, and paying and discharging, when and as the same become due, any and all judgments, penalties or other sums due against the indemnified person. BMW NA, at its sole expense, may employ additional counsel of its choice to associate with counsel representing SUPPLIER and the indemnified parties.

- b. Notwithstanding the above, BMW NA shall defend, indemnify and hold harmless SUPPLIER, its successors, assigns, heirs, legal representatives, officers, directors, employees and agents from all suits, claims, losses, expenses including judgments, settlements and attorney's fees, or liabilities, injuries, damages, claims and suits whether legally liable or not, which may arise out of criminal background checks as described in Sections 11 (f) and (g) and substance abuse screening as described in Sections 11 (c) and (d) above prior to the commencement of this Agreement, as set forth in Section 2 above.
- c. Notwithstanding the above, in the event there is any liability arising out of any potential withdrawal liability on the part of BMW NA to the Western Conference of Teamsters Pension Fund, BMW NA agrees to indemnify and hold 2Am harmless from and against such liability.
- d. The obligation of SUPPLIER under this paragraph shall survive the completion of all activities to be performed by SUPPLIER.
- e. In any and all claims under this INDEMNIFICATION section, the indemnification obligation shall not be limited in any way by any limitation on or for SUPPLIER or any subcontractor, under Worker's Compensation Acts, disability benefit acts or other employee benefit acts.
- f. SUPPLIER shall indemnify and hold BMW NA harmless from all liens and other encumbrances against the premises on account of debts or claims alleged to be due from SUPPLIER or his subcontractors to any person, including subcontractors, and, on behalf of BMW NA and in BMW NA's name, SUPPLIER will defend at its own expense any claims or litigation in connection therewith.
- g. SUPPLIER shall exercise reasonable care to provide warehouse management, supervision and operational expertise consistent with the highest standards and practices of the fulfillment industry consistent with the RFP and elsewhere in this Agreement. SUPPLIER shall be liable for any loss or injury to goods stored, however caused, resulting from the failure by SUPPLIER to exercise such care in regard to them as a reasonably careful warehouseman would exercise under like circumstances.

17. DRIVER'S REQUIREMENTS

a. To the extent that SUPPLIER and/or SUPPLIER's employee(s), agents, or other representative are on or present at any premises of BMW NA, or operating a vehicle owned or leased by BMW NA or its agents, affiliates (collectively BMW), or operating any other vehicle, SUPPLIER shall be and is responsible for the acts and omissions of SUPPLIER's employees, agents, or other representatives within or about the BMW premises and/or in BMW's vehicle(s) and agrees to indemnify and hold BMW harmless from liability for any claims or damages to property or injuries or death to persons arising out of negligence or misconduct of SUPPLIER's employees, agents, or other representatives in performance hereunder or other actions at the BMW premises and/or in BMW vehicle(s), including without limitation (1) the failure of any of SUPPLIER's employees, agents or other representatives to comply with all applicable rules and regulations (BMW or otherwise) governing security, maintenance and safety at or about the BMW premises, (2) the failure of any of SUPPLIER's employees, agents or representatives or any other person to comply with all applicable rules and regulations (BMW NA or otherwise) governing the operation of any BMW vehicle, (3) any claim against BMW by or on behalf of any person including, but not limited to, SUPPLIER's employees, agents or other representatives, for injury or otherwise, (4) any claim against BMW resulting from SUPPLIER's failure to maintain workers' compensation or other public or private insurance with respect to any of SUPPLIER's employees, agents or other representatives. Additionally, SUPPLIER will provide properly trained, duly licensed drivers who are legally qualified under all state and Federal regulations. SUPPLIER shall not assign onto the BMW premises any employee involved in operating or moving vehicles that does not have a driving record that meets the following:

- i. No DWI within the last two years.
- ii. No more than two moving violations within one year.

18. CLAIMS FOR DAMAGES

a. Should either party to this Agreement suffer injury to person or property (including delay or disruption to the BMW NA operative process), or failure to comply with this Agreement because of any act or omission of the other party or any of the other party's employees, agents or others for whose acts such party is legally liable, claim shall be made in writing to such other party within a reasonable time after the first observation of such injury or damage.

19. CONFIDENTIALITY

a. Both SUPPLIER and BMW NA will hold in strict confidence during and after the term of this Agreement all information, materials and data that have been disclosed by either BMW NA or SUPPLIER or to which BMW NA or SUPPLIER have access in the performance of the Services that are not publicly available at the time they are disclosed to or accessible. Any and all technical and commercial information, market plans, strategy, customer lists, marketing surveys and pricing data relating in any way to the materials or Services to be furnished by SUPPLIER may not be publicly communicated without prior written approval by SUPPLIER. SUPPLIER shall not use any such confidential information for any purpose, or disclose it to anyone other than SUPPLIER's personnel with a need to know the information, without prior written approval from BMW NA, except as is necessary to fulfill its obligations under this Agreement or to comply with any court order or subpoena issued by a court having competent jurisdiction provided SUPPLIER will give BMW NA immediate written notice of receipt of such order or subpoena prior to release and cooperate with BMW NA regarding an appropriate protective order. SUPPLIER and BMW NA shall advise its personnel of the restrictions on the

use and disclosure of the confidential information and take appropriate action to ensure their compliance. In addition to the foregoing, SUPPLIER shall take such further steps as BMW NA may direct to ensure the protection of confidential information.

- b. SUPPLIER shall not cause or permit any other party to or allow anything which may damage or endanger any intellectual property of BMW NA relating BMW NA products or BMW NA's title to BMW NA products.
- c. SUPPLIER shall not allow its management, staff or any third party to take any photographs inside or around any facility, except when necessary for damage reports, under this Agreement. SUPPLIER shall obtain a photographer's pass from BMW NA prior to taking any such damage photographs.
- d. BMW NA's policies and operating practices are confidential and proprietary and SUPPLIER agrees not to discuss nor otherwise reveal BMW NA's practices to any third party without prior written consent from BMW NA.

20. TRADEMARKS AND SERVICE MARKS

- a. Neither party shall use any trademark nor service mark of the other party or of any parent, subsidiary, or affiliates of the other party in any published form, literature, or other documents without the express written consent of the other party or its affiliates. Neither party shall give any press release or press interview on any matter pertaining to the other party without first obtaining the consent of the other party.

21. TERM & TERMINATION

- a. This Agreement shall be effective as of the date set forth in the second paragraph of this Agreement and shall continue for the term of the Agreement. Time is of the essence of this Agreement. If this Agreement is terminated for cause as set forth hereunder, SUPPLIER will terminate all services under this Agreement on the date specified in the termination notice and shall terminate all orders chargeable to the performance of this Agreement, which may be terminated without costs on the termination date.

The only claim of SUPPLIER against BMW NA for loss, damage or otherwise, on account of such termination by BMW NA, shall be for compensation and payment in accordance with the provisions of the preceding paragraph.

- b. SUPPLIER's personnel assigned to the BMW NA facilities, if any, as of the date of termination shall be free of any restriction in performing services at the BMW NA facilities for another SUPPLIER and SUPPLIER hereby irrevocably grants its consent to the employment of such persons by any subsequent SUPPLIER providing like services to BMW NA facilities.
- c. The obligations of the SUPPLIER under sections 4, 9, 13, 14, 15, 17, 18, 19, 22, 24, 28, and 29 in this Agreement shall survive the completion of all activities to be performed by SUPPLIER and the termination or expiration of this Agreement.
- d. If SUPPLIER is adjudged a bankrupt or makes a general assignment for the benefit of creditors, or if a receiver is appointed on account of SUPPLIER's insolvency, or if SUPPLIER persistently or repeatedly refuses or fails, except in cases for which extension of time is provided, to supply enough properly skilled employees

or proper materials, or persistently disregards laws, ordinances, rules, regulations or orders of any public authority having jurisdiction, or otherwise has breached any of its obligations under this Agreement and fails within seventy-two (72) hours after the serving receipt of written notice to commence and continue correction of such default, neglect or violation with diligence and promptness, BMW NA may, after seventy-two (72) hours following the service of notice or termination and without prejudice to any other remedy BMW NA may have, terminate the engagement of SUPPLIER on the date specified in the notice of termination and take possession of the site and of all materials and equipment owned by BMW NA.

22. INDEPENDENT CONTRACTOR

- a. SUPPLIER agrees that SUPPLIER is an independent contractor in providing the Services to BMW NA, and that this Agreement is not intended to create an employer/employee, principal/agent, partnership or joint venture relationship between the parties or between BMW NA and any subcontractor of SUPPLIER. The services to be provided by SUPPLIER shall be provided by personnel who are employees of SUPPLIER and SUPPLIER assumes full responsibility for their acts and for their supervision, daily direction, and control. SUPPLIER shall pay, and BMW NA shall not be responsible for, the salaries and expenses of, and all Social Security taxes, unemployment insurance, worker's compensation, disability benefits and any similar taxes and withholdings relating to such employees.
- b. SUPPLIER agrees to place all employees supplied hereunder on a payroll provided by SUPPLIER and to keep all employment records as required by law, make all payroll deductions as required by law or by contract, and to make all payments to all governmental agencies and/or other third parties as may be required by law or contract. All of same shall be promptly and timely performed by SUPPLIER and SUPPLIER shall in all things hold BMW NA harmless from all costs, fines, penalties, expense (including attorney's fees), and/or damages that may directly or indirectly arise as a result of SUPPLIER's failure or alleged failure to provide or perform any of same.

23. NONASSIGNABILITY

- a. Neither party shall assign, transfer, or subcontract this Agreement nor any of its obligations hereunder without the other party's express prior written consent. Notwithstanding the foregoing, to the extent any of the Services will be performed in or relate to a jurisdiction outside the United States, SUPPLIER shall have the right, with the prior consent or approval of BMW NA, to subcontract the performance of such Services to SUPPLIER's international company practicing in such jurisdiction.
- b. SUPPLIER shall not assign any money due or to become due SUPPLIER hereunder without the prior written consent of BMW NA.

24. FORCE MAJEURE

- a. In the event any action or circumstance outside the reasonable control of the parties, or either of them, which has a substantial impact on the parties hereunder, such as a Force Majeure, act of government imposition or maritime restrictions, fire, strike, civil disobedience, disruption in lines of supply (including maritime and overseas) or any other such action or event, the affected party shall give written notice to the other party of said action or event ("Notice of Suspension"). Following the notice of the period of

suspension, the parties shall meet to discuss the duration of the contract. During the term of suspension, all money due under this Agreement shall be paid immediately.

25. BOOKS, RECORDS AND ETHICS

- a. SUPPLIER shall be responsible for maintaining accounting and related activities in connection with the Services, for the duration of this Agreement and for a period of not less than two (2) years after completion of performance under this Agreement, and shall make such records available for audit by BMW NA or any representative or any representatives authorized by BMW NA, upon BMW NA's request. Such request will provide reasonable and sufficient notice to SUPPLIER.
- b. SUPPLIER shall not pay any commissions, fees, or grant any rebates to any employee or officer of BMW NA, favor employees or officers of BMW NA with gifts or entertainment of significant cost or value, or enter into any business arrangements with employees or officers of BMW NA.

26. SOLICITATION

- a. Each party agrees during the term of this Agreement not to directly hire, solicit, or accept solicitation for the employment of the other party's employees providing, supervising or coordinating the Services, unless agreed to in writing by BMW NA and SUPPLIER.
- b. SUPPLIER shall neither sell nor solicit its products to BMW NA employees on or off the premises of BMW NA, without permission in writing from BMW NA.

27. RIGHTS AND REMEDIES

- a. The rights and remedies of BMW NA and SUPPLIER available under this Agreement shall be in addition to, and not a limitation of, any rights and remedies available at law or in equity.

28. NOTICES

- a. All written notices set under this Agreement shall be deemed to have been duly served, if delivered in person to an officer of the corporation from whom it was intended or if delivered at or sent by registered or certified mail or reputable overnight courier service to the following business address:

BMW of North America, LLC
300 Chestnut Ridge Road
Woodcliff Lake, NJ 07675
ATTN: Parts Logistics; W. Neal,
with a copy to: LAW Department; Herbert L. Klein

SUPPLIER:
Street address:
City, stat, zip:

ATTN:
With a copy to:

29. GOVERNING LAW

- a. New Jersey law applicable to contracts made and fully performed within the state of New Jersey shall govern this Agreement and the performance hereunder.

30. GENERAL

- a. This Agreement shall be binding upon and inure to the benefit of its successors and assigns of the parties. Except with the prior written consent of BMW NA, such consent shall not be unreasonably withheld, neither this Agreement nor any rights or obligations of SUPPLIER shall be assigned or otherwise transferred, and any attempt to assign or transfer this Agreement or any rights or obligations of SUPPLIER under this Agreement without such consent shall be null and void.
- b. No action or failure to act by BMW NA or SUPPLIER shall constitute a waiver of any right or duty afforded either of them under this Agreement, nor shall any such action or failure to act constitute an approval of or acquiescence in any breach thereunder, except as may be specifically agreed in writing.
- c. The invalidity of any part of provision of this Agreement shall not impair or affect in any manner whatsoever the validity, enforceability or effect of the remainder of this Agreement.
- d. Each of the parties shall pay its own costs and expenses incurred by it in connection with this Agreement.
- e. For all disputes, controversies or claims which may arise between BMW NA and SUPPLIER (or between any affiliate of BMW NA and SUPPLIER) out of, or in connection with this Agreement, its construction, interpretation, effect, performance or non-performance, termination or consequences thereof, or in connection with any transaction between them contemplated hereby, however characterized as a matter of law (whether in contract, or tort otherwise) BMW NA and SUPPLIER, hereby expressly and irrevocably waive the right to trial by jury. On a case-by-case basis, the parties may agree to mediate or arbitrate a dispute under procedures then agreed to by the parties.
- f. SUPPLIER shall, at the end of the term or upon termination of this Agreement, immediately return to BMW NA any and all materials and all copies thereof in whatever forms that have been provided by BMW NA or related to BMW NA's business, which SUPPLIER possesses or has under its control.
- g. All the undertakings, stipulations, terms and conditions as contained in the SCHEDULES, and Exhibits, if any, referred to in this Agreement shall be deemed to have full force and effect as if they were incorporated in this Agreement and the parties hereby severally covenant to perform and observe the same at all times.

31. ENTIRE AGREEMENT

- a. This Agreement, together with all SCHEDULES, Exhibits, and Appendices hereto, represents the entire and integrated Agreement between the parties hereto and supersedes all prior negotiations, representations or

Agreements wither written or oral. The Agreement may be amended or modified only in writing and signed by both parties.

32. EXHIBITS AND SCHEDULES

- a. Exhibit A: CBA
- b. Exhibit B: RFP
- c. Exhibit C: BMW Purchase Order
- d. Exhibit D: Fee Schedule
- e. Exhibit E: Security Codes

END

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be signed by their duly authorized representatives the day and year indicated below:

BMW of North America, LLC

By: L. WILLISCH, PRESIDENT & CEO

BY: Stefan Sengewald, Executive Vice President

BY: Craig Westbrook, Vice President, Aftersales

ZAM Group LLC

BY: Arthur Perry
President/CEO

[Handwritten Signature]

11/28/11

[Handwritten Signature]

11/28/11
Signature and Date

[Handwritten Signature]

11/28/11
Signature and Date

[Handwritten Signature]

11/28/11
Signature and Date



Western Conference of Teamsters Pension Trust

An Employer-Employee Jointly Administered Pension Plan - Founded 1955

Office of the Administrative Manager
2328 Eastlake Ave S., Seattle, WA 98102
(206) 329-4900

November 20, 2014

Via Certified U.S. Mail
No. 91 7199 9991 7030 9643 7421

10 = NW
31 Doc 41
31 JW 72
Feb 18 2015

2AM Group LLC
2340 Hwy 101 S
Greer SC 29651

**RE: Employer Withdrawal Liability Notice and Demand for Payment
Employer Control Group No. 05845**

Gentlemen:

This letter is sent to you as a notice and demand that the above-named entity and each person and entity under common control with it (within the meaning of the Employee Retirement Income Security Act of 1974) pay to the Fund the liability owed and prescribed below. An employer who withdraws from the Western Conference of Teamsters Pension Plan (the "Plan") is generally liable to the Western Conference of Teamsters Pension Trust Fund (the "Fund") for a share of the Plan's unfunded vested benefits, as determined under the Employer Withdrawal Liability Rules and Procedures adopted and amended from time to time by the Trustees of the Fund pursuant to the Multi-employer Pension Plan Amendments Act of 1980, as amended. In 2014, your firm had a complete withdrawal from the Plan. This Notice is a formal demand for payment of withdrawal liability by the above-named entity and by each and every person or entity under common control with it, in connection with that withdrawal, in the total amount specified below, and according to the schedule of payments enclosed, both of which have been determined by the Plan administrator.

Enclosed is a detailed description of how your withdrawal liability was calculated. Also, enclosed is an amortization schedule showing the number and amount of each payment required to liquidate the withdrawal liability under a monthly payment schedule.

Your first payment is due on or before January 10, 2015. If you do not pay the full amount of your withdrawal liability in a lump sum on or before that date, subsequent monthly installments are due and payable on or before the tenth (10th) of each succeeding calendar month until all of your payments have been made.

Where to Mail Your Payments:

You must make all withdrawal liability payments by check made payable to the Western Conference of Teamsters Pension Trust Fund and mailed to the following address:

Western Conference of Teamsters Pension Trust Fund
ATTN: Withdrawal Liability Section
PO Box 94158
Seattle, WA 98124-6485

Exhibit 2

Page 2
2AM Group LLC
November 20, 2014

An Employer Withdrawal Liability Notice is enclosed for each payment due. The payment notice should be returned with your payment to insure proper credit to your account; the copy should be retained for your records.

Lump Sum Prepayment Option

The unpaid balance of your total withdrawal liability, plus accrued interest, if any, may be prepaid in whole or in part at any time without penalty. If you wish to prepay the full amount of your withdrawal liability before the due date of your first monthly installment as shown above, the total amount due is \$605,669.06.

Request for Review

No later than 90 days after you receive this Notice, you may request in writing that the Fund review any item relating to the determination of your withdrawal liability or of the schedule of your payments. During this period, you may identify in writing any errors in the determination of your allocable share of the Plan's unfunded vested benefits and may furnish the Fund with additional relevant information, if any. Your request for review must be sent to:

Office of the Administrative Manager
Western Conference of Teamsters Pension Trust Fund
2323 Eastlake Avenue East
Seattle, WA 98102

If you file a timely request for review with the Fund, the Fund, after a review of any matter raised, will notify you in writing of its decision, the basis for the decision, and the reasons for any change in your withdrawal liability or schedule of payments.

Arbitration

Your right to dispute any determination made by the Fund concerning your withdrawal liability will be lost unless you first file a timely request for review with the Fund as described above and then initiate arbitration within 60 days after the date the Fund notifies you of its decision on the matters raised in your timely request for review, or if earlier, within 180 days after the date of your timely request for review to the Fund.

Even if you request a review or if you initiate arbitration in accordance with the procedures outlined above, you are still required to make your periodic withdrawal liability payments as set forth in this Initial Notice regardless of the pendency of any request for review or arbitration proceeding. If you fail to make any withdrawal liability payment when due, liquidated damages, interest and attorneys' fees will accrue on the unpaid amount.

The city in which any such arbitration would be held is as indicated on the enclosure herewith, subject to your rights to seek a change under the Plan's withdrawal liability arbitration rules.

Page 3
2AM Group LLC
November 20, 2014

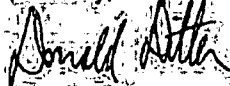
Default

Amounts determined to be in default will be referred to legal counsel for collection, in which case you also will be liable for the Fund's reasonable attorneys' fees and costs. In the event of your default, the Fund, at its option, may require immediate payment of the entire outstanding amount of your withdrawal liability, plus accrued interest on the total outstanding liability from the due date of the first payment, which was timely made. Events of default are defined in Section 16(c)(5) of the Fund's Employer Withdrawal Liability Rules and Procedures and include (among other events) the failure of the employer to make when due any withdrawal liability payment, if the failure is not cured within 60 days after the employer receives written notification from the Fund of such failure.

Any amount finally determined to have been paid by you in excess of your withdrawal liability to the Fund will be repaid to you, together with appropriate interest, to the extent, if any, permitted by applicable regulations and statutory provisions.

A copy of the Agreement and Declaration of Trust of the Western Conference of Teamsters Pension Trust Fund, which includes the Fund's Employer Withdrawal Liability Rules and Procedures, and Employer Withdrawal Liability Arbitration Rules, is enclosed for your information.

Sincerely,



Donald Ditter
Area Manager

DD/hn
Enclosures

Affidavit of Service

FILED

AEP2, LLC., f/k/a 2AM Group, LLC.

2017 FEB 21 PM 1:06

Case No. 2017-CP-10-644

JULIE J. ARMSTRONG
CLERK OF COURT

Court Common Pleas of Charleston County

(Plaintiff)
VS

BY [Signature]

BMW of North America, LLC.

(Defendant)

Personally appeared before me the undersigned, who being duly sworn, deposes and states that he/she served a copy of the following Summons, Complaint, Exhibit 1, Exhibit 2, Civil Action Coversheet, Attachment to Coversheet.

UPON BMW of North America, LLC.. through its registered agent CT Corporation System

by

delivering to him/her a copy of the same at 2 Office Park Court, Suite 103. Columbia, SC 29223

On the 10th day of February 2017 at 10:49 am/pm, and that the above papers were served in compliance with all state and local laws.

MANNER OF SERVICE-

- Personal: By personally delivering copies to the person being served.
- Substituted at Residence: By leaving copies at the dwelling house or usual place of abode of the person being served with a member of the household of suitable age and explaining the general nature of the papers
- Substituted at Business: By leaving, during office hours, copies at the office of the person/entity being served with the person apparently in charge thereof Pam Johnson

Non-Service: After due search, careful inquiry and diligent attempts at the address(es) listed below, I have been unable to effect process upon the person/entity being served because of the following reason(s):

SWORN to before me this 11th day of February 2017
[Signature]
Notary Public for South Carolina
My Commission Expires April 26, 2020

[Signature]
(process server)
Michael Joseph
Pope

STATE OF SOUTH CAROLINA)
)
 COUNTY OF CHARLESTON)
)
 AEP2, LLC f/k/a 2AM GROUP,)
 LLC,)
)
Plaintiff,)
)
 v.)
)
 BMW OF NORTH AMERICA,)
 LLC,)
)
Defendant.)
)

COURT OF COMMON PLEAS
 Civil Action No. 2017 CP-10-644

FILED
 2017 MAR 24 AM 9:58
 JULIE J. ARMSTRONG
 CLERK OF COURT
 BY

AFFIDAVIT OF DEFAULT AND APPLICATION FOR ENTRY OF DEFAULT

PERSONALLY appeared before me Thomas H. Pope III who, being duly sworn, states as follows:

1. He is one of the attorneys for the plaintiff in the above action.
2. A copy of the Summons and Complaint were served on BMW of North America, LLC on February 10, 2017, as evidenced by the Affidavit of Service filed with the Court on February 21, 2017 (copy attached as Exhibit A).
3. That the defendant has not served an Answer or other pleading as required by the Summons and by the South Carolina Rules of Civil Procedure and, therefore, the defendant is now in default.
4. The undersigned also applies for this Court to issue an Order Entering Default and also requests that this Court set a damages hearing on this matter at its convenience.

SWORN to before me this 20th)
 day of March 2017)
)
Lyrene Q. Hunt (L.S.))
 Notary Public for South Carolina)
 My commission expires: 8-12-20

Thomas H. Pope III
 Thomas H. Pope III

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

2017-CP-10-644
IN THE COURT OF COMMON PLEAS

AEP2, LLC f/k/a 2AM GROUP, LLC,

Plaintiff,

v.

BMW OF NORTH AMERICA, LLC,

Defendant.

Civil Action No.: 2017-10-644

BY

JULIE J. ARMSTRONG
CLERK OF COURT

2017 MAR 24 PM 1:22

FILED

NOTICE TO STATE COURT OF DEFENDANTS' REMOVAL TO FEDERAL COURT

TO: The Honorable Julie J. Armstrong
Charleston County Clerk of Court
100 Broad Street
Charleston, SC 29401

PLEASE TAKE NOTICE that on this date Defendant BMW of North America, LLC filed a Notice of Removal in the United States District Court for the District of South Carolina, Charleston Division, in the above captioned case. A copy of the Notice of Removal filed in the United States District Court is attached hereto.

Respectfully submitted this 23rd day of March, 2017.


Ashley B. Abel (State Bar No. 10097)

JACKSON LEWIS, P.C.
15 South Main Street, Suite 700
Greenville, South Carolina 29601
Telephone: 864-232-7000
Email: abela@jacksonlewis.com

ATTORNEYS FOR DEFENDANT BMW OF
NORTH AMERICA, LLC

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

| | | |
|---------------------------------|---|------------------------------------|
| AEP2, LLC f/k/a 2AM GROUP, LLC, |) | |
| |) | |
| Plaintiff, |) | |
| |) | CIVIL ACTION NO. 2:17-cv-00781-DCN |
| v. |) | |
| |) | |
| BMW OF NORTH AMERICA, LLC, |) | |
| |) | |
| Defendant. |) | |
| _____ |) | |

PLAINTIFF'S MOTION TO REMAND

Plaintiff files this motion, pursuant to 28 USC §1447(c), 28 USC §1446(b), and the FRCP, requesting an Order of this Court remanding this action to the Charleston County Court of Common Pleas. The Notice of Removal was filed on March 23, 2017, and same was not timely.

Plaintiff filed the Summons and Complaint on February 8, 2017. A copy of the Summons and Complaint was served on Defendant BMW on February 10, 2017, through its registered agent C.T. Corporation (see Exhibits A & B). BMW's Answer was due on or about March 13, 2017.

Plaintiff filed its Affidavit of Default and Application for Entry of Default dated March 20, 2017 (attached as Exhibit C hereto), and the Court of Common Pleas for Charleston County signed its Order of Entry of Default on March 23, 2017 and filed on March 24, 2017 (attached as Exhibit D). Thus, BMW's notice of removal was untimely pursuant to 28 USC §1446(b), as it was filed more than 30 days after service of the Summons and Complaint.

Based on these facts and the matters set forth in Plaintiff's Memorandum in Support of Motion to Remand, this Court should grant the motion and enter its Order remanding this case to the state court where it was originally filed.

Respectfully submitted,

s/Thomas H. Pope III

Thomas H. Pope III – Federal Bar No. 3095

POPE AND HUDGENS, P.A.

Post Office Box 190 - 1508 College Street

Newberry, SC 29108

Telephone: 803-276-2532

Fax: 803-276-8684

Email: thpope@popeandhudgens.com

John P. Freeman – Federal Bar No. 893

2329 Wilmot Avenue

Columbia, SC 29205-3164

Telephone: 803-254-4667;

Fax: 803-753-9870

Email: jfreemanusc@gmail.com

March 28, 2017

Attorneys for Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

| | | |
|---------------------------------|---|------------------------------------|
| AEP2, LLC f/k/a 2AM GROUP, LLC, |) | |
| |) | |
| Plaintiff, |) | |
| |) | CIVIL ACTION NO. 2:17-cv-00781-DCN |
| v. |) | |
| |) | |
| BMW OF NORTH AMERICA, LLC, |) | |
| |) | |
| Defendant. |) | |
| _____ | |) |

**PLAINTIFF'S MEMORANDUM IN SUPPORT
OF MOTION TO REMAND**

The plaintiff submits this memorandum in support of its motion to remand based on defendant's failure to timely file BMW's Notice of Removal pursuant to 28 USC §1446(b), and defendant's untimely filing requires that this case be remanded to state court under 28 USC §1447.

STATEMENT OF FACTS

This action is one for indemnity which seeks damages from defendant of \$605,669.06, plus prejudgment interest and costs. The Summons and Complaint were filed on February 8, 2017, in the Court of Common Pleas for the State of South Carolina, County of Charleston (captioned AEP2, LLC f/k/a 2AM Group LLC, BMW of North America, LLC, Case No. 2017-CP-10-644). (ECF No. 1-1). The defendant's registered agent for service is CT Corporation, 2 Office Park Court, Suite 103, Columbia, South Carolina 29223 (see Exhibit A).

A copy of the Summons and Complaint were served on C.T. Corporation on February 10, 2017 (see Exhibit B). The defendant did not timely serve or file any responsive pleading and on March 20, 2017, Plaintiff's Affidavit of Default and Application for Default and Judgment was sent to the Clerk of Court for Charleston County for filing (see Exhibit C). The Order of Entry of

Default was signed by Judge Deadra Jefferson on March 23, 2017, and was filed on March 24, 2017, in the Clerk's Office (see Exhibit D).

ARGUMENT

The Notice of Removal erroneously states that BMW was served with the Summons and Complaint on February 21, 2017. Apparently, BMW failed to inform its counsel of the correct date of service as the affidavit of service reflects that service was effective on February 10, 2017. Service of a Summons and Complaint on a registered agent is effective when a copy is delivered to the corporate agent, pursuant to Rule 4, SCRPC. See also S.C. Code §15-9-240.

The defendant's responsive pleadings were due 11 days before March 23, 2017¹, the date on which BMW filed its Notice of Removal. BMW is in default and its Notice of Removal is untimely pursuant to 28 U.S.C. §1446(b), which provides as follows:

“(b) the notice of removal of a civil action or proceeding shall be filed within 30 days after the receipt by the defendant, through service or otherwise, of a copy of an original pleading setting forth the claim for relief upon which such action or proceeding is based...”

The 30-day period for filing notice of removal is strictly construed, and remand is required if the deadline is not met. Federal courts are courts of limited jurisdiction. Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 377, 114 S.Ct. 1673 (1994). Because removal proceedings encroach upon a state court's jurisdiction, removal statutes must be strictly construed and any doubts are to be resolved in favor of state court jurisdiction and remand. Limehouse v. Hulsey, 404 S.C. 93, 106, 744 S.E. 2d 566, 573 (2013), citing Brierly v. Alusuisse Flexible Packaging, Inc., 184 F.3d 527, 534 (6th Circuit 1999).

¹ Counting thirty days from February 10, 2017, the Answer should have been served by March 13, 2017 (actually due on March 12, which was a Sunday). If Rule 6(e) SCRPC applied to this case, which is denied, the defendant would have had five additional days to answer-until March 17-and the notice of removal is still untimely.

Federal courts have consistently determined that this 30-day deadline is to be “construed narrowly in favor of remand and to protect the jurisdictions of state courts.” Harris v. Bankers’ Life & Cas. Co., 425 F.3d 689; 698 (9th Circuit 2005). See also Liebig v. DeJoy, 814 F.Supp. 1074 (MD. Florida, 1993) (30-day time period for filing notice of removal is mandatory and may not be extended by the court; in this case the notice of removal was filed 38 days after service of the complaint) and Gastelum v. American Family Mutual Insurance Company, 2015 WL 4928021 (D. Nev. 2015) (remand required where notice of removal filed more than 30 days after service of initial pleading was untimely).

Defendant bears the burden of establishing the right to removal, including compliance with the requirements of the removal statute, 28 USC §1446(b), and the thirty-day time limit provided in that statute must be strictly applied. Marler v. Amoco Oil Co., Inc., 793 F. Supp. 656 (E.D. N.C. 1992) (district court granted motion to remand where notice of removal was not timely filed.) Defendant’s Notice of Removal was due on or before March 13, 2017. Defendant failed to file its Notice of Removal until March 23, 2017, ten days later. It is, therefore, untimely and the case must be remanded to state court. 28 USC §1447(c).

CONCLUSION

Pursuant to 28 USC §1447(c), if there is any defect in the Notice of Removal, the case is to be remanded to the state court. BMW’s notice of removal was not timely filed, BMW has failed to comply with 28 USC §1446(b), and plaintiff’s motion to remand should be granted.

Respectfully submitted,

s/Thomas H. Pope III
Thomas H. Pope III – Federal Bar No. 3095
POPE AND HUDGENS, P.A.
Post Office Box 190 - 1508 College Street
Newberry, SC 29108
Telephone: 803-276-2532
Fax: 803-276-8684
Email: thpope@popeandhudgens.com

John P. Freeman – Federal Bar No. 893
2329 Wilmot Avenue
Columbia, SC 29205-3164
Telephone: 803-254-4667;
Fax: 803-753-9870
Email: jfreemanusc@gmail.com

March 28, 2017

Attorneys for Plaintiff

EXHIBIT A

South Carolina Secretary of State Mark Hammond

Business Entities Online

File, Search, and Retrieve Documents Electronically

BMW OF NORTH AMERICA, LLC

Corporate Information

Entity Type: Limited Liability Company

Status: Good Standing

Domestic/Foreign: Foreign

Incorporated State: Delaware

Important Dates

Effective Date: 01/05/2001

Expiration Date: N/A

Term End Date: N/A

Dissolved Date: N/A

Registered Agent

Agent: C T CORPORATION SYSTEM

Address: 2 Office Park Court Suite 103
Columbia, South Carolina 29223

Official Documents On File

| Filing Type | Filing Date |
|---------------------------|-------------|
| Change of Agent or Office | 05/06/2010 |
| Authority | 01/05/2001 |

For filing questions please contact us at 803-734-2158

[Download Adobe Reader](#)

Copyright © 2017 State of South Carolina

[South Carolina Secretary of State](#)

EXHIBIT B

Affidavit of Service

AEP2, LLC., f/k/a 2AM Group, LLC.

FILED 2017 FEB 21 PM 1:06

Case No. 2017-CP-10-644

JULIE J. ARMSTRONG CLERK OF COURT

Court Common Pleas of Charleston County

(Plaintiff)

VS

BY _____

BMW of North America, LLC.

(Defendant)

Personally appeared before me the undersigned, who being duly sworn, deposes and states that he/she served a copy of the following Summons, Complaint, Exhibit 1, Exhibit 2, Civil Action Coversheet, Attachment to Coversheet.

UPON BMW of North America, LLC.. through its registered agent CT Corporation System

by

delivering to him/her a copy of the same at 2 Office Park Court, Suite 103, Columbia, SC 29223

On the 10th day of February 2017 10:49 am/pm, and that the above papers were served in compliance with all state and local laws.

MANNER OF SERVICE-

Personal: By personally delivering copies to the person being served.

Substituted at Residence: By leaving copies at the dwelling house or usual place of abode of the person being served with a member of the household of suitable age and explaining the general nature of the papers

XX Substituted at Business: By leaving, during office hours, copies at the office of the person/entity being served with the person apparently in charge thereof Pam Johnson

Non-Service: After due search, careful inquiry and diligent attempts at the address(es) listed below, I have been unable to effect process upon the person/entity being served because of the following reason(s):

SWORN to before me this 11th day of February 2017

Notary Public for South Carolina

My Commission Expires April 26, 2020

Michael Joseph

(process server)

Michael Joseph

Pope

THOMAS H. POPE III
W. CHAD JENKINS
KYLE B. PARKER

**DOPE
&
HUDGENS**
ATTORNEYS, P.A.

1508 COLLEGE STREET-P.O. BOX 190
NEWBERRY, SOUTH CAROLINA 29108
PHONE (803) 276-2532 FAX (803) 276-8684
WWW.POPEANDHUDGENS.COM

JOSEPH W. HUDGENS
Of Counsel
THOMAS H. POPE
(1913-1999)

February 17, 2017

The Honorable Julie J. Armstrong
Clerk of Court
100 Broad Street, Suite 106
Charleston, SC 29401-2210

Re: AEP2, LLC, f/k/a ZAM Group, LLC v. BMW of North America, LLC
Case No. 2017-CP-10-644

Dear Ms. Armstrong:

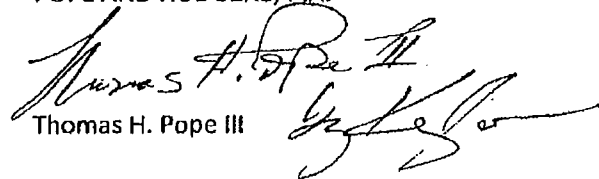
For filing, I enclose herein the original Affidavit of Service in the above case.

Also enclosed herein are two copies of same, which I would appreciate your clocking in and returning to me in the self-addressed stamped envelope.

With kind regards.

Sincerely,

POPE AND HUDGENS, P.A.


Thomas H. Pope III

THP III/lg
Enclosures

Affidavit of Service

AEP2, LLC., f/k/a 2AM Group, LLC.

Case No. 2017-CP-10-644

Court Common Pleas of Charleston County

(Plaintiff)

VS

BMW of North America, LLC.

(Defendant)

. Personally appeared before me the undersigned, who being duly sworn, deposes and states that he/she served a copy of the following Summons, Complaint, Exhibit 1, Exhibit 2, Civil Action Coversheet, Attachment to Coversheet.

UPON BMW of North America, LLC.. through its registered agent CT Corporation System

by

delivering to him/her a copy of the same at 2 Office Park Court, Suite 103, Columbia, SC 29223

On the 10th day of February 2017 10:49 am/pm, and that the above papers were served in compliance with all state and local laws.

MANNER OF SERVICE-

Personal: By personally delivering copies to the person being served.

Substituted at Residence: By leaving copies at the dwelling house or usual place of abode of the person being served with a member of the household of suitable age and explaining the general nature of the papers

XX Substituted at Business: By leaving, during office hours, copies at the office of the person/entity being served with the person apparently in charge thereof Pam Johnson

Non-Service: After due search, careful inquiry and diligent attempts at the address(es) listed below, I have been unable to effect process upon the person/entity being served because of the following reason(s):

SWORN to before me this 11th day of February 2017

[Signature]
Notary Public for South Carolina
My Commission Expires April 26, 2020

[Signature]
(process server)
Michael Joseph
Pope

EXHIBIT C

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)
)
AEP2, LLC f/k/a 2AM GROUP,)
LLC,)
)
Plaintiff,)
)
v.)
)
BMW OF NORTH AMERICA,)
LLC,)
)
Defendant.)
_____)

COURT OF COMMON PLEAS
Civil Action No. 2017 CP-10-644

FILED
2017 MAR 24 AM 9:58
JULIE J. ARHSTRON
CLERK OF COURTS

**AFFIDAVIT OF DEFAULT AND
APPLICATION FOR ENTRY OF DEFAULT**

PERSONALLY appeared before me Thomas H. Pope III who, being duly sworn, states
as follows:

1. He is one of the attorneys for the plaintiff in the above action.
2. A copy of the Summons and Complaint were served on BMW of North America, LLC on February 10, 2017, as evidenced by the Affidavit of Service filed with the Court on February 21, 2017 (copy attached as Exhibit A).
3. That the defendant has not served an Answer or other pleading as required by the Summons and by the South Carolina Rules of Civil Procedure and, therefore, the defendant is now in default.
4. The undersigned also applies for this Court to issue an Order Entering Default and also requests that this Court set a damages hearing on this matter at its convenience.

SWORN to before me this 20th
day of March 2017)
)
Lynne Q. Grant (L.S.))
Notary Public for South Carolina)
My commission expires: 8-12-20

Thomas H. Pope III
Thomas H. Pope III

Affidavit of Service

AEP2, LLC, f/k/a 2AM Group, LLC.

FILED
2017 FEB 21 PM 1:06

Case No. 2017-CP-10-644

JULIE J. ARMSTRONG
CLERK OF COURT

Court Common Pleas of Charleston County

(Plaintiff)

VS

BY _____

BMW of North America, LLC.

(Defendant)

Personally appeared before me the undersigned, who being duly sworn, deposes and states that he/she served a copy of the following Summons, Complaint, Exhibit 1, Exhibit 2, Civil Action Coversheet, Attachment to Coversheet.

UPON BMW of North America, LLC., through its registered agent CT Corporation System

by

delivering to him/her a copy of the same at 2 Office Park Court, Suite 103, Columbia, SC 29223

On the 10th day of February 2017 10:49 am pm, and that the above papers were served in compliance with all state and local laws.

MANNER OF SERVICE-

Personal: By personally delivering copies to the person being served.

Substituted at Residence: By leaving copies at the dwelling house or usual place of abode of the person being served with a member of the household of suitable age and explaining the general nature of the papers

XX Substituted at Business: By leaving, during office hours, copies at the office of the person/entity being served with the person apparently in charge thereof Pain Johnson

Non-Service: After due search, careful inquiry and diligent attempts at the address(es) listed below, I have been unable to effect process upon the person/entity being served because of the following reason(s):

SWORN to before me this 11th day of February 2017

[Signature]
Notary Public for South Carolina
My Commission Expires April 26, 2020

[Signature]

(process server)

Michael Joseph

Pope

EXHIBIT A

EXHIBIT D

STATE OF SOUTH CAROLINA)
)
 COUNTY OF CHARLESTON)
)
 AEP2, LLC f/k/a 2AM GROUP)
 LLC)
)
Plaintiff,)
)
 v.)
)
 BMW OF NORTH AMERICA)
 LLC)
)
Defendant.)

COURT OF COMMON PLEAS
 Civil Action No. 2017 CP 10-0644

FILED
 JULIE J. ARMSTRONG
 CLERK OF COURT

2017 APR 20 PM 2:29

MOTION FOR DAMAGE HEARING

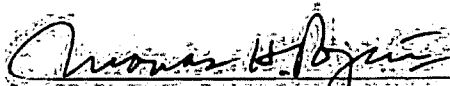
By and through its undersigned counsel, the plaintiff does hereby move for an Order of this Court setting a damage hearing as the defendant is in default. No Answer has been filed by BMW. The Order of Entry of Default by the Circuit Court was entered by Order dated March 23, 2017 and filed on March 24, 2017. The Order also directed that a damages hearing would be scheduled.

Because default has been entered, the plaintiff has a right to a determination of damages. The defendant is allowed to participate in such hearing in the limited manner provided by the case law of South Carolina, including only the right to cross examine witnesses.

The defendant BMW removed the case to Federal Court on March 23, 2017. Thereafter, on April 11, 2017, BMW filed its consent to remand the case to state court acknowledging: "Defendant confirms service of the Complaint in this matter on February 10, 2017." Based upon the entire record in this matter, BMW is in default in this matter and plaintiff is entitled to a hearing on damages. Relevant documents are attached herewith as Attachment 1 (Plaintiff's Memorandum in Support of Motion to Remand in Federal Court, with attached Exhibits A, B, C, and D). BMW's acknowledgment of service on February 10, 2017, is attached as Attachment 2.

This motion is based on the record in this matter, the attachments herewith, the applicable state law, and any further affidavits or other matters to be submitted prior to a hearing in this matter.

By:



Thomas H. Pope III - SC Bar No. 4508

POPE AND HUDGENS, P.A.

Post Office Box 190

1508 College Street

Newberry, SC 29108

Telephone: 803-276-2532; Fax: 803-276-8684

Email: thpope@popeandhudgens.com

John P. Freeman - SC Bar No. 2128

2329 Wilmot Avenue

Columbia, SC 29205-3164

Telephone: 803-254-4667; Fax: 803-753-9870

Email: jpfremanusc@gmail.com

Attorneys for Plaintiff

April 14, 2017

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS

AEP2, LLC f/k/a 2AM GROUP, LLC

Plaintiff

v.

BMW OF NORTH AMERICA, LLC

Defendant

2017 CP 10 644
Civil Action No. 2017-10-644

FILED
2017 MAY -11 PM 3:46
JULIE J. ARNSTRONG
CLERK OF COURT
BY

DEFENDANT'S MOTION TO SET ASIDE ENTRY OF DEFAULT

Defendant BMW of North America, LLC (hereinafter "Defendant"), by and through its undersigned counsel, hereby moves the Court for entry of an order setting aside the Default entered in state court, pursuant to S.C. R. Civ. P. 55 (c). In support therefore, Defendant states as follows:

PROCEDURAL BACKGROUND

1. On February 8, 2017, Plaintiff AEP2, LLC f/k/a 2AM Group, LLC ("Plaintiff") filed in this state court a Complaint alleging a claim for declaratory judgment and a claim for "damages," both under state law.

2. The undersigned counsel for Defendant was informed by Defendant's in-house counsel that Defendant received notice of the complaint on February 21, 2017, which is reasonable based on a filing date of February 8, 2017, as stated in paragraph 1 above. Abel Aff. ¶ 5; see also Spitaleri Aff. ¶ 2-3.

3. The undersigned counsel for Defendant confirmed with Defendant's in-house counsel on March 7, 2017, that the date of service was February 21, 2017. Abel Aff. ¶ 6, 11; see also Spitaleri Aff. ¶¶ 4-6.

4. Based on the identified date of service as being February 21, 2017, Defendant filed a notice of removal in the United States District Court on March 23, 2017. See Exhibit 1.

Defendant's Notice of Removal. That removal to federal court was based on diversity jurisdiction, 28 U.S.C. § 1332, as admitted on the face of the Complaint. Compl. at ¶¶ 1, 2; *see also* Abel Aff. ¶ 7, 12.

5. Also on March 23, 2017, Defendant filed via overnight mail a notice with this Court advising of the removal to federal court. Abel Aff. ¶ 8. Because of that notice effectively removing the case to federal court on March 23, 2017, no answer to the Complaint was filed in this court based on jurisdictional grounds.

6. Thereafter, on March 28, 2017, with no prior communication with the Defendant or its undersigned counsel, Plaintiff filed a motion to remand in the federal court action (2:17-cv-00781-DCN; Dkt. No. 5-1) (copy attached as Exhibit 2). In that motion to remand, Plaintiff represented that service was made on Defendant through its registered agent on February 10, 2017. Abel Aff. ¶ 9.

7. Plaintiff's motion to remand acknowledges that Defendant's outside counsel did not know that the date of service had not been February 21, 2017 and may have instead been February 10, 2017. *See* Pl. Mot. to Remand, at 2.

8. It appears from this Court's records that a motion for entry of default was filed by Plaintiff on March 20, 2017. An order of default was entered on March 23, 2017.

9. Upon receipt and review of the information contained in the motion to remand on March 30, 2017 which suggests the service date was actually February 10, 2017, the undersigned counsel for Defendant and Defendant's in-house counsel began an inquiry to determine whether service was in fact effectuated on February 10, 2017 or some other day and, if so, why it was not communicated promptly by internal channels within Defendant.

10. Defendant has confirmed with its registered agent, CT Corporation, that service was in fact made on Defendant's registered agent on February 10, 2017 but was not effectively communicated within the Defendant. Defendant is a substantial company that has internal processes designed to provide communications regarding lawsuits to in-house counsel and represents that this particular filing was an exception to the rule of prompt internal communications in terms of the proper service date. Thus, the failure to timely remove was the result of a clerical error. In addition, Defendant removed this action to federal court on March 23, 2017, the same day this Court entered an order of default. As such, had the Defendant known the service date was February 10, 2017, it would have timely removed the action and would have filed its answer timely in the federal court action. Abel Aff. ¶¶ 11-13.

11. Attached as Exhibit 3 is the proposed Answer of Defendant. That document reflects that Defendant has a number of meritorious defenses to the unspecified claim for "damages" in the Complaint and intends to deny liability in this action.

MEMORANDUM OF LAW

I. DEFENDANT HAS ESTABLISHED EXCUSABLE NEGLIGENCE, THE EXISTENCE OF MERITORIOUS DEFENSES, AND THAT IT EXERCISED DUE DILIGENCE.

It is widely understood that default judgments are not favored, that the Court's discretion should be liberally exercised, and that all reasonable doubt be resolved in favor of granting applications for relief so as to permit a determination of the controversy upon the merits. *Micronics, Inc. v. S.C. Dep't. of Revenue*, 345 S.C. 506, 508, 548 S.E. 2d 223, 224 (S.C. Ct. App. 2001); *See, e.g., Fore v. United Ins. Co.*, 242 S.C. 451, 452, 131 S.E.2d 508, 509 (S.C. 1963).

Judgments by default are not generally favored; hence, as a general proposition, any doubt should be resolved in favor of permitting a hearing on the merits. *Id.*; *Balloon Plantation, Inc. v.*

Head Balloons, Inc., 303 S.C. 152, 399 S.E.2d 439 (S.C. Ct. App. 1990). The court may set aside default if: (1) there was excusable neglect on the part of the defaulting party for not answering the complaint; (2) the defaulting party responded promptly after notice of the entry of default; (3) setting aside the default will not prejudice the non-defaulting party; and (4) the defaulting party has a meritorious defense. See *Top Value Homes v. Harden*, 319 S.C. 302, 306, 460 S.E.2d 427, 429 (S.C. Ct. App. 1995). The Court, therefore, should set aside the default as Defendant can establish all factors.

A. There Was Excusable Neglect for Not Responding to the Complaint.

Excusable neglect is understood to encompass situations in which the failure to comply with a filing deadline is attributable to negligence. *Micronics, supra*; see also *Advanced Estimating Sys. Inc. v. Riney*, 130 F.3d 996, 999 (11th Cir. 1997) (noting that clerical error or miscommunications constitutes excusable neglect).

In the instant case, due to a clerical error, mistake and miscommunication, an appropriate and timely removal to federal court or response to the Complaint was not filed. The instant circumstance is a classic example of "foibles to which human nature is heir." See *Kinnear Corp. v. Crawford*, 49 F.R.D. 3, 6 (D.S.C. 1970) (noting human error in defendant's incorrect belief in timing deadline to file an answer and granting motion to vacate judgment) (citing to *Johnson v. Finger*, 102 S.C. 354, 86 S.E. 673 (1915)); see also *Micronics, supra*.

Defendant's explanation is reasonable and understandable. Defendant's conduct amounts only to an omission caused by a clerical person's carelessness. The conduct, therefore, constitutes excusable neglect, in a liberal exercise of discretion, and the entry of default should be set aside.

B. Defendant Responded Promptly After Learning of the Plaintiff's Alleged Date of Actual Service on Defendant's Registered Agent.

Upon learning of the motion to remand and Plaintiff's alleged date of actual service, Defendant's counsel contacted Defendant's in-house counsel who internally investigated the allegation. Defendant's counsel immediately contacted Plaintiff's counsel and advised him that there was a miscommunication by GT Corporation. Defendant's counsel offered to file a motion in the federal court to consent to a remand to this Court if Plaintiff would consent to remove the default. Plaintiff refused this reasonable request. Nevertheless, Defendant filed the consent to remand, which was granted on April 20, 2017. Defendant's counsel then prepared and filed this Motion shortly thereafter. Defendant's due diligence in seeking to set aside the default cannot be disputed. See *Peoples Bank of Beaufort v. Exchange Realty, Inc.*, 273 S.C. 537, 541, 257 S.E.2d 733, 735 (S.C. 1979) (noting that a party's exercise of due diligence can help to avoid a default judgment); see also *Woodbury v. Sears, Roebuck & Co.*, 152 F.R.D. 229, 237 (M.D. Fla. 1993) (Defendant's response within 14 days of receiving notice was prompt and diligent response).

C. Setting Aside the Default Will Not Prejudice the Plaintiff.

The delay in responding to the Complaint is in no way prejudicial to the Plaintiff. Plaintiff will still have the ability to assert its claims, engage in discovery, and, if appropriate, present its case to the fact-finder. The setting aside of the default will not affect its ability to recover the applicable remedies in this action, if it prevails. See *Ricks v. Weinrauch*, 293 S.C. 372, 360 S.E.2d 535 (S.C. Ct. App. 1987) (upholding trial court's decision to vacate default judgment after finding that defendants had "shown good cause for not appearing in time," that defendants thus had a meritorious defense, and that delay would "not prejudice [plaintiff]").

D. Defendant Can Assert Meritorious Defenses:

A meritorious defense may be shown by attaching a proposed answer to the motion to vacate. *Jamies v. Progress Energy Fla., Inc.*, 2011 U.S. Dist. LEXIS 91245 *6 (M.D. Fla. 2011). Defendant has provided a proposed Answer which denies that it is responsible for Plaintiff's failure to pay its pension withdrawal liability for its employees, and also asserts other defenses. "A meritorious defense need not be perfect nor one which can be guaranteed at trial... [it] need only be one which is worthy of a hearing or judicial inquiry." See *ITC Commer. Funding, LLC v. Crerar*, 393 S.C. 487, 495, 713 S.E.2d 335, 339 (S.C. Ct. App. 2011). "A mere 'hint of a suggestion' that there is a meritorious defense to the claims alleged is sufficient." See *Bateh v. Colquett D. Trucking, Inc.*, 2011 U.S. Dist. LEXIS 110794 *3 (M.D. Fla. 2011).

As demonstrated by Defendant's proposed Answer, attached hereto as Exhibit 4, Defendant expressly denies Plaintiff's claims and raises various defenses. Thus, Defendants intend to assert substantive defenses.

"When ... a party makes a showing of such mistake ... applies promptly for relief, after he has notice of the judgment, shows by his affidavit or merit that prima facie he has a meritorious defense, and that he makes the application in good faith, a Court should not hesitate to set aside the default and allow him to serve an answer."

Gaskins v. California Ins. Co., 195 S.C. 376, 380, 11 S.E.2d 436, 437 (S.C. 1940).

Therefore, the asserted meritorious defenses, lack of prejudice to Plaintiff, the minimum delay, the lack of bad faith, and the lack of impact on the proceeding require a finding of excusable neglect and setting aside the entry of default.

II. CONCLUSION

Based on the above, the Order of Default clearly should be set aside so as to allow a determination of this controversy on its merits. Defendant respectfully requests this Court enter

an Order: (i) granting this Motion; (ii) setting aside the Order of Default entered against it; (iii) allowing Defendant five (5) days to file its Answer to the Complaint; and (iv) granting such other and further relief as this Court deems just and proper.

Respectfully submitted this 25th day of April, 2017.



Ashley B. Abel (State Bar No. 10097)

Cashida N. Okeke (State Bar No. 101825)

JACKSON LEWIS, P.C.

15 South Main Street, Suite 700

Greenville, South Carolina 29601

Telephone: 864-232-7000

Email: abela@jacksonlewis.com

ATTORNEYS FOR DEFENDANT BMW OF
NORTH AMERICA, LLC

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS

AEP2, LLC f/k/a 2AM GROUP, LLC;

Plaintiff,

v.

BMW OF NORTH AMERICA, LLC,

Defendant.

Civil Action No.: 2017-10-644

ANSWER OF DEFENDANT BMW OF NORTH AMERICA, LLC

COMES NOW Defendant BMW of North America, LLC (hereinafter “BMW” or “Defendant”), by and through its undersigned counsel, hereby responds to the allegations in Plaintiff’s Complaint as follows:

FOR A FIRST DEFENSE

1. With regard to the allegations contained in paragraph 1 of the Complaint, Defendant lacks knowledge or information sufficient to form a belief as to the truth of these allegations.
2. With regard to paragraph 2, Defendant admits that it is a Delaware limited liability company with its principal place of business in Woodcliff Lake, NJ.
3. With regard to the allegations contained in paragraph 3, Defendant admits that it entered into a services agreement with Plaintiff. Defendant denies the remaining allegations in paragraph three. [Was the agreement executed in Charleston County, South Carolina in November 2011?]
4. With regard to the allegations contained in paragraph 4, Defendant admits that Exhibit 2 to the Complaint appears to be a notice which was purportedly received by Plaintiff from the Western Conference of Teamsters Pension Fund. Defendant lacks knowledge or information

sufficient to form a belief as to the truth of those allegations. Defendant denies the remaining allegations in paragraph 4.

5. With regard to the allegations contained in paragraph 5, Defendant admits that it has not provided indemnity pursuant to the documents attached to the complaint and would show that it has no such obligation under applicable law.

6. With regard to the reallegations contained in paragraph 6 of the Complaint, Defendant realleges and incorporates by reference the foregoing paragraphs in response thereto.

7. Defendant denies the allegations contained in paragraph 7 of the Complaint.

8. Defendant denies the allegations contained in paragraph 8 of the Complaint.

9. With regard to the reallegations contained in paragraph 9 of the Complaint, Defendant realleges and incorporates by reference the foregoing paragraphs in response thereto.

10. Defendant denies the allegations contained in paragraph 10 of the Complaint.

11. Defendant denies the allegations contained in paragraph 11 of the Complaint.

12. Unless specifically admitted herein, the allegations of the Complaint are denied.

13. With regard to the "Wherefore" paragraph of the complaint, Defendant denies those allegations.

FOR A SECOND DEFENSE

14. Plaintiff is estopped or otherwise prohibited and barred by the doctrine of unclean hands from the claims and/or relief asserted in the Complaint.

FOR A THIRD DEFENSE

15. Plaintiff is estopped or otherwise prohibited and barred by the doctrine of accord and satisfaction from the claims and/or relief asserted in the Complaint.

FOR A FOURTH DEFENSE

16. Plaintiff is estopped or otherwise prohibited and barred by the doctrine of waiver from the claims and/or relief asserted in the Complaint.

FOR A FIFTH DEFENSE

17. Plaintiff is estopped or otherwise prohibited and barred by the doctrine of election of remedies from the claims and/or relief asserted in the Complaint.

FOR A SIXTH DEFENSE

18. Plaintiff is estopped or otherwise prohibited and barred by the doctrine of statute of limitations from the claims and/or relief asserted in the Complaint.

FOR A SEVENTH DEFENSE

19. Plaintiff is estopped or otherwise prohibited and barred by the doctrine of laches from the claims and/or relief asserted in the Complaint.

FOR AN EIGHTH DEFENSE

20. The contract under which Plaintiff brings suit contains a waiver of the right to a jury trial. The Complaint contains a jury trial demand in the caption but not in the body of the Complaint. Further, the Civil Action Coversheet filed by Plaintiff indicates that the matter is "NON-JURY." For the foregoing reasons, Plaintiff is not entitled to a jury trial on either cause of action asserted in the complaint.

FOR A NINTH DEFENSE

21. The contract under which Plaintiff sues contains a choice of governing law as the law of the State of New Jersey.

WHEREFORE, Defendant asks the Court to dismiss the Complaint with prejudice and award its costs and expenses (including attorney's fees) as provided under the services agreement with Plaintiff.

Respectfully submitted this _____ day of April, 2017.

Ashley B. Abel (State Bar No. 10097)

JACKSON LEWIS, P.C.
15 South Main Street, Suite 700
Greenville, South Carolina 29601
Telephone: 864-232-7000
Email: abela@jacksonlewis.com

*ATTORNEYS FOR DEFENDANT BMW OF
NORTH AMERICA, LLC*

STATE OF SOUTH CAROLINA
 COUNTY OF CHARLESTON)
)
 AEP2, LLC f/k/a 2AM GROUP, LLC,)
)
 Plaintiff,)
)
 v.)
)
 BMW OF NORTH AMERICA, LLC,)
)
 Defendant.)

IN THE COURT OF COMMON PLEAS

Civil Action No.: 2017-10-644

AFFIDAVIT OF RICHARD SPITALERI, JR.

I, Richard Spitaleri, Jr., pursuant to 28 U.S.C. § 1746, declare as follows:

1. I am Corporate Counsel for BMW of North America, LLC (“BMW NA” or “Defendant”) and as such my responsibilities include managing litigation brought against BMW NA. I am over the age of 18 and have personal knowledge of the matters set forth herein and believe the statements contained herein to be true and accurate.

2. On February 21, 2017, I received a copy of the Complaint filed against BMW NA by Plaintiff AEP2, LLC (“Plaintiff”) from an attorney representing another party involved in a different lawsuit with Plaintiff.

3. Believing that BMW had not yet been officially served in this action, I retained counsel, specifically, Ashley B. Abel of the law firm of Jackson Lewis P.C. to represent BMW NA in this action.

4. Despite our corporate procedures, I did not become aware of service upon our registered agent, CT Corporation until March 30, 2017 when Mr. Abel notified me of Plaintiff’s Motion to Remand filed on March 28, 2017 and the discrepancy in the date of service.

5. On March 30, 2017, I followed up with personnel in my office and became aware that our registered agent was indeed served on February 10, 2017 as Plaintiff represented in its Motion to Remand. Although our registered agent delivered the Summons and Complaint to us, it became lost in the proverbial shuffle notwithstanding our internal requirements and protocols in place to facilitate timely responses to legal process.

6. Plaintiff has not been prejudiced by this slight delay attributable to our error. We have immediately taken steps to remedy this situation and preserve Defendant's interests by seeking to have the default judgment set aside. On April 7, 2017, I am informed that Defendant's counsel contacted Plaintiff's counsel to inform them of the mistake. On April 11, 2017, Defendant filed a Consent to Remand to State Court with the United States District Court for the District of South Carolina.

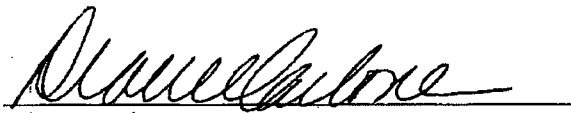
I have read the foregoing and declare under penalty of perjury that the statements set forth above are true and accurate.

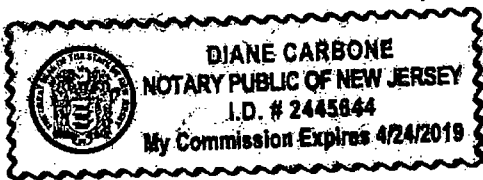
This 25th day of April 2017.

FURTHER AFFIANT SAYETH NOT.


Richard Spitaleri, Jr.

Sworn to and subscribed before me
this 25th day of April 2017.


Diane Carbone
Notary Public of the State of New Jersey
My Commission Expires on April 24, 2019



STATE OF SOUTH CAROLINA)
 COUNTY OF CHARLESTON)
)
 AEP2, LLC f/k/a 2AM GROUP, LLC,)
)
)
 Plaintiff,)
)
 v.)
)
 BMW OF NORTH AMERICA, LLC,)
)
 Defendant.)

IN THE COURT OF COMMON PLEAS

2017-CP-10-644
 Civil Action No.: ~~2017-10-644~~

FILED
 2017 MAY -1 PM 3:42
 JULIE J. ARMSTRONG
 CLERK OF COURT
 BY _____

AFFIDAVIT OF ASHLEY B. ABEL

I, Ashley B. Abel, Esquire, pursuant to 28 U.S.C. § 1746, declare as follows:

1. My name is Ashley B. Abel, Esquire and I am the attorney of record for BMW of North America, LLC (“BMW NA” or “Defendant”).
2. I am a licensed member of the Bar of the State of South Carolina and am in good standing.
3. My business address is JACKSON LEWIS, P.C., which is located at 15 South Main Street, Suite 700, Greenville, South Carolina, 29601.
4. I have personal knowledge concerning the matter set forth in this Affidavit, and believe the statements contained herein to be true and accurate.
5. On February 21, 2017, I received information from the Corporate Counsel of Defendant Richard Spitaleri, Jr., that Defendant had received a courtesy copy of the Complaint from an outside attorney.
6. On March 7, 2017, in-house counsel for Defendant confirmed to me that the date of service was February 21, 2017.

7. Based on the foregoing information we received regarding the date of service, Defendants filed a Notice of Removal on March 23, 2017 with the United States District Court for the District of South Carolina, Charleston Division, based on diversity jurisdiction, 28 U.S.C. § 1332. *See* Defendant's Motion to Set Aside Entry of Default, Exhibit 1.

8. On the same day, pursuant to 28 U.S.C. § 1446(d), I also filed via overnight U.S. mail correspondence to this Court, the Charleston County State Court of Common Pleas, enclosing our notice of removal of this case to federal court. Plaintiff was also served at that time with a copy of the Notice of Removal via overnight mail.

9. On March 28, 2017, I was notified by electronic filing in the federal court case (Case No.: 2: 17-cv-00781-DCN) that Plaintiff's counsel had filed a motion to remand the case back to the Charleston County Court of Common Pleas. *See id.*, Dkt. No. 5-1. In their motion, Plaintiff maintained that they had served Defendant with a copy of the Summons and Complaint on February 10, 2017, and not February 21, 2017, as had been represented to us by Defendant. *See* Defendant's Motion to Set Aside Entry of Default, Exhibit 2.

10. Plaintiff also filed a Motion for Entry of Default against Defendant on March 20, 2017, which was granted on March 23, 2017. Plaintiff's counsel did not serve a copy of this Motion for Entry of Default on Defendant's counsel.

11. On behalf of Defendant, I verified through correspondence that the date Defendant received the Plaintiff's Summons and Complaint was February 21, 2017. Through common error, however, not the common practice by Defendant who has specific requirements in place regarding service on their registered agent and the protocols necessary to alert company officials of the service of complaints, they were not alerted by their registered agent to the actual date of service, which had occurred on February 10, 2017.

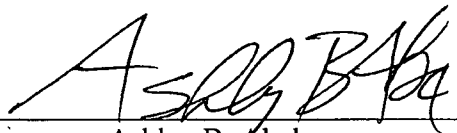
12. I filed a Notice of Removal in the state court action on March 23, 2017 based on the information I had received regarding the date of receipt of Plaintiff's Summons and Complaint. Our actions are the result of mistake and human error, neither of which has prejudiced the Plaintiff in any way nor prohibited them from being able to assert their claims. Had I received the correct date of service, I would have filed a timely Notice of Removal.

13. I, on behalf of Defendant, immediately responded to the entry of default judgment in order to preserve my client's interests by seeking to have the default judgment set aside. On April 7, 2017, I contacted Plaintiff's counsel to inform them of the mistake. On April 11, 2017, I filed Defendant's Consent to Remand to State Court with the United States District Court for the District of South Carolina. I also filed this Motion to Set Aside the Default Judgment with this Court.

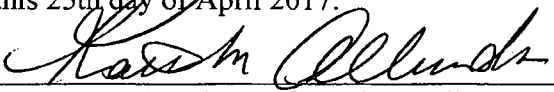
14. I have read the foregoing and declare under penalty of perjury that the statements set forth above are true and accurate.

This 25th day of April 2017.

FURTHER AFFIANT SAYETH NOT.


Ashley B. Abel

Sworn to and subscribed before me
this 25th day of April 2017.


Notary Public – State of South Carolina
My Commission Expires: 2/21/2018

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

AEP2, LLC f/k/a 2AM GROUP, LLC,

Plaintiff,

v.

BMW OF NORTH AMERICA, LLC,

Defendant.

IN THE COURT OF COMMON PLEAS

2017-CP-10-644
Civil Action No.: 2017-10-644

FILED
2017 MAY -2 PM 2:05
JULIE J. ARMSTRONG
CLERK OF COURT

**DEFENDANT'S RESPONSE TO
PLAINTIFF'S MOTION FOR A
HEARING ON DAMAGES**

Defendant BMW of North America, LLC (hereinafter "Defendant"), by and through its undersigned counsel, hereby submits the following response to the Motion for a Damages Hearing filed by Plaintiff AEP2, LLC f/k/a/ 2AM Group, LLC.

PROCEDURAL BACKGROUND

1. On February 8, 2017, Plaintiff filed in this Court a Complaint alleging a claim for declaratory judgment and a claim for "damages," both under state law. *See* Defendant's Motion to Set Aside Entry of Default, at ¶ 1.
2. The undersigned counsel for Defendant was informed by Defendant's in-house counsel that Defendant received notice of the Complaint on February 21, 2017. On March 7, 2017, the undersigned counsel for Defendant confirmed with Defendant's in-house counsel that the date of service was February 21, 2017. *See id.* ¶ 2.
3. Based on the mistakenly identified date of service, Defendant filed a Notice of Removal in the United States District Court on March 23, 2017. *See id.*, Exh. 1. Plaintiff filed a motion to remand in the federal court action, representing that the date of service of the Summons and Complaint on Defendant through its registered agent had instead been on February 10, 2017. *See id.* ¶ 6-7.

4. Court records also indicate that Plaintiff filed a motion for entry of default on March 20, 2017. The Court issued an Order of Default on March 23, 2017. *See id.* ¶ 8.

5. On April 21, 2017, Plaintiff filed a Motion with the court requesting a hearing on damages.

6. On April 26, 2017, Defendant filed a Motion to Set Aside the Entry of Default outlining that Defendant's failure to timely remove the state court action was the result of a clerical error and that Defendant company has internal processes designed to provide communications regarding lawsuits to in-house counsel. This particular filing at issue was an exception to the rule of prompt internal communications in terms of the proper service date.

7. The court has not set a hearing date for either the Defendant's Motion to Set Aside the Default Judgment or on Plaintiff's Motion for a Hearing on Damages.

MEMORANDUM OF LAW

I. PLAINTIFF'S MOTION FOR A HEARING ON DAMAGES IS PREMATURE.

Plaintiff's motion for a hearing on damages in this case is premature. On April 26, 2017, Defendant filed with this Court a motion requesting the Court to set aside the entry of default and allow Defendant to file a response to Plaintiff's Complaint. *See* Def.'s Mot. to Set Aside the Entry of Default (April 26, 2017). Defendant could not have filed its Motion to Set Aside the Entry of Default earlier because the federal court had jurisdiction of this case until the remand order was entered on April 20, 2017. *See* Order to Remand Case to State Court, Case No. 2:17-cv-00781-DCN (ECF Dkt. No. 7). As outlined in their motion, Defendant provides a reasonable and understandable explanation for their failure to timely respond to Plaintiff's Complaint. Specifically, counsel for Defendant was mistakenly led to believe by in-house counsel for Defendant that the date of service of the Complaint was February 21, 2017. *See id.* at 3, *et seq.*

Counsel for Defendant filed a Notice of Removal in the action based on this mistaken date of service. After Plaintiff filed a motion to remand the action back to this Court, Defendant was then able to learn of the mistake and immediately took corrective action to prevent an entry of default. *See id.*

Defendant is therefore entitled to a hearing on the merits of its motion prior to a hearing on damages in order to show good cause for their delay in responding to the Complaint as well as a lack of prejudice to the Plaintiff. *See Ricks v. Weinrauch*, 293 S.C. 372 (Ct. App. 1987) (noting that prior to damages hearing, defendants could proceed with defending motion to set aside default judgment and presentation of defenses).

Default judgments should be “liberally construed to see that justice is promoted and to strive for disposition of cases on their merits.” *See Mann v. Walker*, 285 S.C. 194, 328 S.E.2d 659 (Ct. App. 1985). For this reason, courts have been hesitant to enter default judgments in cases where the delay in responding is due to human error, as in the instant case. *See Ricks*, 293 S.C. 372 (citing *Sears, Roebuck & Co. v. Ramer*, 170 Ga. App. 873, 318 S.E.2d 740 (1984)). For example, in *Ricks*, the court set aside an entry of default against a party after determining that their mistake in believing that the insurance company was appropriately handling the case constituted a meritorious defense. The defaulting party had neglected to follow the progress of the case based on their reliance of incorrect information from the insurance company. In vacating the entry of default, the court cited to the following:

The law should not blindly impose standards which require individuals, in the conduct of their daily business, to distrust the parties with whom they deal. Likewise, a litigant should not unnecessarily be forced into default as a consequence of having reasonably relied upon the word of his fellow, particularly when no innocent party will suffer if the default is opened.

See id.; *see also Kinnear Corp. v. Crawford*, 49 F.R.D. 3 (D.S.C. Feb. 5, 2970) (vacating judgment after noting human error in party's incorrect believe regarding deadline to file answer).

As in *Ricks*, *Sears*, and *Kinnear*, cited above, Defendant in the present action mistakenly relied on incorrect information, which resulted in their delay in responding to Plaintiff's Complaint. Defendant did not act with malice or with bad faith in failing to respond. Instead, Defendant's conduct amounts to excusable error, to which Plaintiff has suffered no prejudice. Moreover, immediately following notice of the default, Defendant promptly responded to avoid an entry of default. *See* Defendant's Motion to Set Aside Default Judgment, *supra*, at ¶¶ 911; *see also Peoples Bank of Beaufort v. Exchange Realty, Inc.*, 273 S.C. 537, 257 S.E.2d 733 (S.C. 1979) (noting that party's due diligence can help avoid default judgment). Therefore, Defendant requests an opportunity to present their meritorious defenses, show lack of prejudice to the Plaintiff, and demonstrate their due diligence in taking corrective action following notice of the default.

II. PLAINTIFF'S MOTION IS DEFICIENT PURSUANT TO THE REQUIREMENTS OF RULE 55(b)(1).

In cases regarding default, "a plaintiff must prove the amount of his damages, and such proof must be made by a preponderance of the evidence." *See Wells Fargo Bank, N.A. v. Marion Amphitheatre, LLC*, 408 S.C. 87 (Ct. App. 2014). South Carolina Rule of Civil Procedure Rule 55(b) requires that claims for default judgments for liquidated amounts, or sum certain amounts, be made either by motion or application to the Court, and must be accompanied by an "affidavit of the amount due." *See* Rule 55(b)(1), SCRPC. In lieu of an affidavit, a party may submit a pleading that includes a Statement of Verification. *See id.*; *see also* Rule 9(i), SCRPC ("In an action on an account the pleader shall attach a verified copy of the account to the pleading, or if the items of the account are set forth in the pleading, it must be verified."). The purpose of the verification requirement is to "give the defendant notice of the basis for the claim and to afford

evidence of the indebtedness sufficient for entry of judgment.” See *Thomas & Howard Co. v. T. W. Graham & Co.*, 318 S.C. 286, 289, 457 S.E.2d 340, 342 (1995). When the plaintiff fails to prove damages sufficiently, courts have reversed part, if not all, of any resulting award. See, e.g., *Solley v. Navy Fed. Credit Union, Inc.*, 397 S.C. 192, 723 S.E.2d 597 (Ct. App. 2012).

In the present action, Plaintiff has failed to provide an affidavit outlining their claims for liability against Defendant as required by Rule 55(b)(1). Moreover, in the absence of an affidavit, Plaintiff has also failed to provide a Statement of Verification in lieu of an affidavit that attests to the liability alleged in their Complaint. See Rule 55(b)(1), SCRPC; see also *Harbor Island Owners’ Ass’n v. Preferred Island Props., Inc.*, 369 S.C. 540, 547, 633 S.E.2d 497, 500-501 (2006) (finding that “the complaint ... [was] not verified; [and] thus the allegation in the complaint d[id] not satisfy Rule 55.”); see also *Thomas & Howard Co.*, 318 S.C. at 290, 457 S.E.2d at 342 (1995) (discussing verification of pleading “if account items are set forth therein.”). Plaintiff’s failure to provide such verification substantially prejudices Defendant from coming forward and effectively being able to defend against Plaintiff’s Motion for a Damages Hearing.

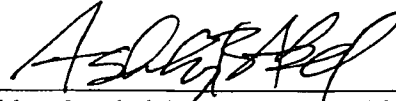
Thus, due to Plaintiff’s failure to comply with the requirements of the rule by providing either a verified pleading or an affidavit, Plaintiff should not be allowed to proceed on their motion for a hearing on damages.

CONCLUSION

Based on the above, Defendant respectfully requests that this Court (i) deny Plaintiff’s motion for a hearing on damages; (ii) allow Defendant to be heard regarding the merits of their Motion to Set Aside the Default Judgment; (iii) set aside the Order of Default entered against Defendant; and (iv) award such other and further relief as this Court deems just and proper.

[SIGNATURE BLOCK ON THE FOLLOWING PAGE.]

Respectfully submitted this 1st day of May 2017.



Ashley B. Abel (State Bar No. 10097)
Cashida N. Okeke (State Bar No. 101825)

JACKSON LEWIS, P.C.
15 South Main Street, Suite 700
Greenville, South Carolina 29601
Telephone: 864-232-7000
Email: abela@jacksonlewis.com

*ATTORNEYS FOR DEFENDANT BMW OF
NORTH AMERICA, LLC*

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

AEP2, LLC f/k/a 2AM GROUP, LLC,

Plaintiff,

v.

BMW OF NORTH AMERICA, LLC,

Defendant.

IN THE COURT OF COMMON PLEAS

FILED
2017 MAY 22 PM 2:07
JANE J. ARMSTRONG
CLERK OF COURT
BY _____

Civil Action No.: 2017-10-644

2017-CP-10-644

AFFIDAVIT OF ATTORNEY ASHLEY
ABEL, ESQUIRE

I, Ashley B. Abel, Esquire, pursuant to 28 U.S.C. § 1746, declare as follows:

1. My name is Ashley B. Abel, Esquire and I am an attorney of record for BMW of North America, LLC (“BMW NA” or “Defendant”).

2. I am a licensed member of the Bar of the State of South Carolina and am in good standing.

3. My business address is JACKSON LEWIS, P.C., which is located at 15 South Main Street, Suite 700, Greenville, South Carolina, 29601.

4. I have personal knowledge concerning the matter set forth in this Affidavit, and believe the statements contained herein to be true and accurate.

5. On February 8, 2017, Plaintiff AEP2, LLC f/k/a 2AM Group, LLC (“Plaintiff”) filed in this state Court a Summons and Complaint against Defendant.

6. In their Complaint, Plaintiff alleges a claim for declaratory judgment and a claim for “damages,” both under state law.

7. Plaintiff alleges that Defendant owes them an indemnity obligation in the amount of or over \$605,669.06. Compl. ¶ 4, 10.

8. However, when Plaintiff served Defendant with a copy of their Complaint, Plaintiff's pleading did not include as an attachment a signed Statement of Verification attesting to the amount of damages Plaintiff claims they are owed by Defendants, in accordance with Rule 9(i) and Rule 55(b)(1) of the South Carolina Rules of Civil Procedure.

9. Additionally, on April 20, 2017, Plaintiff filed with this Court a Motion for a Hearing on Damages.

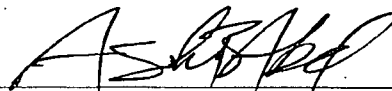
10. I, as undersigned counsel for Defendant, received notice of Plaintiff's filing through the court's electronic filing system as well as a copy of Plaintiff's filing to my business address as provided above.

11. I attest that when I received service of Plaintiff's motion for a damages hearing, Plaintiff's motion was not accompanied by a signed affidavit attesting to the liability they had alleged within their Complaint, as required by Rule 9(i) and Rule 55(b)(1) of the South Carolina Rules of Civil Procedure.

12. I have read the foregoing and declare under penalty of perjury that the statements set forth above are true and accurate.

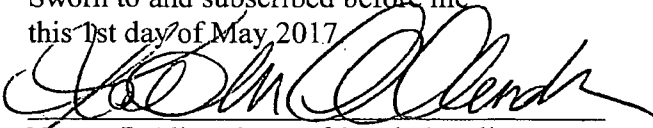
This 1st day of May 2017.

FURTHER AFFIANT SAYETH NOT.



Ashley B. Abel

Sworn to and subscribed before me
this 1st day of May, 2017.



Notary Public – State of South Carolina
My Commission Expires: 2/21/18

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

AEP2, LLC f/k/a 2AM GROUP, LLC,

Plaintiff,

v.

BMW OF NORTH AMERICA, LLC,

Defendant.

IN THE COURT OF COMMON PLEAS

CIVIL ACTION NO. 2017-CP-10-0644

FILED
2017 JUN -8 PM 1:43
JULIE J. ANTONIO
CLERK OF COURT

PLAINTIFF'S MEMORANDUM IN OPPOSITION TO BMW'S MOTION TO SET ASIDE DEFAULT AND MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR DAMAGES HEARING

INTRODUCTION

The above-captioned case of AEP2 against BMW of North America, LLC ("BMW") was filed on February 8, 2017, and was served on BMW on February 10, 2017. BMW's Answer was due thirty days thereafter - i.e., on Monday, March 13, 2017. BMW has filed no Answer and is in default. The Order for Entry of Default was signed by Circuit Judge Deadra Jefferson on March 23, 2017, and filed March 24, 2017. On April 20, 2017, Plaintiff's Motion for Damage Hearing dated April 14, 2017, was filed with the Clerk of Court. On April 26, 2017, BMW then filed its Motion to Set Aside Default (43 days after its Answer was due).

The record does not show "good cause" to set aside the default; however, it does reflect the following:

- (a) BMW's in-house counsel, Mr. Spitaleri "believed" that BMW had not been served with the Summons and Complaint on February 21, 2017, even though on that date, he was sent a "clocked-in" copy of same which showed a filing date of February 8, 2017. BMW provides no factual basis for

Spitaleri's "belief" that no service had been made on BMW by February 21, 2017, or on any other date.

- (b) BMW presents no proof that it ever checked with CT Corporation, its registered agent for service, until March 30, 2017, after it was more than two weeks in default and after it was informed of the date of service based on plaintiff's motion for remand which was filed in federal court on March 28 (Spitaleri Affidavit, Paragraphs 4-5).
- (c) BMW admits that its registered agent delivered the Summons and Complaint to BMW but that once it reached BMW, it "got lost in the proverbial shuffle" (Spitaleri Affidavit, Paragraph 5).
- (d) Even though BMW is alleged to have had "internal requirements and protocols in place to facilitate timely responses to legal process" (Spitaleri Affidavit, Paragraph 5), BMW has not produced nor identified any such requirements or protocols or how same were applied or misapplied in this case, or when, or by whom.
- (e) BMW's South Carolina counsel played no role in the default. After learning of the default, South Carolina counsel represented to plaintiff's undersigned counsel in an email dated April 7, 2017 that the default was due to BMW's in-house "clerical error," the details of which have not been provided by BMW (see Exhibit 1, emails of April 7 and 11, 2017, between South Carolina BMW counsel and plaintiff's counsel). See also BMW Motion to Set Aside Default ¶ 10 (referencing clerical error in terms of "an exception to the rule of prompt internal communications in terms of the proper service date").

The sum and substance of BMW's position is that it has no excuse for its default other than having turned a blind eye to the complaint filed against it. Whatever protocols and procedures that may have been in place by BMW to deal with legal process were apparently ignored. Upon receipt of a clocked-in copy of the Complaint in this case, in-house counsel for BMW made an "assumption" on February 21, 2017, that a Complaint had not been served. He did this without

¹ Mr. Spitaleri's filed affidavit in this case never addresses what supposedly gave him a good faith basis for believing on February 21, 2017, that BMW had not been served.

² On February 21, 2017, I received a copy of the Complaint filed against BMW NA by Plaintiff AEP2, LLC ("Plaintiff") from an attorney representing another party involved in a different lawsuit with Plaintiff.

bothering to call the undersigned lawyer who had signed the Complaint he personally received. He also failed to inquire of BMW's agent for service of process, and without checking with the Charleston County Clerk of Court to ascertain when the affidavit of service was filed. Had BMW checked with CT Corporation and/or the Charleston County Clerk of Court, it would have known that service of the Summons and Complaint was on February 10, 2017 (see Affidavit of Service filed with the Clerk of Court of Charleston County on February 21, 2017, the same day lawyer Spitaleri was informed by telephone about the details of the suit against BMW). WestLaw research does not reflect a single reported case where a defaulting defendant was granted relief for "good cause" because a complaint "got lost in the proverbial shuffle" as asserted by BMW. In any event, the Complaint properly served on BMW was never really lost, it simply was ignored.

For the reasons set forth herein and based on the cases cited hereinafter, BMW's motion to set aside default should be denied, the Court should enter default judgment against BMW, and plaintiff's motion for a damages hearing should be granted. This Court should schedule a damages hearing at the earliest possible time.

STATEMENT OF FACTS

The facts of BMW's default are clear and discussed throughout this Memorandum. Also, the facts relating to BMW's "explanation for the default" are blatantly insufficient as explained herein.

The background facts set forth below give context to BMW's knowledge of the issues of this suit long before it was in default.

A. Background

AEP2, LLC, f/k/a 2AM Group, LLC ("AEP") is a South Carolina business which formerly managed a BMW parts warehouse in Ontario, California under its former name of 2AM Group ("2AM") beginning in 2012. 2AM had a 5-year Services Agreement with BMW whereby 2AM would oversee and manage the warehouse and pay all employees there, all of whom were members of the Teamsters Automotive Industrial and Allied Local 495 ("Teamsters"). BMW reimbursed 2AM Group for all compensation and profit plan contributions it made, and BMW paid 2AM for its management of the facility. The business was profitable.

The Services Agreement between 2AM and BMW dated November 23, 2011 (with a 5-year term beginning January 1, 2012 and ending on December 31, 2016) was coterminous with the Collective Bargaining Agreement ("CBA") between BMW and the Teamsters. In the Indemnity portion of the Services Agreement, §16(c), it was agreed between BMW and 2AM as follows:

"Notwithstanding the above, in the event there is any liability arising out of any potential withdrawal liability on the part of BMW to the Western Conference of Teamsters Pension Fund, BMW N.A. agrees to indemnify and hold 2AM harmless from and against such liability."
(emphasis added).

In 2013-2014, 2AM Group entered into negotiations with Sustained Quality, LLC ("SQ") to sell its assets of the business to SQ. The transaction was closed on February 14, 2014, whereby SQ purchased all assets of the 2AM Group. As part of the sale, BMW and 2AM Group entered into an Assignment, Assumption and Consent Agreement ("ACA") in which BMW consented to the transaction with SQ and reaffirmed its (BMW's) obligation to indemnify 2AM Group. In Paragraph 3(b), the ACA stated as follows:

BMW's indemnification of assignor pursuant to 16(c) of the Agreement with respect to any potential withdrawal liability to the pension fund extends to assignee (and purchaser) and covers all potential withdrawal liability to the pension fund as of the assignment date." (emphasis added)

Several months after the closing on February 14, 2014, plaintiff received a letter from the Western Conference Teamsters Pension Trust which informed plaintiff that, by virtue of the sale to SQ, AEP2, LLC was obligated to pay \$605,699.15 as a withdrawal liability under federal ERISA law. The Services Agreement and the AACA between plaintiff and BMW form the basis of BMW's liability to indemnify 2AM Group's successor, which is AEP2, LLC², the plaintiff herein. AEP2 paid this withdrawal liability in full to the Western Conference Teamsters Pension Trust, and plaintiff is entitled to contractual indemnity from BMW in the amount of \$605,699, plus prejudgment interest at the legal rate.

B. AEP2 v. James Buxton and Buxton & Collic, LLC ("Buxton suit")
(Civil Action No. #2016CP10-02014)
NOW STAYED BY ORDER OF JUDGE JEFFERSON DATED MAY 19, 2017

Plaintiff originally believed that the only responsible party for its \$605,699 loss for the withdrawal liability was its transactional counsel, James Buxton and Buxton & Collic, LLC of Charleston County ("Buxton defendants") who handled the sale of the assets to SQ. The Buxton defendants, the Complaint alleged, did not inform plaintiff about, or protect plaintiff from, its withdrawal liability of \$605,699 imposed on plaintiff by operation of law.

As the Buxton suit progressed, documents were produced early in 2017 which indicated that an additional responsible party may be plaintiff's local counsel, Walter Harris III. Documents were also produced in the Buxton suit by BMW pursuant to a subpoena sent by defense counsel.

² After the sale of its assets to SQ in February 2014, 2AM changed its corporate name to AEP2, LLC.

BMW provided a document (the AACA) which restated the indemnity obligation which BMW originally had to plaintiff for the withdrawal liability on which the Buxton suit was brought.

In his affidavit dated May 24, 2017, counsel for the Buxton defendants, Bruce Wallace of Nexsen Pruet law firm in Charleston, reported that he had a 30-minute telephone call with BMW in-house lawyer, Richard Spitaleri on February 21, 2017, during which he explained that he needed to depose BMW in-house lawyer Courtney Anderson about BMW's indemnity obligation to AEP2. He outlined to Mr. Spitaleri the questions he anticipated asking Anderson about the claims raised by AEP2 in its Complaint against BMW (Affidavit Exhibit 2, Paragraphs 8 and 10).

He told Mr. Spitaleri in that call that he "would have Ms. Anderson confirm that BMW of North America was obligated to indemnify AEP2 for \$600,000 in withdrawal liability alleged in the Complaint filed in this action." (Affidavit, Paragraph 10). Mr. Wallace then emailed the Summons and Complaint which bore a clocked file date of February 8, 2017. Because of this personal contact with Mr. Wallace, Mr. Spitaleri (and presumably Ms. Anderson too) was personally well-aware of the filed Complaint in this action, and the allegations therein, within 11 days after same was served on BMW. The record shows no effort made by BMW to identify the date of service — from CT Corporation, from the Clerk of Court, or from plaintiff's counsel.

In early 2017, all parties in the Buxton case realized that BMW's indemnity obligations to plaintiff were paramount to the claims against Buxton because the BMW suit may mitigate or even obviate the need to proceed against Buxton, and counsel agreed to stay proceedings in the Buxton matter. On May 19, 2017, the Stipulation of Counsel and Consent Order of Stay of Judge Deadra Jefferson was filed. It stayed proceedings in the Buxton case until the instant case had reached a determination.

C. AEP2, LLC v. Harris ("Harris suit")
(Civil Action No. 2014-CP-36-405)

CASE STAYED BY ORDER OF JUDGE T. L. HUGHSTON FILED APRIL 5, 2017

Upon learning in discovery in the Buxton case of possible negligence by plaintiff's former attorney, Walter Harris III, the Summons & Complaint in the Harris case were filed on February 7, 2017 (one day before the Summons and Complaint were filed in this BMW case). It alleges Defendant Harris' joint and several liability with the Buxton defendants for the \$605,000 withdrawal liability incurred by plaintiff.

Because plaintiff's counsel learned at the same time in late 2016 of the BMW documents which had been supplied to Buxton's counsel via a subpoena from BMW, the Harris case has also been stayed. The Order of Stay was issued by Circuit Judge T. L. Hughston, Jr. on March 31, 2017 and filed on April 5, 2017. By its terms, all proceedings in the Harris case are stayed until there is final adjudication in the case of AEP2 v. BMW. The consent Order recited that resolution of the BMW case involves "the same damages as in AEP2 v. Harris, and the result in the BMW case will obviate and likely make moot the issues in the instant case." See attached Exhibit 4, the affidavit of attorney Frederick Jekel dated April 14, 2017, with attached Order of Stay.

APPLICABLE STANDARD FOR RELIEF
FROM AN ENTRY OF DEFAULT UNDER RULE 55

Our Supreme Court recently reiterated the standard for a party seeking relief from an entry of default. In White Oak Manor, Inc. v. Lexington Insurance Company, 407 S.C. 1, 753 S.E.2d 587 (2014), our Supreme Court ruled as follows:

The standard for granting relief from an entry of default under Rule 55(c) is "mere good cause." This standard requires a party seeking relief from an entry of default under rule 55(c) to provide an explanation for the default and give reasons why vacation of the default entry would serve the interests of justice. Sundown Operating Co. v. Intedgel Indus., Inc., 383 S.C. 601, 607, 681 S.E.2d 885, 888 (2009).

Once a party has put forth a satisfactory explanation for the default, the trial court must also consider: (1) the timing of the motion for relief; (2) whether the defendant has a meritorious defense; and (3) the degree of prejudice to the plaintiff if relief is granted." *Id.* at 607-08; 681 S.E.2d at 888. (emphasis added).

In the White Oak case, the circuit court found and concluded that the defendant had provided no reasonable explanation for why it failed to respond to the initial complaint and noted that the only excuse offered was that Defendant Lexington had "lost the pleadings." The circuit court concluded that ground was insufficient and denied the motion.

On appeal to the Court of Appeals, the decision was reversed. Our Supreme Court reversed the Court of Appeals opinion and affirmed the circuit court's order denying the motion to set aside the default. In that case, Defendant Lexington had taken the position that it had replied promptly after discovering the default, that it had presented evidence of meritorious defense and alleged that the plaintiff would not suffer prejudice if the relief was granted. The Supreme Court nonetheless affirmed the lower court order, finding that there was no error in the lower court's holding that losing the complaint was not good cause and that the circuit court acted within its discretion in concluding that losing a complaint was not a satisfactory explanation for failing to timely respond.

ARGUMENT

I. BMW Has Produced No Evidence Which Constitutes "Good Cause" Under Rule 55, SCRPC, To Justify Setting Aside Default.

Had BMW acted reasonably, there is no way that it would have been in default in this case. BMW has 15 in-house corporate counsel in its New Jersey office. (See Exhibit 1). Two of those BMW lawyers, Courtney Anderson and Richard Spitaleri, had information about the subject matter of the Complaint against BMW in this case long before BMW was in default. Defense counsel in Buxton, Bruce Wallace of Charleston, SC, details in his affidavit (See Exhibit 2) that on February 21, 11 days after BMW was served with the Summons and Complaint in this case, he had a

discussion with Mr. Spitaleri, BMW's counsel, about the facts of the BMW Complaint filed in this case. After that 30-minute telephone conversation which Mr. Wallace had with Mr. Spitaleri, Mr. Wallace actually forwarded a clocked copy of the Summons and Complaint to Mr. Spitaleri on the same day, February 21, 2017.

At that point, Mr. Spitaleri could have done one of three things to find out exactly when the Summons and Complaint had been served on BMW:

- (a) he could have called the Clerk of Charleston County who would have informed him that the affidavit of service on BMW's registered agent, CT Corporation, showed that the documents were served on February 10, 2017;
- (b) he could have called the undersigned plaintiff's counsel; had he do so, he would have learned the date of service was February 10, 2017; or,
- (c) he could have called CT Corporation which BMW selected to be its agent for service of process in South Carolina. Had he done so, he would have learned the actual date of service was February 10, 2017.

Mr. Spitaleri did none of these things. His affidavit indicates that on March 30, two weeks after BMW was in default, and more than five weeks after he received the Complaint from Mr. Wallace, he called CT Corporation and learned the date of service was February 10, 2017. Mr. Spitaleri also verified that BMW had received from CT Corporation the Summons and Complaint (BMW does not state the date on which it was received). However, Mr. Spitaleri made a flippant excuse for BMW's default by asserting that the Summons and Complaint "became lost in the proverbial shuffle...." This excuse has never previously been presented in any reported case of which counsel is aware.

BMW's South Carolina counsel reported via email of April 7, 2017 that the default was due to a "clerical error which prohibited the proper transmittal of the Complaint to the in-house counsel." While South Carolina counsel was merely repeating what BMW counsel in New Jersey told him, no facts have been submitted to specify the exact clerical error or how any alleged error

prohibited the filed and properly served transmittal Summons and Complaint from being received and processed by BMW's legal counsel. (See Exhibit 1). South Carolina counsel also noted in his email of April 11, 2017 that the basis for trying to lift this default is not due to any action or inaction by South Carolina counsel for BMW. BMW South Carolina counsel was simply doing what he was told. BMW's in-house counsel reportedly informed South Carolina counsel for BMW that service was on February 21, 2017. There is no reason in this record which supports why or how BMW's in-house counsel would have thought service was on February 21. As noted above, on February 21, the Affidavit of Service was on file with the Charleston Clerk's office.

BMW finds itself in a dilemma created by its own in-house counsel's failure to make any one of three inquiries that would have led him to know that service was on February 10. BMW filed notice of removal 43 days after service.⁹ As the moving party seeking relief from default, BMW has the burden of providing an explanation for the default. It has not discharged that burden.

As explained by the Supreme Court of South Carolina in White Oak Manor, id., a determination of "good cause" under Rule 55, SCRPC, requires first that the defaulting party must provide a justifiable explanation for the default and give reasons why vacation of the default entry would serve the interests of justice.

The White Oak case is the culmination of many appellate decisions in South Carolina where our appellate courts have steadfastly applied Rule 55, SCRPC, to reject motions to set aside default where the defaulting party has not been diligent in responding timely to lawsuits. In an earlier case, Roche v. Young Brothers, Inc., 318 S.C. 207, 456 S.E.2d 897 (1995), the Supreme Court ruled that "losing a summons and complaint within the corporation" was not a ground to set aside

⁹ Later realizing that its in-house counsel had not been diligent, BMW filed its Consent to Remand which acknowledged that BMW was served on February 10, 2017 (Exhibit 1, Attachment 1).

default. Id. at 212, 456 S.E.2d at 900. In that case, the Supreme Court reinstated the entry of default and remanded the case for a damages hearing. The ruling of Roche makes it clear that our Supreme Court has already established a ruling that the excuse that a complaint was "lost within a corporation" is not good cause under Rule 55.

In Richardson v. PV, Inc., 383 S.C. 610, 682 S.E.2d 263 (2009), the Supreme Court held that the insurance company's negligence in failing to timely answer was imputed to the insured and was not "good cause." The courts in this state have consistently held that "the negligence of an attorney or an insurance company is imputable to a defaulting litigant." Richardson, 682 S.E.2d at 267, citing Roberts v. Peterson, 292 S.C. 149, 355 S.E.2d 280 (Ct.App. 1987). In Roberts, a motion to set aside was filed two months after entry of default; the lower court order finding no "good cause" and denying the motion was affirmed.

In Sundown Operating Co. v. Intedge Industries, Inc., 383 S.C. 601, 681 S.E.2d 885 (2009), the defendant forwarded the complaint to its insurance agent two weeks after notifying the agent of the suit. The lower court denied the motion to set aside default. The Court of Appeals affirmed, and the Supreme Court affirmed on the ground that the defaulting defendant failed to show good cause. It specifically ruled as follows:

"... we do not believe that petitioner meets even the most minimal showing of good cause and is therefore not entitled to relief from the entry of default." Id. at 607, 681 S.E.2d 888 (emphasis added).

It is clear from the four decisions of our Supreme Court cited above, covering 1995 through 2014, that BMW's motion is based on facts (intra-corporate negligence) that do not constitute good cause.

II. Having Failed to Establish a Satisfactory Explanation for Its Default, BMW Cannot Rely on the Additional Factors in Sundown Operating for Relief.

Our appellate courts have consistently held that if the trial court determines that the defaulting party has failed to establish a satisfactory explanation for the default, its decision will not be reversed for failing to make a specific finding of fact on the record for each of the three factors identified in Sundown Operating Co. v. Intedge Indus., Inc., 383 S.C. 601, 607, 681 S.E.2d 885, 888 (2009),⁴ if there is sufficient evidentiary support on the record for the finding of the lack of good cause. *Id.* at 608.

In the instant case, BMW has established no satisfactory explanation for the default. As to the three factors set forth in the Sundown Operating Co. case, the timing of BMW's motion for relief (43 days after default) does not weigh in its favor. Further, on the second factor, BMW has not met its burden of demonstrating a meritorious defense. Indeed, the proposed Answer it attached with its motion to set aside default amounts to nothing more than a general denial. The affidavit submitted by BMW is deficient in this regard. Further, the affidavit of Bruce Wallace is most telling. He had a 30-minute telephone call with BMW's in-house counsel more than two weeks before BMW's Answer was due in which he fully explained to BMW counsel why it was liable to indemnify plaintiff and how he expected to depose BMW's in-house lawyer on that issue. (Exhibit 2).

On the final issue, prejudice to plaintiff if entry of default is set aside, it is noted that BMW's indemnity obligation accrued because of a transaction in 2014 arising out of an agreement BMW had with plaintiff to indemnify it for the withdrawal liability, if any. Plaintiff is entitled to

⁴ In that case, the Supreme Court provided that once a party puts forth a satisfactory explanation for the default, the next step for the trial court is to also consider: "(1) the timeliness of the motion for relief; (2) whether the defendant has a meritorious defense; and, (3) the degree of prejudice to the plaintiff if relief is granted." *Id.* at 888.

be indemnified without any further delay and the costs involved with discovery, depositions and a one year court trial roster.

CONCLUSION

Our courts have steadfastly refused to grant relief from default for a party (or its agent or attorney) having "lost the pleadings." It has never recognized that suit papers "lost in the proverbial shuffle" constitute "good cause."

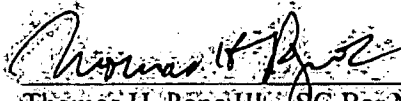
BMW's in-house counsel was grossly negligent when he, after having the complaint explained to him and receiving it on February 21, 2017, did nothing to confirm the date of service from any one of three available sources between that date and March 13 when it went into default. Its motion to set aside default was filed on April 26, 2017, which was 32 days after entry of default and 43 days after its Answer was due.

Denial of BMW's motion will not be disturbed on appeal absent a clear showing of an abuse of discretion.

No good cause exists. None has been shown. For the reasons set forth herein and based on the cases cited, BMW's motion to set aside default should be denied; plaintiff's motion for a damage hearing should be granted; after which default judgment should be entered for the amounts so awarded by this Court.

Respectfully submitted,

By:



Thomas H. Pope III, SC Bar No. 4508

POPE AND HUDGENS, P.A.

Post Office Box 190

1508 College Street

Newberry, SC 29108

Telephone: 803-276-2532, Fax: 803-276-8684

Email: thpope@popeandhudgens.com

John P. Freeman = SC Bar No. 2128
200 W. Highland Dr. Unit 107
Seattle, WA 98119
Telephone: 803-361-6934
Email: jfremanusc@gmail.com

June 8, 2017

Attorneys for Plaintiff

STATE OF SOUTH CAROLINA)
)
 COUNTY OF CHARLESTON)
)
 AEP2, LLC f/k/a 2AM GROUP,)
 LLC,)
)
 Plaintiff,)
)
 v.)
)
 BMW OF NORTH AMERICA,)
 LLC,)
)
 Defendant.)
)

COURT OF COMMON PLEAS
 Civil Action No. 2017 CP-10-0644

FILED
 2017 JUN -8 PM 1:43
 JULIE J. ARMSTRONG
 CLERK OF COURT

**AFFIDAVIT OF PLAINTIFF’S COUNSEL
 IN OPPOSITION TO DEFENDANT’S MOTION
 TO SET ASIDE DEFAULT**

PERSONALLY appeared before me Thomas H. Pope III who being duly sworn, deposes and states as follows:

1. I am co-counsel with John Freeman of Columbia, SC representing the plaintiff in the above case.
2. The Summons and Complaint in this case were filed in the office of the Clerk of Court for Charleston County on February 8, 2017. I had BMW served with a copy of the Summons and Complaint via its registered agent for service, CT Corporation, in Columbia at the address listed by the Secretary of State. Service of the Summons and Complaint was made on February 10, 2017.
3. BMW’s Answer to the Complaint was due on or about Monday, March 13, 2017 (because the actual due date was Sunday, March 12).
4. I heard nothing from any person at BMW or on BMW’s behalf, and after BMW was in default, I filed a motion for entry of default on or about March 20, 2017.
5. On March 23, 2017, Circuit Judge Deadre Jefferson issued an Order of Entry of Default in this case which was filed on March 24, 2017. On March 23, 2017, BMW filed electronically its notice of removal in federal court in Charleston. This was the first notice that we had that BMW had South Carolina counsel.
6. On March 28, 2017, I filed in federal court plaintiff’s motion to remand to state court with memorandum in support and exhibits.
7. On April 11, 2017, BMW filed its consent to remand and confirmed that service of the Complaint was on February 10, 2017 (Attachment 1 hereto).

8. On April 20, 2017, US District Judge David C. Norton issued his Order remanding this case to state court. The Clerk of the federal court also mailed a certified copy of the Order of Remand to the Clerk of Court of Common Pleas for Charleston County. The certified copy of the Order was filed by the Charleston Clerk of Court on May 3, 2017 (see Attachment 2 herewith).
9. I have had three communications via email with BMW counsel to learn why it was in default. As reflected in the emails dated April 7, 2017, and April 11, 2017, herewith (see Attachment 3), I was informed that the only reason was that there "was a clerical error" in BMW's general counsel's office.
10. I learned of no fact as of the date of writing this affidavit that shows South Carolina counsel had any part to play in the default; all the filings and communications I have had indicated that in-house counsel for BMW in New Jersey simply ignored or lost the pleadings or failed to follow their own protocol for handling complaints against BMW.
11. I have since learned that BMW has 15 in-house counsel at its New Jersey office (see Attachment 4 which is a listing of those counsel as appears on the website for corporate counsel).

SWORN to before me this 6th
day of June, 2017)

Mira Elizabeth Brooks Alexander)
(L.S.)
Notary Public for South Carolina
My commission expires: 1/29/2025

Thomas H. Pope III
Thomas H. Pope III

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

AEP2, LLC f/k/a 2AM GROUP, LLC,

Plaintiff,

v.

BMW OF NORTH AMERICA, LLC,

Defendant.

C.A. NO.: 2:17-cv-00781-DCN

DEFENDANT'S CONSENT TO REMAND TO STATE COURT

Defendant confirms service of the Complaint in this matter on February 10, 2017 as stated in Plaintiff's Motion to Remand to State Court (Doc. 5) and therefore consents to remand this matter to state court.

Respectfully submitted,

s/ Ashley B. Abel

Ashley B. Abel (Fed. Bar No. 1032)

JACKSON LEWIS, P.C.
15 South Main Street, Suite 700
Greenville, South Carolina 29601
Telephone: 864-232-7000
Email: abela@jacksonlewis.com

ATTORNEYS FOR DEFENDANT

This 11th day of April, 2017.

CERTIFICATE OF SERVICE

I hereby certify that on April 11, 2017, a copy of the foregoing was served via Federal Express, to the following address:

Thomas H. Pope III
Pope and Hudgens, P.A.
P. O. Box 190
1508 College Street
Newberry, SC 29108
Tel: 803-276-2532
thpope@popeandhudgens.com

John P. Freeman
2329 Wilmot Avenue
Columbia, SC 29205-3164
Tel: 803-254-4667
jfreemanusc@gmail.com

s/ Ashley B. Abel

Ashley B. Abel

Dated: April 11, 2017

A TRUE COPY
ATTEST: ROBIN L. BLUME, CLERK

2017-CP-10-644

BY: *John P. Byrge*
DEPUTY CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

AEP2, LLC f/k/a 2AM Group, LLC,)
)
Plaintiff,)
)
-vs-)
)
BMW of North America, LLC,)
)
Defendant.)

C/A No.: 2:17-cv-0781 DCN



ORDER

FILED
2017 MAY -3 PM 2:29
JULIE J. ARMSTRONG
CLERK OF COURT

This matter is before the court upon plaintiff's motion to remand this case to state court. This motion was filed on March 28, 2017. On April 11, 2017, defendant filed its response, stating that it do not oppose plaintiff's motion to remand. It is therefore

ORDERED that plaintiff's motion to remand to state court is **GRANTED**. This action is hereby remanded to the Court of Common Pleas for Charleston County, South Carolina.

IT IS SO ORDERED.

David C. Norton

David C. Norton
United States District Judge

April 20, 2017
Charleston, South Carolina



**Order remanding AEP2 LLC v. BMW of North America LLC
2:17-cv-00781-DCN**

John P Bryan to: jarmstrong

04/20/2017 11:51 AM

From: John P Bryan/SCD/04/USCOURTS
To: jarmstrong@charlestoncounty.org

Good Morning -

Please be advised that on April 20, 2017 an order was entered remanding the above referenced case to your court. The case number assigned to this action in your Court is

2017-CP-10-00644

Please confirm receipt of the order by responding to this email.

A copy of the Notice of Electronic Filing and a certified copy of the order are attached.



Remand Order 17cv781.pdf NEF of Remand Order.pdf

The attorneys in this case are listed at the bottom of the Notice of Electronic Filing and will be responsible for sending the documents filed in Federal Court to State Court.

If you have any questions, please do not hesitate to contact me.

Thank you,

Jack Bryan
Civil Case Manager
United States District Court
Charleston Division
843.579.1437

From: "Abel, Ashley B. (Greenville)" <AbelA@jacksonlewis.com>
Date: Friday, April 7, 2017 at 10:43 AM
To: th <thpope@popeandhudgens.com>
Subject: AEP2 v. BMW NA

Mr. Pope,

We received your motion to remand and have discussed it with our client. It appears there was a clerical error which prohibited the proper transmittal of the Complaint to in-house counsel. We are prepared to oppose the motion but will file the attached Consent to Remand if you will consent to setting aside the default filed in the state court. Please let me know if you agree. We can then proceed in the state court in that event. While we know your client does not agree, our client has substantive defenses available to it which should be litigated on the merits.

Best regards,

Ashley

Ashley B. Abel

Attorney at Law

Jackson Lewis P.C.

15 South Main Street

Suite 700

Greenville, SC 29601

Direct: (864) 672-8036 | Main: (864) 232-7000

AbelA@jacksonlewis.com | www.jacksonlewis.com

Jackson Lewis P.C. is included in the 2016 rankings of the AmLaw 100 and Global 100 law firms.

Ashley B. Abel

Attorney at Law

Jackson Lewis P.C.

15 South Main Street

Suite 700

Greenville, SC 29601

Direct: (864) 672-8036 | Main: (864) 232-7000

AbelA@jacksonlewis.com | www.jacksonlewis.com

Jackson Lewis P.C. is included in the 2016 rankings of the AmLaw 100 and Global 100 law firms.

Subject: Re: AEP2 v. BMW NA

Date: Tuesday, April 11, 2017 at 12:41:55 PM Eastern Daylight Time

From: Abel, Ashley B. (Greenville)

To: Tom Pope

The basis for lifting the default is that we removed the case to federal court based on what we were told was the service date and the fact that defendant has substantive defenses to assert on the merits. Again, if we consent to remand, will you consent to set aside the default? Thank you for your consideration.

Regards,

Ashley

Ashley B. Abel

Attorney at Law

Jackson Lewis P.C.

15 South Main Street

Suite 700

Greenville, SC 29601

Direct: (864) 672-8036 | Main: (864) 232-7000

AbelA@jacksonlewis.com | www.jacksonlewis.com

Jackson Lewis P.C. is included in the 2016 rankings of the AmLaw 100 and Global 100 law firms.

On Apr 11, 2017, at 10:06 AM, Tom Pope <thpope@popeandhudgens.com> wrote:

Until we see the factual basis for lifting default, we cannot agree.

Please send me some info about BMW's position.

I'll be in a depo all morning, starting shortly, but free this afternoon.

Thanks.

Tom

From: "Abel, Ashley B. (Greenville)" <AbelA@jacksonlewis.com>
Date: Tuesday, April 11, 2017 at 8:13 AM
To: th <thpope@popeandhudgens.com>
Subject: Re: AEP2 v. BMW NA

If we consent to remand, will you agree to lift the default?

I do not have an affidavit drafted yet to support the removal as timely.

Ashley

Ashley B. Abel

Attorney at Law

Jackson Lewis P.C.

15 South Main Street
Suite 700

Greenville, SC 29601

Direct: (864) 672-8036 | Main: (864) 232-7000

AbelA@jacksonlewis.com | www.jacksonlewis.com

Jackson Lewis P.C. is included in the 2016 rankings of the AmLaw 100 and Global 100 law firms.

On Apr 9, 2017, at 6:33 PM, Tom Pope <thpope@popeandhudgens.com> wrote:

Mr Abel

I left my office early Friday. Please advise your client's position on opposing remand.

Also, please provide the affidavit(s) your client plans to use to seek to lift default, particularly the "clerical error" by in-house counsel.

Thanks very much.

Kind regards,

Tom Pope

BMW of North

● **BMW OF NORTH AMERICA, LLC**
300 Chestnut Ridge Rd, Woodcliff Lake, NJ
07677-7731
201-307-4000 FAX: 201-307-9286
www.bmwusa.com

HOWARD S. HARRIS, Vice President of Legal Affairs,
General Counsel & Secretary (2008)
Phone 201-307-3613
E-mail howard.harris@bmwna.com
Bar 1998-NJ, 1987-MI; *educ* Georgetown U (JD, 1987),
Syracuse U (BS-finance & management information sys-
tems, 1984); *prev* Atty, Ford Motor Co, Office of the GC,
1987-98

ANN MARIE A. DIAS-LEBRUN, Corporate Counsel
(2000)
Phone 201-307-4161
E-mail annemarie.dias@bmwna.com
Bar 1997-NJ, PA; *educ* Temple U (JD, 1997)

KEVIN JAMES HEALY, Corporate Counsel (1997)
Phone 201-307-3616
E-mail kevin.healy@bmwna.com
Bar 1996-NJ, NY; *educ* New York U (LLM, 1996, JD, 1995),
Harvard U (AB-history & science, 1989); *prev* Assoc.
Brown & Wood LLP, 1996-97, Legal Asst, Kornstein Veisz
& Wexler, 1991-92, Business Analyst, Dun & Bradstreet
Corp, 1989-91

PAUL B. LINDEMANN, Corporate Counsel (2000)
Phone 864-989-6929
E-mail paul.lindemann@bmwmc.com
Bar 1987-SC, 1986-GA; *educ* U of South Carolina
(JD, 1986), Georgia Institute of Technology (BSIMGT-
industrial management, 1983); *prev* Pfr, Jackson, Lewis,
Schnitzler & Krupman, 1986-90

FRANCES MARINO, Corporate Counsel (2004)
Phone 201-307-4048
E-mail fran.mccallrey@bmwna.com
Bar 1995-NJ, 1994-NY; *educ* Rutgers U (JD, 1994); *prev*
Center Development Mgr, 2002-04, Customer Relations
Mgr, 1997-02, Atty, 1994-97, BMW of North America, LLC

JOSEPH PISTICK, Corporate Finance Counsel (2007)
Phone 614-210-8542
E-mail joseph.pistick@bmwfs.com
Bar OH

MARK WILLIAM REDMAN, Corporate Counsel (2009)
Phone 201-307-3610
E-mail mark.redman@bmwna.com
Bar 2006-TN, 2002-CA, 1986-MI; *educ* Wayne State U (JD,
1986), U of Michigan (BA-political science, 1983); *prev*
Sr Counsel, Nissan North America, GC, Jaguar Cars

SEANN TZOUVELEKAS, Corporate Counsel (2008)
Phone 864-989-6772
E-mail seann.tzouvelekas@bmwmc.com
Bar 1995-SC; *educ* U of South Carolina (JD, 1995, 1991);
prev Law Clerk, Hon. John H. Waller, Jr., 1995-98, Share-
holder, Leatherwood Walker Todd Mann, 1998-08

COURTNEY ANDERSON, Corporate Counsel (2012)
Phone 201-307-3933
E-mail courtney.anderson@bmwna.com
Commercial, Contracts, Labor & Employment
Bar 2002-IL; *educ* U of Pennsylvania (JD, 2002, BA, 1999);
prev Assoc Counsel, Mayer Brown LLP, 2002-12

ROSHIDA DOWE, Corporate Counsel
Phone 614-210-7919
E-mail roshida.dowe@bmwfs.com
Compliance, Regulatory
Bar 2006; *educ* U of Virginia (JD), U of California - Berke-
ley (BA); *prev* Assoc Counsel, Bricker & Eckler

IAN SIDECO, Corporate Counsel
Phone 905-428-5400
E-mail ian.sideco@bmwgroup.ca
Bar 1991; *educ* Rutgers U (JD, 1990), Concordia U (BA,
1985); *prev* Mbr, Bd of Dirs, Global Automaker of Canada,
2013-pres.

RICHARD SPITALERI, Jr., Corporate Counsel
Phone 201-307-4178
E-mail richard.spitaleri@bmwna.com
Contracts, Real Estate
Bar 2004; *educ* Fordham U (JD), St Peter's College (BA-
English literature); *prev* Assoc Counsel, Jasinski PC, 2012-
13, Assoc Counsel, Bingham McCutchen, 2007-12, Law
Clerk, US District Court NJ, 2006-07, Assoc, Lowenstein
Sandler, PC, 2004-06

IRMA MILAGROS LEON-GONZALEZ, Corporate
Counsel (2015)
Phone 614-718-2582
E-mail irma.leon-gonzalez@bmwfs.com
Litigation

Bar 2012-DC, 2004-PR; *educ* U of Chicago (LLM, 2011),
U of Puerto Rico (JD, 2003), Harding U (BA-romance
languages, 1999); *prev* Assoc, Steptoe & Johnson LLP,
2012-15, Income Mbr, McConnell Valdes LLC, 2003-10

RICHARD PRESTON CORTHELL, Corporate Counsel
(2015)
Phone 614-210-7956
E-mail richard.corthell@bmwfs.com
Banking, Consumer, Regulatory
Bar 2007-KY, 2006-OH; *educ* U of Cincinnati (JD, 2006),
Mercer U (BS-information systems, 2002); *prev* Legal
Counsel, Fifth Third Bank, 2011-15, Assoc, Dinsmore
& Shohl LLP, 2006-11

M. SUSANA DIAZ, Corporate Counsel (2015)
Phone 905-428-5388
E-mail sic.diaz@bmwgroup.ca
Advertising, Contracts, General/Corporate
Bar 2002-ON; *educ* York U - Osgoode Hall Law School
(LLB, 2001), Berklee C of Music (BMus-music produc-
tion and engineering, 1998); *prev* GC, 2014-15, Legal
Counsel, Compliance, 2011-14, LG Electronics Canada,
Inc., Assoc, 2002-11, Articling Student, 2001-02, Deeth
Williams Wall LLP

● **BNP PARIBAS**
787 7th Ave, New York, NY 10019
212-841-2000 FAX: 212-841-3561
www.bnpparibas.com/en

BETTY ANNE WHELCHER, General Counsel
Phone 212-841-3245
Bar 1986-NY; *educ* Harvard U (JD, 1981), U of Geor-
gia (AB-political science/economics, 1978); *prev* Global
GC, Deutsche Asset Management Limited, Deputy GC,
Deutsche Bank AG, Atty, Shearman & Sterling, Atty-
Advisor, U.S. Treasury Dept Legal Honors Program

ANDREW W. ALTER, Managing Director
Bar 1987-NY; *educ* Harvard U (JD, 1986), Yale U (BS,
1983); *prev* Managing Dir, UBS Investment Bank, 2005-
08, Managing Dir, Citigroup, 1990-05, Assoc, Breed,

© 2016 CCH Incorporated. All Rights Reserved.

222 / DIRECTORY OF CORPORATE COUNSEL 2016-2017

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

AEP2, LLC f/k/a 2AM GROUP, LLC,

Plaintiff,

vs.

BMW OF NORTH AMERICA, LLC,

Defendant.

IN THE CIRCUIT COURT

Case No. 2017-CP-10-00644

AFFIDAVIT OF BRUCE WALLACE

FILED
2017 JUN -8 PM 1:43
JULIE J. ARMSTRONG
CLERK OF COURT

Personally appeared before me R. Bruce Wallace who, being duly sworn, testifies as follows:

1. I am an attorney licensed to practice law in South Carolina.
2. I represent local Charleston lawyers as defendants in another, related action brought by AEP2 which is pending in Charleston County ("Legal Malpractice" case). This action is one in which AEP2, LLC is suing my clients for professional negligence regarding the withdrawal liability of \$605,699, which plaintiff had to pay to the Western Conference Teamsters Pension Trust, as the result of a transaction in which AEP2, LLC sold its assets to another company known as Sustained Quality, LLC in February 2014.
3. In the course of the discovery in the Legal Malpractice case, I concluded, based on documents produced by BMW pursuant to a subpoena, that BMW had agreed to indemnify AEP2 for any withdrawal liability obligations, the identical withdrawal liability obligations that are the subject of this case of AEP2 v. BMW.
4. In the course of representing my clients, I determined it necessary to depose Courtney Anderson, an in-house lawyer employed by BMW of North America, LLC, regarding that certain Assignment, Assumption and Consent Agreement between AEP2, LLC and BMW of North America, LLC. An unsigned copy of the Assignment, Assumption and Consent Agreement is

attached to this Affidavit as Exhibit A. The Assignment, Assumption and Consent Agreement is directly related to the Plaintiff's claims raised in this action.

5. The Assignment, Assumption and Consent Agreement specifically reaffirms BMW of North America's obligation to indemnify AEP2, LLC for withdrawal liability, as set forth in paragraph 3(v) of Exhibit A, which reads as follows:

"BMW's indemnification of Assignor pursuant to §16C of the Agreement with respect to any potential withdrawal liability to the Pension Fund extends to Assignee (and Purchaser) and covers all potential withdrawal liability to the Pension Fund as of the assignment date."

6. I domesticated a deposition subpoena for Courtney Anderson because she negotiated the Assignment, Assumption and Consent Agreement with AEP2 on behalf of BMW. The Notice of Deposition set Ms. Anderson's deposition for March 14, 2017, in the Legal Malpractice case. A true and correct copy of the Notice is attached as Exhibit B.

7. I hired local counsel to domesticate the subpoena in New Jersey. Richard Spitaleri, another in-house lawyer employed by BMW of North America, contacted local counsel in New Jersey, who forwarded Mr. Spitaleri's email to my attention. A true and correct copy of the forwarded email is attached as Exhibit C.

8. I called Mr. Spitaleri on February 21, 2017. Mr. Spitaleri and I spoke for approximately 30 minutes. During the course of our conversation, I explained that I needed to depose Ms. Anderson, as a lawyer employed by BMW of North America, regarding her negotiations with AEP2 to draft and execute the Assignment, Assumption and Consent Agreement. During our discussion, I specifically informed Mr. Spitaleri about the 2011 Service Agreement between AEP2 and BMW, and the 2014 Assignment, Assumption and Consent Agreement between them (Exhibit C).

9. Counsel for AEP2 had forwarded me the Complaint filed in this action against BMW by email dated February 14, 2017.

10. In our February 21 telephone call, I discussed this BMW Complaint with Mr. Spitaleri, and I outlined the questions for Mr. Spitaleri that I anticipated asking Courtney Anderson regarding the claims raised by AEP2 in this Complaint. Specifically, I told Mr. Spitaleri that I would have Courtney Anderson confirm that BMW of North America was obligated to indemnify AEP2 for \$605,000 in withdrawal liability alleged in the Complaint filed in this action.

11. Despite my clear demonstration of the connection between Ms. Anderson's anticipated testimony about BMW of North America's indemnity obligations under the Assignment, Assumption and Consent Agreement, and this lawsuit, Mr. Spitaleri asked me to forward a copy of the Complaint filed in this action so he could understand the connection better.

12. Following our telephone conversation, on February 21, 2017, I emailed Mr. Spitaleri, as counsel for BMW of North America, LLC, a copy of the Summons and Complaint filed in this action against BMW. A true and correct copy of that email, with the Summons and Complaint attached, is attached herewith as Exhibit D. This exhibit clearly reflects that the Summons and Complaint bore the stamp of the Office of the Clerk of Court for Charleston County reflecting "FILED 2017 Feb. 8...".

13. In the Legal Malpractice case, the Court's entry of a Consent Order staying the Legal Malpractice case may obviate Plaintiff's need to pursue the Legal Malpractice case later because BMW's liability for the withdrawal liability paid by plaintiff is the issue in this BMW case. Resolution of this BMW case in favor of AEP2 will either substantially mitigate the damages claimed in the Legal Malpractice case or resolve the action entirely.

Further your affiant sayeth not.

R. Bruce Wallace

R. Bruce Wallace

SWORN and subscribed to before me
this 24 day of May, 2017.

Cystal L. Lippitt (L.S.)
Notary Public for South Carolina
My Commission Expires: 8-17-20

EXHIBIT A

To Affidavit of R. Bruce Wallace

Case No. 2017-CP-10-00644

Draft Assignment, Assumption, and Consent Agreement

ASSIGNMENT, ASSUMPTION AND CONSENT AGREEMENT

This Assignment, Assumption and Consent Agreement (this "Assignment") is made as of February _____, 2014, by and among BMW of North America, LLC, a Delaware limited liability company ("BMW"), 2AM Group, LLC, a South Carolina limited liability company ("Assignor") and Sustained Quality, LLC, an Indiana limited liability company ("Purchaser"), its wholly-owned subsidiary limited liability company named on the signature page of this Assignment ("Assignee") with regard to the following circumstances:

A. Assignor and BMW are parties to that certain Services Agreement – Ontario RDC, dated as of January 1 2012, as amended by the Addendum, dated May 24, 2012 (as so amended, the "Agreement"), for a term through and including December 31, 2016 (the "Term") with respect to Assignor's operation of BMW's regional distribution center (the "RDC") currently located in Ontario, California. An accurate and complete copy of the Agreement (including all amendments thereto) is attached hereto as Attachment I.

B. The Agreement references that certain Collective Bargaining Agreement between Assignor and Teamsters Automotive, Industrial and Allied Workers Local No. 495 (the "Teamsters"), dated as of January 1, 2012 (the "CBA") for a term also through and including December 31, 2016 relating to Assignor's operations at the RDC. An accurate and complete copy of the CBA (including all amendments thereto) is attached hereto as Attachment II.

C. Assignor and Purchaser have entered into an Asset Purchase Agreement, dated February 1, 2014 (the "Asset Purchase Agreement"), providing for Assignor's sale of substantially all of its business assets to Purchaser subject to the terms and conditions set forth therein.

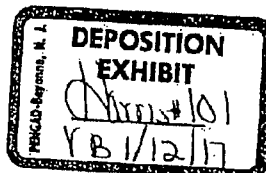
D. Purchaser and Assignor desire to assign Assignor's rights under the Agreement to Assignee, and Assignee desires to assume the obligations of Assignor under the Agreement, from and after the closing of the sale of Assignor's business pursuant to the Asset Purchase Agreement.

E. BMW desires to consent to the proposed assignment and assumption of Assignor's rights and obligations with respect to the Agreement from and after the closing of the sale of Assignor's business pursuant to the Asset Purchase Agreement.

NOW, THEREFORE, in consideration of the covenants and agreements hereinafter set forth and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, BMW, Assignor and Assignee each represent, warrant and agree as follows:

1. Assignment and Assumption. Effective as of the date Closing Date as defined in the Asset Purchase Agreement (the "Assignment Date"): (i) Assignor assigns, transfers and conveys to Assignee all of its right, title and interest in, to, and under the Agreement; and (ii) Assignee accepts the assignment of the Agreement by Assignor.

2. Assignee Agreement as to BMW. Assignee agrees for the benefit of BMW, from and after the Assignment Date and for the remainder of the Term, to pay and perform those obligations of Assignor under the Agreement arising on or after the Assignment Date.



3. Assignor and BMW Representations as to Agreement. Assignor and BMW each represent and warrant to and covenant with Purchaser and Assignee that (i) a complete and accurate copy of the Agreement, as in effect on the date hereof, is attached to this Assignment as Attachment I and there is no other agreement or arrangement regarding Assignee's services at the RMD and BMW's payment for those services and reimbursement of costs thereof, (ii) as of the Assignment Date, the Agreement is currently in full force and effect, (iii) as of the Assignment Date, Tenant has fully performed its obligations under the Agreement and there exists no event or condition which constitutes a default, or event which would following a grace period become a default, under the Agreement, (iv) under the Agreement, payments made by Assignee under the CBA to the Teamsters (or its members or trusts for their benefit) other than regular *[and overtime]* wages paid under Article IV of the CBA, such as payments for vacation pay (Article V of the CBA), holiday pay (Article VI of the CBA), sick leave (Article XI of the CBA), health and welfare fund contributions (Article XII of the CBA), contributions to the Western Conference of Teamsters Pension Trust Fund (the "Pension Fund") (Article XV of the CBA), *[productivity bonuses]* and severance payments (Article XXIII of the CBA) are pass-through costs which BMW will reimburse with a 15% "mark-up" (iv) at the commencement of the Term of the Agreement, upon BMW ceasing and Assignor commencing operations at the RDC under the Agreement, [describe what action BMW took under the CBA with regard to its withdrawal liability to the Pension Fund], and (v) BMW's indemnification of Assignor pursuant to Section 16c of the Agreement with respect to any potential withdrawal liability to the Pension Fund extends to Assignee (and Purchaser) and covers all potential withdrawal liability to the Pension Fund as of the Assignment Date.

4. Consent. BMW hereby consents to the assignment and assumption of all rights and obligations under the Agreement between Assignor and Assignee as set forth herein and agrees that it will not look solely to Assignor with respect to any and all liabilities and obligations under the Agreement arising on or before the Assignment Date.

5. Non-Amendment. BMW and Assignee confirm that this Assignment does not constitute an amendment to the Agreement, other than to substitute Assignee for Assignor thereunder as of the Assignment Date.

6. Counterparts. This Assignment may be executed in two or more counterparts and by the parties on separate counterparts, all of which shall be considered one and the same instrument, and each of which shall be deemed an original.

7. Electronic Signatures. Each of the parties hereto (i) has agreed to permit the use, from time to time, of faxed or otherwise electronically transmitted signatures in order to expedite the consummation of the transactions contemplated hereby, (ii) intends to be bound by its respective faxed or otherwise electronically transmitted signature, (iii) is aware that the other parties hereto shall rely on the faxed or otherwise electronically transmitted signature, and (iv) acknowledges such reliance and waives any defenses to the enforcement of the documents effecting the transaction contemplated by this Assignment based on the fact that a signature was sent by fax or otherwise electronically transmitted.

8. Binding Effect. This Assignment shall be binding upon and inure to the benefit of the parties hereto and their respective successors and assigns.

9. Applicable Law. This Assignment shall be governed by and construed and enforced in accordance with the laws of the State of Indiana, without regard to conflict of law principles.

EXECUTED as of the date first written above.

BMW:

BMW OF NORTH AMERICA, LLC

By: _____

(representative's name and title)

PURCHASER:

SUSTAINED QUALITY, LLC

By: _____
William J. Wilkinson, President

ASSIGNEE:

SQ - BMW ONTARIO RDC, LLC

By: _____
William J. Wilkinson, President

ASSIGNOR:

2AM GROUP, LLC

By: _____
Arthur Perry, President

EXHIBIT B

To Affidavit of R. Bruce Wallace

Case No. 2017-CP-10-00644

Notice of Deposition of Courtney Anderson

L'ABBATE, BALKAN, COLAVITA & CONTINI, L.L.P.

Attorneys at Law
100 Eagle Rock Avenue, Suite 220
East Hanover, New Jersey 07936
(973) 428-4824
(973) 428-1036
John Gonzo, Esq.
Attorney ID: 005191991
New Jersey Local Counsel for Defendants,
James Buxton, Esquire, and Buxton & Collie, LLC

AEP2, LLC, f/k/a 2AM Group, LLC,

Plaintiff,

vs.

JAMES BUXTON, ESQUIRE, and BUXTON &
COLLIE, LLC

Defendants.

SUPERIOR COURT OF NEW JERSEY
BERGEN COUNTY: LAW DIVISION
DOCKET NO.:

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON
IN THE COURT OF COMMON PLEAS
CASE NO.: 2016-CP-10-2014

Civil Action

SUBPOENA AD TESTIFICANDUM

THE STATE OF NEW JERSEY TO: Courtney Anderson

YOU ARE HEREBY COMMANDED to appear in person at L'Abbate, Balkan, Colavita & Contini, LLP, 100 Eagle Rock Ave., Suite 220, East Hanover, NJ 07936 on **March 14, 2017 at 10:00 a.m.** to audio visually testify as a witness in the above captioned matter.

Pursuant to Rule 4:14-7(c), the subpoenaed evidence should not be produced or released until the date herein specified. If you are notified that a motion to quash the subpoena has been filed prior to the deposition date set forth above, you shall not produce or release the subpoenaed evidence until ordered to do so by the court or until the release of the evidence is consented to by all parties to this action. Moreover, you have the right to move to quash or modify this subpoena or otherwise move under New Jersey R. 4:10-3, R. 4:14-4, R. 4:23-1 or any other Rules governing the Courts of the State of New Jersey that are applicable to discovery.

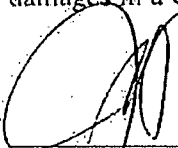
Any subpoenaed organization not a party to this suit is hereby directed to Rule 30(b)(6), South Carolina Rules of Civil Procedure, to file a designation with the Court specifying one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and

shall set forth, for each person designated, the matters on which he will testify or produced documents or things. The person so designated shall testify as to matters known or reasonably available to the organization.

The video deposition shall be taken before an officer authorized by law to administer oaths, shall continue from time to time until completed, and shall be for the purposes of discovery and/or use at trial.

Furthermore, should there be a fee for the photocopying of said materials, please contact the undersigned by mail or telephone with the amount and a check will be forwarded to your attention.

Failure to appear according to the command of this subpoena will subject you to a penalty, damages in a Civil Suit and punishment for contempt of Court.



John Gorzö, Esq.
Attorneys for Defendants,
James Buxton, Esquire, and
Buxton & Collie, LLC

Michelle Smith/s/
Michelle Smith
Clerk of the Superior Court

Address for Service:
Courtney L. Anderson
BMW Group
Corporate Counsel
AJ-NA
300 Chestnut Ridge Road
Woodcliff Lake, NJ 07677

Counsel of record in the proceeding to which this subpoena relates:

Thomas H. Pope, III, Esq.
Pope & Hudgens, PA
1508 College Street
PO Box 190
Newberry, SC 29108
(803) 276-2532

Prof. John P. Freeman
2329 Wilmot Avenue
Columbia, SC 29205
(803) 254-4667

R. Bruce Wallace, Esq.
Nexsen Pruet, LLC
205 King Street, Suite 400
PO Box 486
Charleston, SC 29402
(843) 720-1760



R. Bruce Wallace
NEXSEN PRUET, LLC
205 King Street, Suite 400 (29401)
P.O. Box 486
Charleston, South Carolina 29402
843-720-1760

ATTORNEYS FOR THE DEFENDANTS

November 28th, 2016
Charleston, South Carolina

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

AEP2, LLC, f/k/a 2AM Group, LLC,

Plaintiff,

vs.

JAMES BUXTON, ESQUIRE, and
BUXTON & COLLIE, LLC,

DEFENDANTS.

IN THE COURT OF COMMON PLEAS

CASE NO.: 2016-CP-10-2014

FOR THE ISSUANCE OF A NEW JERSEY
SUBPOENA UNDER NEW JERSEY RULE
4:11-4(B)

**NOTICE OF VIDEO DEPOSITION
OF COURTNEY ANDERSON**

**TO: THE PLAINTIFF AND THEIR ATTORNEYS THOMAS H. POPE III, ESQUIRE
AND PROF. JOHN P. FREEMAN:**

YOU WILL PLEASE TAKE NOTICE that pursuant to Rule 30 of the South Carolina Rules of Civil Procedure, Plaintiff will take the video deposition of **Courtney Anderson** at the offices of **L'Abbate, Balkan, Colavita & Contini, LLP**, located at, **100 Eagle Rock Ave., Suite 220, East Hanover, NJ 07936**, on **March 14, 2017 at 10:00**.

The video deposition shall be taken before an officer authorized by law to administer oaths, shall continue from time to time until completed, and shall be for the purposes of discovery and/or use at trial. You are hereby invited to be present and participate if so minded.

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing **NOTICE OF VIDEO DEPOSITION OF COURTNEY ANDERSON** has been served upon the following counsel of record, via USPS Certified and USPS Regular Mail, as shown below this 28th day of November, 2016.

Thomas H. Pope III, Esquire
Pope & Hudgens, PA
1508 College Street
Post Office Box 190
Newberry, SC 29108

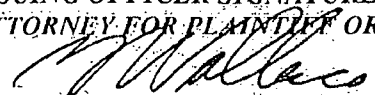
Prof. John P. Freeman
2329 Wilmot Avenue
Columbia, SC 29205-3164



JOHN R. GONZO, ESQ.
L'Abbate, Balkan, Colavita, & Contini, LLP
100 Eagle Rock Ave, Suite 220
East Hanover, NJ 07936
T: (973) 428-4824
F: (973) 428-1036
Local Counsel for Defendants,
James Buxton, Esquire, and
Buxton & Collie, LLC

STATE OF SOUTH CAROLINA

ISSUED BY THE CIRCUIT COURT IN THE COUNTY OF CHARLESTON
FOR THE ISSUANCE OF A NEW JERSEY SUBPOENA UNDER NEW JERSEY RULE 4:11-4(B)

| | | |
|--|---|---|
| AEP2, LLC, f/k/a 2AM Group, LLC, James Buxton, Esquire, et al. | Plaintiff vs. Defendants. | <p align="center"><i>SUBPOENA DUCES TECUM IN A CIVIL CASE</i></p> <p align="center">CASE NO: 2016-CP-10-02014</p> <p align="center">Pending in Charleston County</p> |
| TO: Courtney Anderson | | |
| <input type="checkbox"/> YOU ARE COMMANDED to appear in the above named court at the place, and time specified below to testify in the above case. | | |
| PLACE OF TESTIMONY | COURTROOM | |
| | DATE AND TIME | |
| <input checked="" type="checkbox"/> YOU ARE COMMANDED to appear at the place, date and time specified below to testify at the taking of a deposition in the above case. | | |
| PLACE OF DEPOSITION: L'Abbate, Balkan, Colavita & Contini, LLP, 100 Eagle Rock Ave., Suite 220, East Hanover, NJ 07936 | DATE AND TIME: March 14, 2017 at 10:00 am | |
| <input type="checkbox"/> YOU ARE COMMANDED to produce and permit inspection and copying of the following documents or objects in your possession, custody or control at the place, date, and time specified below (list documents or objects): | | |
| PLACE: | DATE AND TIME | |
| <input type="checkbox"/> YOU ARE COMMANDED to permit inspection of the following premises at the date and time specified below. | | |
| PREMISES | DATE AND TIME | |
| ANY SUBPOENAED ORGANIZATION NOT A PARTY TO THIS SUIT IS HEREBY DIRECTED TO RULE 30(b)(6), SOUTH CAROLINA RULES OF CIVIL PROCEDURE, TO FILE A DESIGNATION WITH THE COURT SPECIFYING ONE OR MORE OFFICERS, DIRECTORS, OR MANAGING AGENTS, OR OTHER PERSONS WHO CONSENT TO TESTIFY ON ITS BEHALF, AND SHALL SET FORTH, FOR EACH PERSON DESIGNATED, THE MATTERS ON WHICH HE WILL TESTIFY OR PRODUCE DOCUMENTS OR THINGS. THE PERSON SO DESIGNATED SHALL TESTIFY AS TO MATTERS KNOWN OR REASONABLY AVAILABLE TO THE ORGANIZATION. | | |
| I CERTIFY THAT THE SUBPOENA IS ISSUED IN COMPLIANCE WITH RULE 45(c)(1) AND THAT NOTICE AS REQUIRED BY RULE 45(b)(1) HAS BEEN GIVEN TO ALL PARTIES | | |
| ISSUING OFFICER'S NAME, ADDRESS AND PHONE NUMBER R. Bruce Wallace, Esquire NEXSEN PRUET, LLC 205 King Street, Suite 400 (29401) P. O. Box 486 Charleston, South Carolina 29402 843-720-1760 | | |
| ISSUING OFFICER SIGNATURE AND TITLE (INDICATE IF ATTORNEY FOR PLAINTIFF OR DEFENDANT)  _____ Attorney for Defendants | DATE: November 21, 2016 | |

(see Rule 45, South Carolina Rules of Civil Procedure, Parts (c) & (d) on next page)

| PROOF OF SERVICE | | |
|------------------|--------|--|
| <i>SERVED</i> | (date) | FEEES AND MILEAGE TENDERED TO WITNESS <input type="checkbox"/> YES <input type="checkbox"/> NO AMOUNT \$ _____ |
| <i>SERVED ON</i> | | <i>MANNER OF SERVICE</i> |
| <i>SERVED BY</i> | | <i>TITLE</i> |

DECLARATION OF SERVER

I declare under penalty of perjury under the laws of the United States of America that the foregoing information contained in the Proof of Service is true and correct.

Executed on November , 2016

Signature of Server

Address of Server

Rule 45, South Carolina Rules of Civil Procedure, Parts (c) & (d):

(c) PROTECTION OF PERSONS SUBJECT TO SUBPOENAS.

(1) A party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The court on behalf of which the subpoena was issued shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction, which may include, but is not limited to, lost earnings and a reasonable attorney's fee.

(2)(A) A person commanded to produce and permit inspection and copying of designated books, papers, documents or tangible things, or inspection of premises need not appear in person at the place of production or inspection unless commanded to appear for deposition, hearing or trial.

(B) Subject to paragraph (d)(2) of this rule, a person commanded to produce and permit inspection and copying may, within 14 days after service of the subpoena or before the time specified for compliance if such time is less than 14 days after service, serve upon the party or attorney designated in the subpoena written objection to inspection or copying of any or all of the designated materials or of the premises. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials or inspect the premises except pursuant to an order of the court by which the subpoena was issued. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move at any time for an order to compel the production. Such an order to compel production shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection and copying commanded.

(3)(A) On timely motion, the court by which a subpoena was issued, or regarding a subpoena commanding appearance at a deposition, or production or inspection directed to a non-party, the court in the county where the non-party resides, is employed or regularly transacts business in person, shall quash or modify the subpoena if it

(i) fails to allow reasonable time for compliance; or

(ii) requires a person who is not a party or an officer, director or managing agent of a party to travel more than 50 miles from the county where that person resides, is employed or regularly transacts business in person, except that, subject to the provisions of clause (c)(3)(B)(iii) of this rule, such a person may in order to attend trial be commanded to travel from the county where the subpoena was served to the place within the state where the trial is held, or

(iii) requires disclosure of privileged or otherwise protected matter and no exception or waiver applies; or

(iv) subjects a person to undue burden.

(B) If a subpoena:

(i) requires disclosure of a trade secret or other confidential research, development, or commercial information, or

(ii) requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party, or

(iii) requires a person who is not a party or an officer, director or managing agent of a party to incur substantial expense to travel from the county where that person resides, is employed or regularly transacts business in person, the court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena or, if the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearance or production only upon specified conditions.

(d) DUTIES IN RESPONDING TO SUBPOENA.

(1) A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand.

(2) When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

EXHIBIT C

To Affidavit of R. Bruce Wallace


Case No. 2017-CP-10-00644

Forwarded Email from Richard Spitaleri of BMW of North America

Wallace, Bruce

From: John R. Gonzo <JGonzo@lbcclaw.com>
Sent: Monday, February 20, 2017 3:15 PM
To: Wallace, Bruce
Subject: Fwd: AEP2, LLC, f/k/a 2AM Group, LLC v. James Buxton, Esq., South Carolina Case No. 2016-CP-10-2014 (Charleston County Court of Common Pleas)
Attachments: image001.jpg

Bruce

Hope all is well. Please see below. 

John

John R. Gonzo
L'Abbate, Balkan, Colavita & Contini, L.L.P.
100 Eagle Rock Avenue, Suite 220
East Hanover, New Jersey 07936
Telephone: (973) 428-4824
Fax: (973) 428-1036
E-Mail: JGonzo@lbcclaw.com
Web: www.lbcclaw.com

CONFIDENTIALITY NOTICE: The information contained in this message and any attachments may be information protected by attorney-client and/or the attorney/work product privilege. It is intended only for the use of the individual named above. If the person actually receiving this email or any other reader of this message is not the named or intended recipient or the employee or agent responsible to deliver it to the named recipient or intended recipient, any use, dissemination, distribution, or copying of this communication is strictly prohibited. If you have received this communication in error, please immediately notify us by email and delete the message from your system.

Begin forwarded message:

From: <Richard.Spitaleri@bmwna.com>
Date: February 20, 2017 at 3:06:07 PM EST
To: <jgonzo@lbcclaw.com>
Subject: AEP2, LLC, f/k/a 2AM Group, LLC v. James Buxton, Esq., South Carolina Case No. 2016-CP-10-2014 (Charleston County Court of Common Pleas)

Dear Mr. Gonzo:

We received a subpoena directed to Courtney Anderson in connection with the above-referenced South Carolina action seeking to take her video deposition on March 14, 2017 at 10:00 AM at your offices in East Hanover. Without waiving our rights to object to the subpoena or service thereof, I write to advise you that I am the in-house attorney that will be representing Ms. Anderson and BMW of North America, LLC.

I'm trying to understand why your client needs Ms. Anderson's deposition testimony with respect to a matter she handled while a member of BMW NA's Legal Department. Can

you please elaborate? To the extent you can provide a satisfactory answer, we can make arrangements for Ms. Anderson's deposition on a date that is convenient for all parties. Ms. Anderson moved on to a new role in BMW of North America, LLC as the Head of Human Resources so her schedule is very tight. We would also seek to schedule the deposition at a location closer to our offices in Woodcliff Lake, NJ (Bergen County). All of my contact information is below.

Best regards,
Rich

BMW Group
Richard Spitaleri, Jr.
Corporate Counsel
AJ-NA
300 Chestnut Ridge Road
Woodcliff Lake, NJ 07677-7731

Tel: 201-307-4178
Fax: 201-307-9286
Mobile: 201-873-9133
Mail: Richard.Spitaleri@bmwna.com



EXHIBIT D

To Affidavit of R. Bruce Wallace

Case No. 2017-CP-10-00644

Email to Richard Spitaleri of BMW of North America, LLC

Wallace, Bruce

From: Wallace, Bruce
Sent: Tuesday, February 21, 2017 11:41 AM
To: 'Richard.Spitaleri@bmwna.com'
Subject: BMW lawsuit [IWOV-NPCHAR1.FID997840]
Attachments: Tab 1 - Summons and Complaint - 2 8 1 7-c.pdf

Mr. Spitaleri,
Please find the complaint that was provided to me.

Sincerely,
Bruce

R. Bruce Wallace
Member
Nexsen Pruet, LLC
205 King St, Suite 400
Charleston, SC 29401
Post Office Box 486 (29402)
T: 843.720.1760, F: 843.414.8222
BWallace@nexsenpruet.com

www.nexsenpruet.com

NEXSEN | PRUET

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

AEP2, LLC f/k/a 2AM GROUP,)
LLC,)
)
Plaintiff,)
)
v.)
)
BMW OF NORTH AMERICA,)
LLC,)
)
Defendant.)
_____)

COURT OF COMMON PLEAS
Civil Action No.

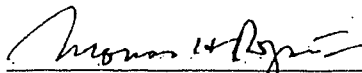
SUMMONS
(JURY TRIAL DEMANDED)

FILED
2017 FEB - 8 PM 2:59
JUDGE J. ANN STRONG
CLERK OF COURT
BY _____

TO THE ABOVE NAMED DEFENDANT AND HIS ATTORNEY:

YOU ARE HEREBY SUMMONED and required to answer the Complaint in this action of which a copy is herewith served upon you, and to serve a copy of your Answer on the subscriber at his office, Post Office Box 190, Newberry, South Carolina, 29108, within thirty (30) days after the service hereof, exclusive of the day of such service; and if you fail to answer the Complaint within the time aforesaid, the Plaintiff will apply to the Court for the relief demanded in the Complaint.

POPE & HUDGENS
1508 College Street - PO Box 190
Newberry, South Carolina 29108
Tel: (803) 276-2532; Fax: 803-276-8684

By: 
Thomas H. Pope, III - SC Bar #4508
Attorneys for Plaintiff

February 7, 2017

STATE OF SOUTH CAROLINA)
)
 COUNTY OF CHARLESTON)
)
 AEP2, LLC f/k/a 2AM GROUP,)
 LLC,)
)
Plaintiff,)
)
 v.)
)
 BMW OF NORTH AMERICA,)
 LLC,)
)
Defendant.)
)

COURT OF COMMON PLEAS

Civil Action No.

FILED
 2017 FEB - 8 PM 2:59
 JULIE M. ANASTASIOU
 CLERK OF COURT
 BY _____

COMPLAINT
(JURY TRIAL DEMANDED)

Plaintiff, AEP2, LLC f/k/a 2AM Group, LLC (referred to as "Plaintiff"), brings this civil action against the Defendant, BMW of North America, LLC (referred to as "BMW"), for declaratory and other relief arising out of a contractual indemnity obligation owe it by BMW. Plaintiff respectfully complains and alleges as follows.

General Allegations

1. Plaintiff is a limited liability company organized and existing under the laws of the State of South Carolina and having its office in Charleston County, South Carolina.
2. Defendant BMW is a Delaware limited liability company, with its principal place of business at 300 Chestnut Ridge Road, Woodcliff Lake, NJ, 07675.
3. In 2011, Plaintiff entered into a Services Agreement with BMW. Attached as Exhibit 1 is a copy of the Services Agreement. Under section 16(c) of the Services Agreement, BMW is obligated to indemnify Plaintiff for any potential withdrawal liability Plaintiff incurred to the Western Conference of Teamsters Pension Fund. This agreement was executed in November 2011 in Charleston County, South Carolina.

4. Attached as Exhibit 2 is the notice received by Plaintiff from the Western Conference of Teamsters Pension Fund. The Exhibit 2 notice reflects that Plaintiff is being assessed liability of \$605,669.06 arising out of the potential withdrawal liability for which BMW owes an indemnity obligation. The union contract and related pension obligation assumed by Plaintiff when it became a BMW supplier saddled Plaintiff with potential and actual withdrawal liability of over \$605,000. Indemnity is thus called for under Exhibit 1, section 16(c).

5. To date, BMW has not provided indemnity under section 16(c).

**COUNT I
(Declaratory Judgment)**

6. Paragraphs 1 through 5 are incorporated by reference.

7. There is an actual and justiciable controversy between the parties over the existence and extent of BMW's indemnity duty owed to Plaintiff.

8. By reason of this actual and justiciable controversy, Plaintiff is entitled to a declaratory judgment resolving all issues, claims and disputes related to its indemnity rights under Exhibit 1, section 16(c).

**COUNT II
(Damages)**

9. Plaintiff repeats Paragraphs 1 through 8.

10. Plaintiff is informed and believes that under the said agreement BMW owes indemnity to Plaintiff in an amount up to \$605,669.06.

11. By virtue of the foregoing, Plaintiff is entitled to judgment against BMW for the amount established, plus prejudgment interest and costs.

WHEREFORE, Plaintiff prays for relief against Defendant BMW as follows:

1. Entry of an Order declaring the amount of BMW's indemnity obligation to Plaintiff and ordering payment thereof;
2. Entering judgment in favor of Plaintiff against BMW for actual damages, plus prejudgment interest;
3. Costs of this action; and,
4. Other further relief as is just and proper.

By: 

Thomas H. Pope III – SC Bar No. 4508

POPE AND HUDGENS, P.A.

Post Office Box 190

1508 College Street

Newberry, SC 29108

Telephone: 803-276-2532; Fax: 803-276-8684

Email: thpope@popeandhudgens.com

John P. Freeman – SC Bar No. 2128

2329 Wilmot Avenue

Columbia, SC 29205-3164

Telephone: 803-254-4667; Fax: 803-753-9870

Email: jfreemanusc@gmail.com

Attorneys for Plaintiff

February 7, 2017

SERVICES AGREEMENT – ONTARIO RDC

1. RECITAL

- a. This Agreement, dated as of _____ (the Effective Date”) is between BMW of North America, LLC a limited liability company, with its principal place of business at 300 Chestnut Ridge Road, Woodcliff Lake NJ, 07675 (BMW NA) and 2AM Group, LLC (“2AM” of “SUPPLIER”), a limited liability company with its principal place of business at 201 Commerce St., Duncan, SC 29334.
- b. This RDC location in Ontario, CA. has been previously operated solely by BMW N.A. under a previous collective bargaining agreement between BMW NA and Local 495, as defined below, such agreement to have expired on August 31, 2011; said agreement was extended through February 28, 2012.
- c. BMWNA has offered to 2AM and 2AM has accepted, the opportunity to supervise and manage operations and logistics management at the above location, as such, 2AM has agreed to assume and become a signatory to the new CBA (as defined below) with Local 495..

2. TERM

- a. The term of this agreement shall commence on January 1, 2012 and shall expire on December 31, 2016. It is the intent of the parties that this services agreement (“Services Agreement”) be coterminous with the collective bargaining agreement (“CBA”) between 2AM and Teamsters Automotive, Industrial and Allied Local 495 (“Local 495”), said agreement dated _____, 2011. As such, this Services Agreement shall commence on the effective date of the CBA and shall terminate and expire on the date of expiration of the CBA, unless terminated earlier consistent with the terms and conditions set forth herein. The terms and conditions of the CBA shall be incorporated hereunder and attached hereto, said CBA to be attached as Exhibit A.
- b. The parties agree that in the event any term or provision set forth in this Service Agreement is in conflict with a term or provision set forth in the aforementioned CBA the applicable term or provision set forth in the CBA shall be supersede and pre-empt the contradictory term in this Service Agreement.
- c. Notwithstanding the above, in the event BMW should, in its absolute discretion to do so, determine to relocate the PDC (as defined in Section 3 below) to a location other than the present PDC site set forth in Section 3 below, 2AM shall be afforded the opportunity to relocate and supervise, manage and administer logistics and fulfillment operations at the PDC at such new location for the term of the Agreement, provided 2AM shall not be in default of the terms and conditions of this Agreement; except, in the event BMW shall determine, in its absolute discretion, to merge operations of the PDC with operations at BMW’s parts distribution facility located in Stockton CA at one location, upon the date that operations cease and terminate at the PDC, this Agreement shall conclude, expire and terminate. In the event of such merger, provided 2AM is not in default of the terms and conditions of this Agreement, 2AM shall be afforded the opportunity to respond to a request for proposal to operate, administer and manage logistics and fulfillment operations at said new, consolidated parts distribution facility.

3. SCOPE

Exhibit 1

- a. ZAM shall be appointed to be the designated operator for the purpose of supervising, managing and administering logistics and fulfillment operations at BMW's parts distribution facility ("PDC"), located at 1150 S. Milliken Ave., Ontario, CA. For the purposes of this Agreement, SUPPLIER shall perform the functions and duties identified in BMW's RFP dated _____ ("RFP"), and to realize continuous improvement in providing the services. SUPPLIER shall use commercially reasonable efforts to look for ways to improve the efficiency of the services provided and will implement identified efficiency, even though identified efficiency is not outlined and described in the RFP. The purpose of SUPPLIER is to provide the general services identified in the RFP in the most commercially efficient and effective manner possible. BMW NA is entering into this Agreement with SUPPLIER because SUPPLIER possesses the knowledge and expertise to provide the services described in the RFP. If SUPPLIER takes exception to any additional responsibilities and efficiencies not described in the RFP, then SUPPLIER can request a meeting with BMW NA. The RFP shall be attached hereto and incorporated hereunder as Exhibit B.
- b. Any mutually-agreed-upon attachments issued by BMW NA on and after the date of this Agreement(s) shall expressly reference this Agreement or its terms and conditions.
- c. Quick and smooth communications are of significant importance to both BMW NA and SUPPLIER. This refers to answering questions, supplying documents and responding to complaints during the process of providing the services. To the extent that BMW NA may be in a position to resolve any operational problems, SUPPLIER will inform BMW NA.
- d. SUPPLIER is responsible to ensure that its duties under this Agreement shall continue without interruption. If SUPPLIER is unable to ensure that its duties under this Agreement continue without interruption, SUPPLIER shall be considered in substantial breach of this Agreement and BMW NA will have the right to terminate this Agreement. SUPPLIER will pay any costs arising from such a breach.
- e. If SUPPLIER is providing product(s) along with Services, this Agreement shall also include and incorporate by reference BMW NA's Purchase Order Terms and Conditions, if so appropriate, whether or not BMW NA's Purchase Order Terms and Condition is expressly referenced hereunder. Said Purchase Order Terms and Conditions for Investments and Consumables are detailed in Exhibit C attached hereto and incorporated hereunder. If there is any conflict between Exhibit C, and the terms of this Agreement, the terms of this Agreement apply.
- f. Unless otherwise agreed to by both parties in writing, any terms and Condition in SUPPLIER's forms that is inconsistent with or additional to any term or condition in this Agreement is hereby material and is objected to, and shall not be applicable to a transaction within the scope of this Agreement.

4. SAFETY AND HOUSEKEEPING

- a. If SUPPLIER is performing the services at BMW NA, SUPPLIER has the obligation of maintaining a high level of cleanliness in all areas of its operating environment. SUPPLIER shall perform audits to evaluate housekeeping conditions in the facilities used by SUPPLIER and shall immediately advise BMW NA in writing of any physical safety hazard related to facilities or equipment provided by BMW NA.

- b. SUPPLIER's personnel performing and providing services at any BMW NA facility must attend BMW NA's Safety Orientation prior to the placement of any SUPPLIER employees at BMW NA.
- c. SUPPLIER is responsible to ensure SUPPLIER's personnel are aware and knowledgeable of BMW NA's safety requirements. SUPPLIER can coordinate safety meetings at any time with BMW NA.
- d. If SUPPLIER will be working on-site at BMW NA for a period of greater than 90 days, SUPPLIER shall maintain on site at BMW NA a current OSHA 300 Log (summary of workplace injuries and illnesses covering SUPPLIER's employees) for review by BMW NA as requested.
- e. SUPPLIER will also provide to BMW NA upon request, SUPPLIER's current Worker's Compensation Experience Modification Factor for SUPPLIER's company.

5. WARRANTY

- a. SUPPLIER represents and warrants that it may enter into this Agreement, that it has obtained all necessary approvals to do so and that all Services rendered hereunder shall comply with all specifications and guidelines referenced in the Agreement and the attached RFP of this Agreement.
- b. All employees supplied by the SUPPLIER hereunder shall be qualified and competent, having all the skills and abilities necessary to perform the services specified in the RFP.
- c. SUPPLIER warrants that the service performed by and deliverables delivered by SUPPLIER shall be free from significant errors and from defects in workmanship and materials and shall be no less than common industry standards. SUPPLIER further warrants that the services to be performed by SUPPLIER shall be performed in a timely and professional manner by qualified SUPPLIER employees and will not violate or infringe upon the rights of third parties, including property, contractual employment, trade secrets, proprietary information, non-disclosure rights and any trademark, copyright or patent rights.

6. STAFF OF SUPPLIER

- a. SUPPLIER must ensure that all individuals working for SUPPLIER, including SUPPLIER's subcontractor(s) under this Agreement have all appropriate licenses, training and certifications necessary to perform the services.
- b. SUPPLIER employees must comply with all BMW NA rules, policies, orders and/or requests relating to performance, electronic communications, security, safety, appearance, dress and/or conduct and shall at all times respect and abide by the policies and codes of conduct, including without limitation those relating to alcohol, drugs, safety, security, smoking, controlled substances, and/or weapons. For any reason, or for no reason, upon BMW NA's request, any SUPPLIER employee will be promptly removed from the performance under this Agreement and may be restricted from further eligibility to work on BMW NA's premises.
- c. SUPPLIER shall ensure that qualified and trained staff is engaged for the services to be performed. SUPPLIER is responsible to ensure that it has engaged a sufficient number of personnel to satisfy its obligations, and if working on site at BMW NA that it has engaged a sufficient number of on-site management to supervise personnel.

- d. SUPPLIER will employ a progressive discipline matrix intended to correct sub-standard employee behavior and performance in the areas of safety, productivity, and quality standards.

7. COMPENSATION

- a. SUPPLIER will provide the services as specified in the Exhibit D, attached hereto and incorporated hereunder.
- b. The compensation rates, as identified in Exhibit D, will be reviewed as agreed to by BMW NA and SUPPLIER, but not more often than annually for any upward adjustment, unless specified differently in said attachment. SUPPLIER agrees to use all commercially reasonable efforts to employ methods to reduce the overhead and direct cost to ensure total billing compensation remains competitive.
- c. The parties agree and acknowledge that certain financial issues are still remaining outstanding, including, but not necessarily limited to, costs arising out of certain benefit and compensation costs, and the administrative support related to those issues arising out of the CBA. The parties agree that Exhibit D shall be amended, modified and updated within fifteen (15) business days of the date of execution of this Agreement to reflect the finalization of said costs.

8. ADJUSTMENT OF COMPENSATION

- a. Upon the occurrence of any of the acts or omissions listed below, there shall be an equitable downward adjustment of SUPPLIER's charges to fairly reflect the reduced value of the services provided. This downward adjustment shall be determined by mutual Agreement to the contracting parties. Pending final Agreement on the amount of such downward adjustment, BMW/NA may deduct from the monthly invoicing the sum of fifty (\$50) dollars for each occurrence per day per incident. If no mutual Agreement is reached within two (2) months after deduction, the amount actually deducted by BMW NA shall be deemed acceptable to both parties. This section will include, but not be limited to, the following acts or omissions:
 - i. Failure to provide the number of personnel in order to perform the Services as specified in the RFP.
 - ii. Failure to produce documentation concerning pre-employment drug testing and criminal background checks prior to assignment to BMW NA.
 - iii. Failure to furnish all equipment and material necessary for the performance of the services as specified in the Agreement.
 - iv. Failure to comply with BMW NA's safety requirements when on site at BMW NA.
 - v. Failure to assign correctly dressed employees.
 - vi. Nothing in this section shall limit the right of BMW NA to seek legal remedies in the event SUPPLIER non-performance results in actual damage(s) exceeding amount withheld from billing. Any failure on the part of BMW NA to require performance of the provisions of this section shall in no way affect the right of BMW NA to enforce the provisions on subsequent occurrences.

Notwithstanding the above, the implementation of the penalties and adjustments as set forth above in this Section 8 shall not be implemented until calendar year 2013, commencing on January 1, 2013.

9. PAYMENT AND INVOICING

- a. All rates for Services hereunder are listed in Exhibit D.
- b. If SUPPLIER submits any invoice for charges that are three months or older, BMW NA has the right to refuse payment; provided however, that such invoice has not been previously presented to, or issues with respect to such invoice have not been previously addressed with BMW NA.
- c. SUPPLIER shall submit monthly invoices reflecting the charges as agreed to in Exhibit D. All such invoices shall be subject to review and approval by BMW NA. Within thirty (30) days after the receipt of the invoice by BMW NA, BMW NA shall pay SUPPLIER all invoiced items that are approved and undisputed.
- d. Payment will not be made unless a BMW NA purchase order number is referenced on the invoice. Invoices must be delivered to BMW NA's facility manager, and mailed to: BMW of North America, LLC; ATTN: Accounts Payable Department; 300 Chestnut Ridge Road; Woodcliff Lake, NJ; 07675.
- e. Should it become necessary for SUPPLIER employees to travel to other BMW NA sites, SUPPLIER shall schedule, arrange, approve, and procure all travel related requirements, billing those costs back to BMW during the month in which the travel is completed.

10. INSURANCE

- a. SUPPLIER shall procure and maintain insurance, in accordance with the amounts and coverages as set forth in this section, at SUPPLIER's sole expense, with reputable and financially responsible insurance companies having an A.M. Best rating of A- or better, insuring against any and all public liability, including injuries or death to SUPPLIER's employees or other persons and damage to property, arising from or related to the Services or SUPPLIER's performance hereunder and shall furnish to BMW NA certificates or memoranda of such insurance and renewals thereof signed by the issuing company or other information respecting such insurance at any time promptly upon request of BMW NA. Such certificates will list BMW NA as the certificate holder and provide for cancellation only subsequent to thirty day's prior written notice to BMW NA.
- b. SUPPLIER shall show the following as minimum limits of insurance:
 - i. General liability (per occurrence, coverage to include completed and ongoing operations):
\$5,000,000.00
 - ii. Worker's Compensation (as defined by Florida law): Statutory Limits
 - iii. Employer's Liability: \$1,000,000.00

- iv. Auto Liability (combined single limit per accident, covering all vehicles operated by : \$1,000,000.00
- c. BMW NA's examination of, or failure to request or demand, any evidence of insurance shall not constitute a waiver of this insurance requirement and the existence of any insurance shall not limit SUPPLIER's obligation under any provision hereof.
- d. Additional Insured / Waiver of Subrogation
 - i. BMW of North America, LLC, their respective parent and/or subsidiary, related or affiliated companies, shall be listed as an Additional Insured with respect to liability arising from ongoing and completed operations performed under this Agreement by the SUPPLIER as respects General Liability, Excess Liability, and Auto Liability coverages.
 - ii. A waiver or subrogation, except for damages caused by BMW of North America's sole negligence will be granted favoring BMW of North America, LLC, their respective parent and/or subsidiary, related or affiliated companies, and their agents, employees or assigns, for as respects General Liability, Excess Liability, and Auto Liability policies.
- e. Nothing in this INSURANCE section shall be construed as limiting SUPPLIER's liability to BMW NA or as limiting BMW NA's rights or remedies against SUPPLIER.

11. BADGING/BUILDING REQUIREMENTS, DRUG FREE FACILITY, AND BACKGROUND CHECKS

- a. BMW NA shall provide continuous access (but not exclusive access) to SUPPLIER on January 2,, 2012 for carrying out its duties and responsibilities hereunder. BMW NA requires that its personnel and those personnel authorized by BMW NA be permitted to enter any and all facilities at any time, with or without advance notice. Keys to enter the facility, as well as security codes, shall be provided to the individuals named on Exhibit E, attached hereto and incorporated hereunder.
- b. SUPPLIER is responsible for maintaining the facility in good working condition and will be responsible for repairing or replacing items that are damaged due to the actions of its employees. This includes, but is not limited to, damage occurring to storage racks, shelves, drawers, mezzanine units, dock doors, light fixtures, furniture, fences, bathrooms, and interior and exterior portions of the building, etc.
- c. During the performance of Services, SUPPLIER agrees to prohibit SUPPLIER employee(s) and subcontractor employee(s) from engaging in the illegal use, sale, possession, transfer or purchase of drugs at any time; prohibit use or possession of alcohol on BMW NA premises and; prohibit SUPPLIER and subcontractor employee(s) from working under the influence of illegal drugs, controlled substances and alcohol. It is the specific responsibility of the SUPPLIER, and SUPPLIER agrees to monitor compliance with this obligation.
- d. SUPPLIER's and subcontractor's employment policies shall provide for SUPPLIER's and subcontractor's right to test and discipline (up to and including terminating) its employees for use of illegal drugs, controlled substances, and alcohol. SUPPLIER and/or subcontractor shall, at SUPPLIER's expense, conduct illegal drug, controlled substance and alcohol testing on its employees performing Services, and furnish proof of negative test results to BMW NA if requested to do so.

- e. As a minimum, all drug testing requirements for this Agreement shall be by a certified independent laboratory, not an on-site instant test. The test transaction shall follow the legally defensible chain of custody and quality standards that meet NIDA (National Institute on Drug Abuse) testing requirements. If on-site requirements will be less than ninety (90) days, drug testing can be a urinalysis test. If on-site requirements are more than ninety (90) days, the testing will be by means of hair analysis (radioimmunoassay) testing, and said testing will consist of all classes of substances mandated for screening by NIDA. The test will assure that the employee(s) is free of cocaine and crack, opiates such as heroin, PCP (angel dust), cannabinoids (marijuana), amphetamines, plus barbiturates and others. Notwithstanding the above, in the event the terms and provisions set forth above in this Section 11 (e) are in conflict with the provisions applicable to substance abuse testing set forth in the CBA, the terms and provisions of the CBA shall supersede and pre-empt the terms set forth in this Section 11 (e) herein.
- f. SUPPLIER's employment policies shall provide for SUPPLIER's performance of pre-employment, annual, and reasonable cause controlled substance and alcohol testing and provide disciplinary measures (up to and including terminating) for its employees testing positive for use of controlled substances and alcohol.
- i. Pre-employment: SUPPLIER shall not assign onto BMW NA's premises any SUPPLIER or subcontractor employee(s) without said employee having successfully passed illegal drug, controlled substance and alcohol testing and has furnished documentation to the BMW NA Facility Manager or designee that such employee has, within thirty (30) days prior to such assignment, successfully passed illegal drug, controlled substance and alcohol screening testing. Verification of the negative test shall be provided to BMW NA's Facility Manager or designee prior to the initial assignment of said employee. The drug testing results shall be presented at orientation or submitted to BMW NA no later than the afternoon prior to orientation. Failure to do so will prevent site access. SUPPLIER will maintain results of testing on file.
 - ii. Annual: SUPPLIER and subcontractor shall provide documented proof that on an annual basis SUPPLIER will randomly drug test 50% of all SUPPLIER and subcontractor employees assigned to the BMW NA premises and be able to provide documented proof that these employees have successfully passed an annual illegal drug, controlled substance and screening test within 365 days prior to the date of the request. If documented proof cannot be produced such employee shall be immediately removed from assignment to BMW NA.
 - iii. Reasonable Cause: Upon a reasonable cause, SUPPLIER and subcontractor shall under their existing policy, conduct illegal drug, controlled substance and alcohol testing on its employees performing services who are assigned to the BMW NA premises. 2AM shall test by urine, blood analysis or by hair analysis (radioimmunoassay) testing, and said testing will consist of all classes of substances mandated for screening by NIDA. The test will assure that the applicant is free of cocaine and crack, opiates such as heroin, PCP (angel dust), cannabinoids (marijuana), amphetamines, plus barbiturates and others.
- g. **BACKGROUND CHECKS:** SUPPLIER must perform a criminal background check on all employees assigned to BMW NA for more than 90 days (including those of any SUPPLIER sub-contractor's) and must engage any person who has a felony conviction involving violence, theft, dishonesty, or other moral turpitude. General guidelines for rejecting SUPPLIER employees with prior criminal convictions are murder, assault and battery,

rape, child abuse, spousal abuse, manufacturing and distribution of drugs, or any convictions of violent nature. There are no statutes of limitation on violent crimes. SUPPLIER should maintain results of testing on file in case of an audit by BMW NA.

h. RETURN AND DEACTIVATION OF BADGES

i. SUPPLIER is responsible for the following:

- 1. Notifying BMW's facility manager whenever changes occur that require the badge to be deactivated or deleted from the system.**
- 2. Returning these badges to BMW NA. The badges can be returned in person to BMW's facility manager or can be mailed to: BMW NA RDC, 1150 South Milliken Ave., Ontario CA.**

12. FORMER EMPLOYEES OF BMW NA

a. During the performance of this Agreement, SUPPLIER agrees to the following:

- i. SUPPLIER shall not have any former employee of BMW NA render any service at BMW NA without prior written authorization from the BMW NA.**

13. EQUAL OPPORTUNITY AND EMPLOYMENT LAWS AND REGULATIONS

a. During the performance of the Agreement, SUPPLIER agrees to the following:

- i. SUPPLIER will not discriminate against any employee or applicant for employment because of race, color, religion, sex, age, national origin, disability, or veteran status. SUPPLIER will ensure that employees and applicants for employment are treated without regard to their race, color, religion, sex, age, national origin, disability or veteran status. Such action shall include, but not be limited to, the following: employment, upgrading, demotion, or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. SUPPLIER agrees to post in conspicuous places, available to employees and applicants for employment, notices to be provided by an appropriate agency of the federal, state and local governments regarding nondiscrimination in employment.**
- ii. SUPPLIER will, in all future solicitations or advertisements for employees to perform services hereunder for BMW NA, state that all qualified applicants will receive consideration for employment without regard to race, color, religion, sex, age, natural origin, disability or veteran status.**
- iii. SUPPLIER will comply with all state and federal employment laws, rules, regulations and orders.**
- iv. In the event of SUPPLIER's noncompliance with the Equal opportunity conditions of this Agreement or with any employment laws, rules, regulations or orders, BMW NA may cancel, terminate or suspend this Agreement in whole or in part.**

14. COMPLIANCE WITH LAWS

- a. During the performance of this Agreement, SUPPLIER agrees to fully comply with all laws, rules, regulations, and/or ordinances of all governments and all agencies thereof, and shall in all things hold BMW NA harmless from all costs, fines, penalties, expenses (including attorney's fees), and/or damages that may directly or indirectly arise as a result of SUPPLIER's failure or alleged failure to comply with any of same.
- b. SUPPLIER is responsible for complying with all employment, environmental, safety, health and all other legal requirements for its operations under this Agreement. BMW NA does not condone or encourage violations of law. If SUPPLIER observes that any activity required herein is at variance with applicable law, SUPPLIER shall immediately advise BMW NA in writing and any changes to the Services shall be mutually agreed upon. Otherwise, SUPPLIER is responsible for all costs, fines, penalties, or assessments attributable to violations of law, including those which may be assessed against BMW NA as a result of SUPPLIER's conduct of the Services or related activities performed by SUPPLIER hereunder.

15. WORK FOR HIRE

- a. Except as otherwise agreed, with respect to all tangible or intangible property that is created or generated by SUPPLIER personnel working solely and directly in the course of SUPPLIER's performance under this Agreement, including, but not limited to printed materials, artwork, plates, audiovisual materials, software, negatives, mechanicals, and photographs, SUPPLIER acknowledges and agrees that all results of work performed or goods supplied hereunder by employees and contractors of SUPPLIER whom are working solely and directly in support of BMW NA, whether created by or at the direction of SUPPLIER, constitute "works made for hire" which have been specially ordered or commissioned by BMW NA within the meaning of the United States Copyright Act (the "Copyright Act"). SUPPLIER further acknowledges and agrees that BMW NA is and shall be considered the author of such works for all purposes and the sole and exclusive owner throughout the world of all of the rights, including copyright, in and to the works arising from or created as a result of SUPPLIER's performance of services and/or provisions of goods hereunder. To the extent that the works or any part thereof shall be deemed by a court of competent jurisdiction or any government agency not to be a "work made for hire" within the meaning of the Copyright Act, the provisions of this Agreement shall control and, for the consideration set forth herein, SUPPLIER hereby irrevocably and absolutely assigns-sets over and grants to BMW NA, its successors and assigns, all rights, title and interest in the works subject to any written limitations in a separate Agreement under which the goods are purchased. SUPPLIER also acknowledges and agrees that BMW NA shall be the sole and exclusive owner through the world of any and all patentable inventions, trade secrets, and technical know-how created by the SUPPLIER, or its employees or contractors, and of any and all trademarks and service marks, along with the associated goodwill generated by or arising solely and directly from SUPPLIER's performance hereunder. This paragraph specifically does not apply to any tangible or intangible property that is created or generated by those SUPPLIER personnel whom are not working solely and directly for BMW NA and which is created or generated as SUPPLIER's Initiative but which may be used in support of BMW NA.

16. LIABILITY AND INDEMNIFICATION

- a. SUPPLIER assumes full and complete liability for all injuries to, or death of, any person including SUPPLIER's personnel and for damages to property, including property of BMW NA, arising from or associated with the

presence of SUPPLIER's personnel on BMW NA's premises in connection with the services furnished under this Agreement. SUPPLIER further agrees to defend, indemnify and hold harmless BMW NA, its partners, successors, assigns, heirs, legal representatives, officers, directors, employees and agents from all suits for such injuries, death or damages whether or not such claims are valid and all claims, losses, expenses including judgments, settlements and attorney's fees, or liabilities, injuries, damages, claims and suits whether legally liable or not, which may arise as a result of the breach of this Agreement or the conduct of SUPPLIER, its officers, employees, and agents in the course of or in connection with providing these services or the claims of any SUPPLIER employee or applicant relating to his or her employment. This obligation shall include, but not be limited to, the burden and expense of defending all claims, suits and administrative proceedings provided that counsel has relevant expertise and does not represent any party or interest adverse to or in competition with BMW NA or its affiliates, even if such claims, suits, or proceedings are groundless, false or fraudulent, and conducting all negotiations of any description, and paying and discharging, when and as the same become due, any and all judgments, penalties or other sums due against the indemnified person. BMW NA, at its sole expense, may employ additional counsel of its choice to associate with counsel representing SUPPLIER and the indemnified parties.

- b. Notwithstanding the above, BMW NA shall defend, indemnify and hold harmless SUPPLIER, its successors, assigns, heirs, legal representatives, officers, directors, employees and agents from all suits, claims, losses, expenses including judgments, settlements and attorney's fees, or liabilities, injuries, damages, claims and suits whether legally liable or not, which may arise out of criminal background checks as described in Sections 11 (f) and (g) and substance abuse screening as described in Sections 11 (c) and (d) above prior to the commencement of this Agreement, as set forth in Section 2 above.
- c. Notwithstanding the above, in the event there is any liability arising out of any potential withdrawal liability on the part of BMW NA to the Western Conference of Teamsters Pension Fund, BMW NA agrees to indemnify and hold 2Am harmless from and against such liability.
- d. The obligation of SUPPLIER under this paragraph shall survive the completion of all activities to be performed by SUPPLIER.
- e. In any and all claims under this INDEMNIFICATION section, the indemnification obligation shall not be limited in any way by any limitation on or for SUPPLIER or any subcontractor, under Worker's Compensation Acts, disability benefit acts or other employee benefit acts.
- f. SUPPLIER shall indemnify and hold BMW NA harmless from all liens and other encumbrances against the premises on account of debts or claims alleged to be due from SUPPLIER or his subcontractors to any person, including subcontractors, and, on behalf of BMW NA and in BMW NA's name, SUPPLIER will defend at its own expense any claims or litigation in connection therewith.
- g. SUPPLIER shall exercise reasonable care to provide warehouse management, supervision and operational expertise consistent with the highest standards and practices of the fulfillment industry consistent with the RFP and elsewhere in this Agreement. SUPPLIER shall be liable for any loss or injury to goods stored, however caused, resulting from the failure by SUPPLIER to exercise such care in regard to them as a reasonably careful warehouseman would exercise under like circumstances.

17. DRIVER'S REQUIREMENTS

- a. To the extent that SUPPLIER and/or SUPPLIER's employee(s), agents, or other representative are on or present at any premises of BMW NA, or operating a vehicle owned or leased by BMW NA or its agents, affiliates (collectively BMW), or operating any other vehicle, SUPPLIER shall be and is responsible for the acts and omissions of SUPPLIER's employees, agents, or other representatives within or about the BMW premises and/or in BMW's vehicle(s) and agrees to indemnify and hold BMW harmless from liability for any claims or damages to property or injuries or death to persons arising out of negligence or misconduct of SUPPLIER's employees, agents, or other representatives in performance hereunder or other actions at the BMW premises and/or in BMW vehicle(s), including without limitation (1) the failure of any of SUPPLIER's employees, agents or other representatives to comply with all applicable rules and regulations (BMW or otherwise) governing security, maintenance and safety at or about the BMW premises, (2) the failure of any of SUPPLIER's employees, agents or representatives or any other person to comply with all applicable rules and regulations (BMW NA or otherwise) governing the operation of any BMW vehicle, (3) any claim against BMW by or on behalf of any person including, but not limited to, SUPPLIER's employees, agents or other representatives, for injury or otherwise, (4) any claim against BMW resulting from SUPPLIER's failure to maintain workers' compensation or other public or private insurance with respect to any of SUPPLIER's employees, agents or other representatives. Additionally, SUPPLIER will provide properly trained, duly licensed drivers who are legally qualified under all state and Federal regulations. SUPPLIER shall not assign onto the BMW premises any employee involved in operating or moving vehicles that does not have a driving record that meets the following:

- i. No DWI within the last two years
- ii. No more than two moving violations within one year

18. CLAIMS FOR DAMAGES

- a. Should either party to this Agreement suffer injury to person or property (including delay or disruption to the BMW NA operative process), or failure to comply with this Agreement because of any act or omission of the other party or any of the other party's employees, agents or others for whose acts such party is legally liable, claim shall be made in writing to such other party within a reasonable time after the first observation of such injury or damage.

19. CONFIDENTIALITY

- a. Both SUPPLIER and BMW NA will hold in strict confidence during and after the term of this Agreement all information, materials and data that have been disclosed by either BMW NA or SUPPLIER or to which BMW NA or SUPPLIER have access in the performance of the Services that are not publicly available at the time they are disclosed to or accessible. Any and all technical and commercial information, market plans, strategy, customer lists, marketing surveys and pricing data relating in any way to the materials or Services to be furnished by SUPPLIER may not be publicly communicated without prior written approval by SUPPLIER. SUPPLIER shall not use any such confidential information for any purpose, or disclose it to anyone other than SUPPLIER's personnel with a need to know the information, without prior written approval from BMW NA, except as is necessary to fulfill its obligations under this Agreement or to comply with any court order or subpoena issued by a court having competent jurisdiction provided SUPPLIER will give BMW NA immediate written notice of receipt of such order or subpoena prior to release and cooperate with BMW NA regarding an appropriate protective order. SUPPLIER and BMW NA shall advise its personnel of the restrictions on the

use and disclosure of the confidential information and take appropriate action to ensure their compliance. In addition to the foregoing, SUPPLIER shall take such further steps as BMW NA may direct to ensure the protection of confidential information.

- b. SUPPLIER shall not cause or permit any other party to or allow anything, which may damage or endanger any intellectual property of BMW NA relating BMW NA products or BMW NA's title to BMW NA products.
- c. SUPPLIER shall not allow its management, staff or any third party to take any photographs inside or around any facility, except when necessary for damage reports, under this Agreement. SUPPLIER shall obtain a photographer's pass from BMW NA prior to taking any such damage photographs.
- d. BMW NA's policies and operating practices are confidential and proprietary and SUPPLIER agrees not to discuss nor otherwise reveal BMW NA's practices to any third party without prior written consent from BMW NA.

20. TRADEMARKS AND SERVICE MARKS

- a. Neither party shall use any trademark nor service mark of the other party or of any parent, subsidiary, or affiliates of the other party in any published form, literature, or other documents without the express written consent of the other party or its affiliates. Neither party shall give any press release or press interview on any matter pertaining to the other party without first obtaining the consent of the other party.

21. TERM & TERMINATION

- a. This Agreement shall be effective as of the date set forth in the second paragraph of this Agreement and shall continue for the term of the Agreement. Time is of the essence of this Agreement. If this Agreement is terminated for cause as set forth hereunder, SUPPLIER will terminate all services under this Agreement on the date specified in the termination notice and shall terminate all orders chargeable to the performance of this Agreement, which may be terminated without costs on the termination date.

The only claim of SUPPLIER against BMW NA for loss, damage or otherwise, on account of such termination by BMW NA, shall be for compensation and payment in accordance with the provisions of the preceding paragraph.

- b. SUPPLIER's personnel assigned to the BMW NA facilities, if any, as of the date of termination shall be free of any restriction in performing services at the BMW NA facilities for another SUPPLIER and SUPPLIER hereby irrevocably grants its consent to the employment of such persons by any subsequent SUPPLIER providing like services to BMW NA facilities.
- c. The obligations of the SUPPLIER under sections 4, 9, 13, 14, 15, 17, 18, 19, 22, 24, 28, and 29 in this Agreement shall survive the completion of all activities to be performed by SUPPLIER and the termination or expiration of this Agreement.
- d. If SUPPLIER is adjudged a bankrupt, or makes a general assignment for the benefit of creditors, or if a receiver is appointed on account of SUPPLIER's insolvency, or if SUPPLIER persistently or repeatedly refuses or fails, except in cases for which extension of time is provided, to supply enough properly skilled employees

or proper materials, or persistently disregards laws, ordinances, rules, regulations or orders of any public authority having jurisdiction, or otherwise has breached any of its obligations under this Agreement and fails within seventy-two (72) hours after the serving receipt of written notice to commence and continue correction of such default, neglect or violation with diligence and promptness, BMW NA may, after seventy-two (72) hours following the service of notice or termination and without prejudice to any other remedy BMW NA may have, terminate the engagement of SUPPLIER on the date specified in the notice of termination and take possession of the site and of all materials and equipment owned by BMW NA.

22. INDEPENDENT CONTRACTOR

- a. SUPPLIER agrees that SUPPLIER is an independent contractor in providing the Services to BMW NA, and that this Agreement is not intended to create an employer/employee, principal/agent, partnership or joint venture relationship between the parties or between BMW NA and any subcontractor of SUPPLIER. The services to be provided by SUPPLIER shall be provided by personnel who are employees of SUPPLIER and SUPPLIER assumes full responsibility for their acts and for their supervision, daily direction, and control. SUPPLIER shall pay, and BMW NA shall not be responsible for, the salaries and expenses of, and all Social Security taxes, unemployment insurance, worker's compensation, disability benefits and any similar taxes and withholdings relating to such employees.
- b. SUPPLIER agrees to place all employees supplied hereunder on a payroll provided by SUPPLIER and to keep all employment records as required by law, make all payroll deductions as required by law or by contract and to make all payments to all governmental agencies and/or other third parties as may be required by law or contract. All of same shall be promptly and timely performed by SUPPLIER and SUPPLIER shall in all things hold BMW NA harmless from all costs, fines, penalties, expense (including attorney's fees), and/or damages that may directly or indirectly arise as a result of SUPPLIER's failure or alleged failure to provide or perform any of same.

23. NONASSIGNABILITY

- a. Neither party shall assign, transfer, or subcontract this Agreement nor any of its obligations hereunder without the other party's express prior written consent. Notwithstanding the foregoing, to the extent any of the Services will be performed in or relate to a jurisdiction outside the United States, SUPPLIER shall have the right, with the prior consent or approval of BMW NA, to subcontract the performance of such Services to SUPPLIER's international company practicing in such jurisdiction.
- b. SUPPLIER shall not assign any money due or to become due SUPPLIER hereunder without the prior written consent of BMW NA.

24. FORCE MAJEURE

- a. In the event any action or circumstance outside the reasonable control of the parties, or either of them, which has a substantial impact on the parties hereunder, such as a Force Majeure, act of government imposition or maritime restrictions, fire, strike, civil disobedience, disruption in lines of supply (including maritime and overseas) or any other such action or event, the affected party shall give written notice to the other party of said action or event ("Notice of Suspension"). Following the notice of the period of

suspension, the parties shall meet to discuss the duration of the contract. During the term of suspension, all money due under this Agreement shall be paid immediately.

25. BOOKS, RECORDS AND ETHICS

- a. SUPPLIER shall be responsible for maintaining accounting and related activities in connection with the Services, for the duration of this Agreement and for a period of not less than two (2) years after completion of performance under this Agreement; and shall make such records available for audit by BMW NA or any representative or any representatives authorized by BMW NA, upon BMW NA's request. Such request will provide reasonable and sufficient notice to SUPPLIER.
- b. SUPPLIER shall not pay any commissions, fees, or grant any rebates to any employee or officer of BMW NA, favor employees or officers of BMW NA with gifts or entertainment of significant cost or value, or enter into any business arrangements with employees or officers of BMW NA.

26. SOLICITATION

- a. Each party agrees during the term of this Agreement not to directly hire, solicit, or accept solicitation for the employment of the other party's employees providing, supervising or coordinating the Services, unless agreed to in writing by BMW NA and SUPPLIER.
- b. SUPPLIER shall neither sell nor solicit its products to BMW NA employees on or off the premises of BMW NA, without permission in writing from BMW NA.

27. RIGHTS AND REMEDIES

- a. The rights and remedies of BMW NA and SUPPLIER available under this Agreement shall be in addition to, and not a limitation of, any rights and remedies available at law or in equity.

28. NOTICES

- a. All written notices set under this Agreement shall be deemed to have been duly served, if delivered in person to an officer of the corporation from whom it was intended or if delivered at or sent by registered or certified mail or reputable overnight courier service to the following business address:

BMW of North America, LLC
300 Chestnut Ridge Road
Woodcliff Lake, NJ 07675
ATTN: Parts Logistics; W. Neal,
with a copy to: LAW Department: Herbert L. Klein

SUPPLIER:
Street address
City, stat, zip

ATTN:

With a copy to:

29. GOVERNING LAW

- a. New Jersey law applicable to contracts made and fully performed within the state of New Jersey shall govern this Agreement and the performance hereunder.

30. GENERAL

- a. This Agreement shall be binding upon and inure to the benefit of its successors and assigns of the parties. Except with the prior written consent of BMW NA, such consent shall not be unreasonably withheld, neither this Agreement nor any rights or obligations of SUPPLIER shall be assigned or otherwise transferred, and any attempt to assign or transfer this Agreement or any rights or obligations of SUPPLIER under this Agreement without such consent shall be null and void.
- b. No action or failure to act by BMW NA or SUPPLIER shall constitute a waiver of any right or duty afforded either of them under this Agreement, nor shall any such action or failure to act constitute an approval of or acquiescence in any breach thereunder, except as may be specifically agreed in writing.
- c. The invalidity of any part of provision of this Agreement shall not impair or affect in any manner whatsoever the validity enforceability or effect of the remainder of this Agreement.
- d. Each of the parties shall pay its own costs and expenses incurred by it in connection with this Agreement.
- e. For all disputes, controversies or claims which may arise between BMW NA and SUPPLIER (or between any affiliate of BMW NA and SUPPLIER) out of, or in connection with this Agreement; its construction, interpretation, effect, performance or non-performance, termination or consequences thereof, or in connection with any transaction between them contemplated hereby, however characterized as a matter of law (whether in contract, or tort otherwise) BMW NA and SUPPLIER, hereby expressly and irrevocably waive the right to trial by jury. On a case-by-case basis, the parties may agree to mediate or arbitrate a dispute under procedures then agreed to by the parties.
- f. SUPPLIER shall, at the end of the term or upon termination of this Agreement, immediately return to BMW NA any and all materials and all copies thereof in whatever forms that have been provided by BMW NA or related to BMW NA's business, which SUPPLIER possesses or has under its control.
- g. All the under takings stipulations, terms and conditions as contained in the SCHEDULES, and Exhibits, if any, referred to in this Agreement shall be deemed to have full force and effect as if they were incorporated in this Agreement and the parties hereby severally covenant to perform and observe the same at all times.

31. ENTIRE AGREEMENT

- a. This Agreement, together with all SCHEDULES, Exhibits, and Appendices hereto, represents the entire and integrated Agreement between the parties hereto and supersedes all prior negotiations, representations or

Agreements wither written or oral. The Agreement may be amended or modified only in writing and signed by both parties.

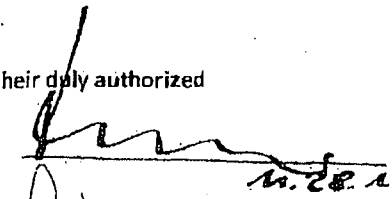
32. EXHIBITS AND SCHEDULES

- a. Exhibit A: CBA
- b. Exhibit B: RFP
- c. Exhibit C: BMW Purchase Order
- d. Exhibit D: Fee Schedule
- e. Exhibit E: Security Codes

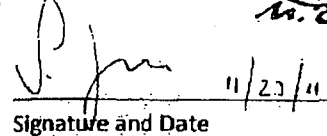
END

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be signed by their duly authorized representatives the day and year indicated below:

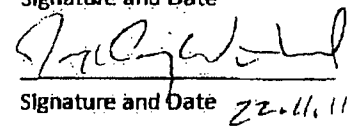
BMW of North America, LLC : *By: L. WILLIUCH, PRESIDENT & CEO*


Signature and Date 11.22.11

BY: Stefan Sengewald, Executive Vice President

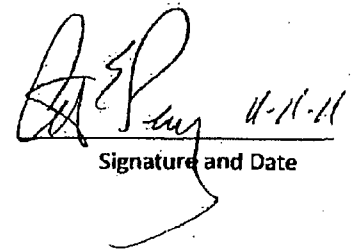

Signature and Date 11/23/11

BY: Craig Westbook, Vice President, Aftersales


Signature and Date 22.11.11

ZAM Group LLC

BY: Arthur Perry
President/CEO


Signature and Date 11-11-11



Western Conference of Teamsters Pension Trust

An Employer-Employee Jointly Administered Pension Plan - Founded 1955

Office of the Administrative Manager
2378 Eastlake Ave E., Seattle, WA 98102
(206) 329-4980

November 20, 2014

Via Certified U.S. Mail -
No. 91 7199 9991 7030 9643 7421

0 - 100
31 Dec 41
31 Jan 72

Feb 18 2015

2AM Group LLC
2340 Hwy 101 S
Greer SC 29651

**RE: Employer Withdrawal Liability Notice and Demand for Payment
Employer Control Group No. 05845**

Gentlemen:

This letter is sent to you as a notice and demand that the above-named entity and each person and entity under common control with it (within the meaning of the Employee Retirement Income Security Act of 1974) pay to the Fund the liability owed and prescribed below. An employer who withdraws from the Western Conference of Teamsters Pension Plan (the "Plan") is generally liable to the Western Conference of Teamsters Pension Trust Fund (the "Fund") for a share of the Plan's unfunded vested benefits, as determined under the Employer Withdrawal Liability Rules and Procedures adopted and amended from time to time by the Trustees of the Fund pursuant to the Multi-employer Pension Plan Amendments Act of 1980, as amended. In 2014, your firm had a complete withdrawal from the Plan. This Notice is a formal demand for payment of withdrawal liability by the above-named entity and by each and every person or entity under common control with it, in connection with that withdrawal, in the total amount specified below, and according to the schedule of payments enclosed, both of which have been determined by the Plan administrator.

Enclosed is a detailed description of how your withdrawal liability was calculated. Also, enclosed is an amortization schedule showing the number and amount of each payment required to liquidate the withdrawal liability under a monthly payment schedule.

Your first payment is due on or before **January 10, 2015**. If you do not pay the full amount of your withdrawal liability in a lump sum on or before that date, subsequent monthly installments are due and payable on or before the tenth (10th) of each succeeding calendar month until all of your payments have been made.

Where to Mail Your Payments

You must make all withdrawal liability payments by check made payable to the Western Conference of Teamsters Pension Trust Fund and mailed to the following address:

**Western Conference of Teamsters Pension Trust Fund
ATTN: Withdrawal Liability Section
PO Box 94158
Seattle, WA 98124-6485**

Exhibit 2

Page 2
2AM Group LLC
November 20, 2014

An Employer Withdrawal Liability Notice is enclosed for each payment due. The payment notice should be returned with your payment to insure proper credit to your account; the copy should be retained for your records.

Lump Sum Prepayment Option

The unpaid balance of your total withdrawal liability, plus accrued interest, if any, may be prepaid in whole or in part at any time without penalty. If you wish to prepay the full amount of your withdrawal liability before the due date of your first monthly installment as shown above, the total amount due is \$605,669.06.

Request for Review

No later than 90 days after you receive this Notice, you may request in writing that the Fund review any item relating to the determination of your withdrawal liability or of the schedule of your payments. During this period, you may identify in writing any errors in the determination of your allocable share of the Plan's unfunded vested benefits and may furnish the Fund with additional relevant information, if any. Your request for review must be sent to:

**Office of the Administrative Manager
Western Conference of Teamsters Pension Trust Fund
2323 Eastlake Avenue East
Seattle, WA 98102**

If you file a timely request for review with the Fund, the Fund, after a review of any matter raised, will notify you in writing of its decision, the basis for the decision, and the reasons for any change in your withdrawal liability or schedule of payments.

Arbitration

Your right to dispute any determination made by the Fund concerning your withdrawal liability will be lost unless you first file a timely request for review with the Fund as described above and then initiate arbitration within 60 days after the date the Fund notifies you of its decision on the matters raised in your timely request for review, or if earlier, within 180 days after the date of your timely request for review to the Fund.

Even if you request a review or if you initiate arbitration in accordance with the procedures outlined above, you are still required to make your periodic withdrawal liability payments as set forth in this initial Notice regardless of the pendency of any request for review or arbitration proceeding. If you fail to make any withdrawal liability payment when due, liquidated damages, interest and attorneys' fees will accrue on the unpaid amount.

The city in which any such arbitration would be held is as indicated on the enclosure herewith, subject to your rights to seek a change under the Plan's withdrawal liability arbitration rules.

Page 3
2AM Group LLC
November 20, 2014

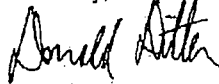
Default

Amounts determined to be in default will be referred to legal counsel for collection, in which case you also will be liable for the Fund's reasonable attorneys' fees and costs. In the event of your default, the Fund, at its option, may require immediate payment of the entire outstanding amount of your withdrawal liability, plus accrued interest on the total outstanding liability from the due date of the first payment, which was timely made. Events of default are defined in Section 16(c)(5) of the Fund's Employer Withdrawal Liability Rules and Procedures and include (among other events) the failure of the employer to make when due any withdrawal liability payment, if the failure is not cured within 60 days after the employer receives written notification from the Fund of such failure.

Any amount finally determined to have been paid by you in excess of your withdrawal liability to the Fund will be repaid to you, together with appropriate interest, to the extent, if any, permitted by applicable regulations and statutory provisions.

A copy of the Agreement and Declaration of Trust of the Western Conference of Teamsters Pension Trust Fund, which includes the Fund's Employer Withdrawal Liability Rules and Procedures, and Employer Withdrawal Liability Arbitration Rules, is enclosed for your information.

Sincerely,



Donald Ditter
Area Manager

DD/hn
Enclosures

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

AEP2, LLC f/k/a 2AM Group, LLC

Plaintiff(s)

vs.

BMW OF NORTH AMERICA, LLC,

Defendant(s)

IN THE COURT OF COMMON PLEAS

CIVIL ACTION COVERSHEET

2017-CP - 10 - 1044

(Please Print)

Submitted By: Thomas H. Pope III

Address: Pope & Hudgens, PA

PO Box 190, Newberry, SC 29108

(see attached also)

SC Bar #: 4508

Telephone #: 803-276-2532

Fax #: 803-276-8684

Other:

E-mail: thpope@popeandhudgens.com

NOTE: The cover sheet and information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for the use of the Clerk of Court for the purpose of docketing. It must be filled out completely, signed, and dated. A copy of this cover sheet must be served on the defendant(s) along with the Summons and Complaint.

DOCKETING INFORMATION (Check all that apply)

*If Action is Judgment/Settlement do not complete

- JURY TRIAL demanded in complaint. NON-JURY TRIAL demanded in complaint. This case is subject to ARBITRATION pursuant to the Court Annexed Alternative Dispute Resolution Rules. This case is subject to MEDIATION pursuant to the Court Annexed Alternative Dispute Resolution Rules. This case is exempt from ADR (Proof of ADR/Exemption Attached)

NATURE OF ACTION (Check One Box Below)

- Contracts: Constructions (100), Debt Collection (110), Employment (120), General (130), Breach of Contract (140), Other (199), Indemnity/damages
Torts - Professional Malpractice: Dental Malpractice (200), Legal Malpractice (210), Medical Malpractice (220), Previous Notice of Intent Case # 20-CP-, Notice/File Med Mal (230), Other (299)
Torts - Personal Injury: Assault/Slander/Libel (300), Conversion (310), Motor Vehicle Accident (320), Premises Liability (330), Products Liability (340), Personal Injury (350), Wrongful Death (360), Other (399)
Real Property: Claim & Delivery (400), Condemnation (410), Foreclosure (420), Mechanic's Lien (430), Partition (440), Possession (450), Building Code Violation (460), Other (499)
Inmate Petitions: PCR (500), Mandamus (520), Habeas Corpus (530), Other (599)
Judgments/Settlements: Death Settlement (700), Foreign Judgment (710), Magistrate's Judgment (720), Minor Settlement (730), Transcript Judgment (740), Lis Pendens (750), Transfer of Structured Settlement Payment Rights Application (760), Other (799)
Administrative Law/Relief: Reinstate Driver's License (800), Judicial Review (810), Relief (820), Permanent Injunction (830), Forfeiture-Petition (840), Forfeiture-Consent Order (850), Other (899)
Appeals: Arbitration (900), Magistrate-Civil (910), Magistrate-Criminal (920), Municipal (930), Probate Court (940), SCDOJ (950), Worker's Comp (960), Zoning Board (970), Public Service Commission (990), Employment Security Comm (991), Other (999)
Special/Complex/Other: Environmental (600), Automobile Arb. (610), Medical (620), Other (699), Pharmaceuticals (630), Unfair Trade Practices (640), Out-of State Depositions (650), Motion to Quash Subpoena in an Out-of-County Action (660), Sexual Predator (510)

Submitting Party Signature: [Signature]

Date: February 7, 2017

Note: Frivolous civil proceedings may be subject to sanctions pursuant to SCRCP, Rule 11, and the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. §15-36-10 et. seq.

FOR MANDATED ADR COUNTIES ONLY

Allendale, Anderson, Beaufort, Clarendon, Colleton, Florence, Greenville, Hampton, Horry, Jasper, Lee, Lexington, Pickens (Family Court Only), Richland, Sumter, Union, Williamsburg, and York

SUPREME COURT RULES REQUIRE THE SUBMISSION OF ALL CIVIL CASES TO AN ALTERNATIVE DISPUTE RESOLUTION PROCESS, UNLESS OTHERWISE EXEMPT.

You are required to take the following action(s):

1. The parties shall select a neutral and file a "Proof of ADR" form on or by the 210th day of the filing of this action. If the parties have not selected a neutral within 210 days, the Clerk of Court shall then appoint a primary and secondary mediator from the current roster on a rotating basis from among those mediators agreeing to accept cases in the county in which the action has been filed.
2. The initial ADR conference must be held within 300 days after the filing of the action.
3. Pre-suit medical malpractice mediations required by S.C. Code §15-79-125 shall be held not later than 120 days after all defendants are served with the "Notice of Intent to File Suit" or as the court directs. (Medical malpractice mediation is mandatory statewide.)
4. Cases are exempt from ADR only upon the following grounds:
 - a. Special proceeding, or actions seeking extraordinary relief such as mandamus, habeas corpus, or prohibition;
 - b. Requests for temporary relief;
 - c. Appeals
 - d. Post Conviction relief matters;
 - e. Contempt of Court proceedings;
 - f. Forfeiture proceedings brought by governmental entities;
 - g. Mortgage foreclosures; and
 - h. Cases that have been previously subjected to an ADR conference, unless otherwise required by Rule 3 or by statute.
5. In cases not subject to ADR, the Chief Judge for Administrative Purposes, upon the motion of the court or of any party, may order a case to mediation.
6. Motion of a party to be exempt from payment of neutral fees due to indigency should be filed with the Court within ten (10) days after the ADR conference has been concluded.

Please Note: You must comply with the Supreme Court Rules regarding ADR. Failure to do so may affect your case or may result in sanctions.

ATTACHMENT TO CIVIL COVER SHEET

Other Counsel for Plaintiff AEP2, LLC:

John P. Freeman – SC Bar No. 2128
2329 Wilmot Avenue
Columbia, SC 29205-3164
Telephone: 803-254-4667 Fax: 803-753-9870
Email: jfreemanusc@gmail.com

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

AEP2, LLC, f/k/a 2AM Group, LLC,

Plaintiff,

vs.

JAMES BUXTON, ESQUIRE, and
BUXTON & COLLIE, LLC,

Defendants.

IN THE CIRCUIT COURT

Case No. 2016-CP-10-02014

**STIPULATION OF COUNSEL AND
CONSENT ORDER OF STAY**

FILED
2017 MAY 19 PM 2:23
CLERK OF COURT

The parties, by and through their undersigned counsel, hereby stipulate pursuant to Rule 43(k) of the South Carolina Rules of Civil Procedure as follows:

1. The Plaintiff initiated this action, seeking to recover the following damages from Defendants:

| | |
|--|--------------------------|
| Amount of withdrawal liability | \$605,669.09 |
| Attorney's fees paid | \$21,162.65 |
| Prejudgment interest (through 8/15/16) | \$137,119.44 |
| Punitive Damages | Amount to be determined. |

2. Defendants in this action have continuously and consistently denied liability for any damages to the Plaintiff.

3. During the course of discovery in this action, Plaintiff concluded that Walter F. Harris, III might be liable to Plaintiff, jointly and severally, for the same damages set forth in paragraph 1 above.

4. Plaintiff initiated a lawsuit against Walter F. Harris, III. The action against Walter F. Harris, III has now been stayed by court order.

EXHIBIT 3

017
4.02

5. During the course of discovery in this action, it became apparent that BMW of North America, LLC (“BMW”) might also be liable to Plaintiff for the following damages:

| | |
|--|--------------|
| Amount of withdrawal liability | \$605,669.09 |
| Prejudgment interest (through 8/15/16) | \$137,119.44 |

6. The damages alleged against BMW are some of the same damages alleged against Defendants in this action.

7. Plaintiff initiated a lawsuit against BMW for the damages described in paragraph 4 above. The case was assigned case number 2017-CP-10-0644 (the “BMW Action”). BMW failed to timely answer the Complaint and default was entered against BMW on March 24, 2017.

8. Should Plaintiff recover its damages against BMW in the BMW Action, Plaintiff’s damages alleged against the Defendants in this action for withdrawal liability and prejudgment interest will be satisfied as a matter of law.

9. Upon recovering its damages against BMW Plaintiff will concede and will stipulate that it can only recover damages against the defendants in this action for the attorney’s fees and punitive damages described in paragraph 1 above.

10. Plaintiff further stipulates that, upon recovering the sums set forth in paragraph 5 above, it will only seek damages against the Defendants in this action for the attorney’s fees and punitive damages described in paragraph 1 above. Defendants deny Plaintiff are entitled to these damages.

SIGNATURES OF COUNSEL APPEAR ON THE FOLLOWING PAGE

BASED ON THE FOREGOING STIPULATIONS, the Parties to this action consent to a stay of this action until either party moves to restore the action.

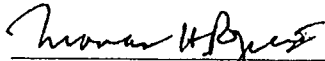
IT IS THEREFORE ORDERED THAT this action is stayed until further Order of the Court.

AND IT IS SO ORDERED.

Presiding Judge
Court of Common Pleas

WE SO STIPULATE AND CONSENT

WE SO STIPULATE AND CONSENT:



Thomas H. Pope III
John Freeman
Attorney for Plaintiff



R. Bruce Wallace
Attorney for Defendants

BASED ON THE FOREGOING STIPULATIONS, the Parties to this action consent to a stay of this action until either party moves to restore the action.

IT IS THEREFORE ORDERED THAT this action is stayed until further Order of the Court.

AND IT IS SO ORDERED.

Chat, lc
May 18, 2017

Dr. J. J. [Signature]

Presiding Judge
Court of Common Pleas

WE SO STIPULATE AND CONSENT

WE SO STIPULATE AND CONSENT:

Thomas H. Pope III

Thomas H. Pope III
John Freeman
Attorney for Plaintiff

R. Bruce Wallace

R. Bruce Wallace
Attorney for Defendants

The case is stayed for ninety (90) days after which the parties are to advise the chief administrative judge of the status of the case. The stay will conclude on August 21, 2017.

ATTEST: A TRUE COPY
JULIE J. ARMSTRONG (SEAL)
CLERK, C.P., G.S. 87A
By *[Signature]*
DEPUTY CLERK

3023
[Signature]

STATE OF SOUTH CAROLINA)
)
 COUNTY OF CHARLESTON)
)
 AEP2, LLC f/k/a 2AM GROUP,)
 LLC,)
)
 Plaintiff,)
)
 v.)
)
 BMW OF NORTH AMERICA,)
)
 Defendants.)
 _____)

COURT OF COMMON PLEAS

Civil Action No. ^{2017 0644} 2016 CP 10-02014

FILED
 2017 JUN -8 PM 1:44
 JULIE J. ARMSTRONG
 CLERK OF COURT

AFFIDAVIT OF FREDERICK JEKEL

PERSONALLY appeared before me Frederick Jekel who being duly sworn, deposes and states as follows:

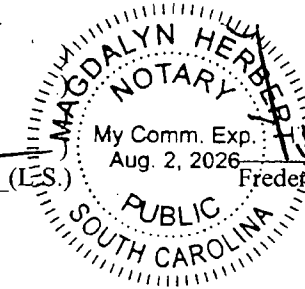
1. I am a member of the South Carolina Bar and a partner in Jekel-Doolittle law firm with offices in Charleston and Columbia, South Carolina.
2. I am counsel for the defendant, a lawyer in Mount Pleasant, SC in the case of AEP2 v. Harris (Case No. 2017 CP 10-626) in Charleston County Common Pleas Court. This is a suit against my client, Mr. Harris, claiming legal malpractice involving damages alleged by plaintiff of \$605,669.06 (plus interest) for plaintiff's incurring a withdrawal liability of that amount under applicable law which plaintiff had to pay to the Western Conference Teamsters Pension Trust.
3. I am aware that AEP2, LLC also has a claim for the same damages against James Buxton, Esquire and the law firm of Buxton & Collie, LLC of Charleston County in the case of AEP2, LLC v. Buxton, et al.
4. It is my understanding that in recent months it came to be learned in the case of AEP2 v. Buxton, et al. that the documents in that case indicated that the plaintiff had a right of indemnity against BMW for this withdrawal liability and that on February 8, 2017, plaintiff filed its Summons & Complaint in AEP2, LLC v. BMW North America alleging its right of indemnity against BMW for the entire amount of \$605,609.06, plus prejudgment interest.
5. In view of this development, counsel for AEP2 and I, as counsel for Defendant Walter Harris, Esquire, consented to an Order of Stay of the Harris case pending the outcome of AEP2 v. BMW. Attached as Exhibit A is the Order of Stay in AEP2, LLC v. Harris (2017 CP 10-626) issued on March 20, 2017 by Circuit Judge Thomas L. Hughston and filed on April 5, 2017. As recited in that Order, the resolution of the case of AEP2 v. BMW may obviate the need to litigate the Harris case.
6. Since that Order of Stay was entered, I have seen documents reflecting that BMW is in default in the case, and I understand that plaintiff's counsel in that case intend to

move for a damages hearing.

7. It is my belief that an award of damages in that case against the defaulting party BMW may well make unnecessary the pursuit of claims against my client, Mr. Harris, and this would relieve my client of the need to deal with protracted litigation challenging his professional behavior.

SWORN to before me this 14th
day of April 2017

Magdalyn Herbert



Frederick Jekel

STATE OF SOUTH CAROLINA)
)
 COUNTY OF CHARLESTON)
)
 AEP2, LLC f/k/a 2AM GROUP,)
 LLC,)
)
) *Plaintiff,*)
)
) v.)
)
 WALTER H. HARRIS, III,)
)
) *Defendant.*)
)
 _____)

COURT OF COMMON PLEAS
 Civil Action No. 2017 CP10-626

ORDER OF STAY

FILED
 2017 APR -5 AM 10:19
 JUDGE JEFFREY B. HARRIS
 CLERK OF COURT

This matter comes before the Court pursuant to consent of counsel for both parties in this matter. The plaintiff moves for a stay of this action until the final adjudication in the case of AEP2 v. BMW, Case No. 2017 CP 10-644. ("BMW case"). It appears that the resolution of BMW is for the same damages as in the case of AEP2 v. Harris and that the result in the BMW case will obviate and likely make moot the issues in the instant case.

It is further represented that the issues in the BMW suit are relatively simple ones which will be resolved non-jury (causes of action for declaratory judgment and damages per said contract) and will not involve any extensive discovery and few, if any, depositions. However, in the Harris case, prosecution of this suit by both parties will be costly, time-consuming, discovery intense and will involve a number of depositions.

Based on the foregoing, this Court finds and concludes that it would be in the interest of judicial efficiency and economy to stay all matters in the instant case until final adjudication in the BMW case.

#1
 T.L.H.

THEREFORE IT IS ORDERED that all proceedings in this case are stayed until there is a final adjudication in the case of AEP2 v. BMW, Case No. 2017 CP 10-644.

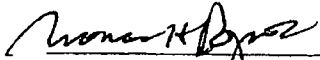
IT IS SO ORDERED.



Presiding Judge of the Ninth Judicial Circuit

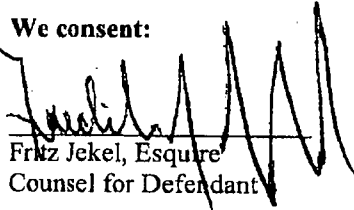
#2 3/31, 2017

We move:

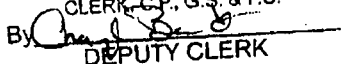


Thomas H. Pope III, Esquire
John Freeman, Esquire
Counsel for Plaintiff

We consent:



Fritz Jekel, Esquire
Counsel for Defendant

ATTEST: A TRUE COPY
JULIE J. ARMSTRONG (SEAL)
CLERK, C.P., G.S. & F.C.
By 

DEPUTY CLERK

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS

AEP2, LLC f/k/a 2AM GROUP, LLC,

Plaintiff,

v.

BMW OF NORTH AMERICA, LLC,

Defendant.

Civil Action No.: 2017-10-644

2017-cp-10-644

FILED
2017 JUN 13 PM 1:05
JULIE J. ARMSTRONG
CLERK OF COURT

MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION FOR DAMAGES HEARING AND REPLY MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION TO SET ASIDE DEFAULT JUDGMENT

Defendant BMW of North America, LLC, "Defendant," by and through its undersigned counsel, hereby submits the following Memorandum in Opposition to Plaintiff's Motion for a Hearing on Damages and Reply Memorandum in Support of Defendant's Motion to Set Aside the Default Judgment. In support thereof, Defendant states as follows:

MEMORANDUM OF LAW

I. PLAINTIFF HAS FAILED TO ESTABLISH ANY ENTITLEMENT TO DAMAGES.

A. Plaintiff Has Failed to Submit a Statement of Verification Pursuant to Rule 55(b).

As outlined previously in Defendant's Response to Plaintiff's Motion for a Damages Hearing filed May 1, 2017, South Carolina Rule of Civil Procedure Rule 55(b)(1) requires a verification by Plaintiff as provides as follows:

When the claim of a party seeking judgment by default is for a liquidated amount, a sum certain or a sum which can by computation be made certain, the judge, upon motion or application of the party seeking default, and upon affidavit of the amount due, shall enter judgment for that amount and costs against the party against whom judgment by default is sought.... A verified pleading may be used in lieu of an

affidavit when the pleading contains information sufficient to determine or compute the sum certain.

See Rule 55(b)(1), SCRCF. Courts have not hesitated to dismiss actions in which a party has failed to provide either a Statement of Verification or a verified affidavit. See, e.g., *Harbor Island Owners' Ass'n v. Preferred Island Props., Inc.*, 369 S.C. 540, 547, 633 S.E.2d 497, 500-01 (2006). The purpose of the verified pleadings or the Statement of Verification is to "give the defendant notice of the basis for the claim and to afford evidence of the indebtedness sufficient for entry of judgment." See *Thomas & Howard Co. v. T. W. Graham & Co.*, 318 S.C. 286, 289, 457 S.E.2d 340, 342 (1005).

In the interest of justice, and to afford Defendant a proper and fair opportunity to defend against the claims Plaintiff has leveled against them, this rule governing default judgments must be followed. Plaintiff's failure to follow these procedures substantially prejudices Defendant's ability to defend against Plaintiff's allegations and deprives it of the ability to know all amounts claimed and make a responsive showing. Plaintiff's memorandum filed two business days before the hearing fails to even address Defendant's May 1, 2017 response to their Motion for a Damages Hearing. Therefore, this case should proceed on its merits. As discussed below, Defendant not only has a good faith defense to assert, it may be entitled to a dispositive ruling in its favor.

B. Plaintiff Ignores the Express Language of the 2011 Services Agreement.

Plaintiff has failed to demonstrate any entitlement to an award of damages. Instead, Plaintiff completely disregards the express language of the Parties' 2011 Services Agreement, which notes, in part, the following:

Notwithstanding the above, in the event there is any liability arising out of any potential withdrawal liability on the part of BMW NA to the Western Conference of Teamsters Pension Fund, BMW VA agrees to indemnify and hold 2A harmless from and against such liability.

See [Defendant's] Motion to Set Aside Default Judgment, Ex. A, Services Agreement.

The express language of the Agreement provides that Defendant's obligation to indemnify Plaintiff was only if there was withdrawal liability on the part of BMW to the union pension fund, notably not withdrawal liability on the part of 2AM (AEP2). Plaintiff's tortured interpretation would rewrite the parties' agreement to delete the words "on the part of BMW" and make BMW responsible even for 2AM's intentional refusal to pay its own liability. Plaintiff had responsibilities for contributing money to the pension fund as evidenced by the Parties' Collective Bargaining Agreement. *See* Collective Bargaining Agreement, at 24-26 (Attached as Exh. A). In addition, Defendant has fully and completely satisfied its indemnity obligation, as evidenced by the attached Second Affidavit of Richard Spitaleri, Jr., which verified that BMW NA paid its own withdrawal liability pursuant to the Services Agreement in the amount of approximately \$863,811.59 before December 31, 2011. *See* Second Aff. of Richard Spitaleri at ¶ 4. Plaintiff compounds its error by then maintaining reliance on an unexecuted "amendment" presented to the Court by someone without personal knowledge to validate its unfounded claims against Defendants. This willful disregard of evidentiary rules cannot be condoned or followed.

Defendant asserts that Plaintiff has no claim for damages against it. Instead, Plaintiff should request that the Court remove the stay from the pending cases Plaintiff filed against the two attorneys that actually assisted them, albeit negligently as Plaintiff alleges, in this very transaction, and continue pursuing its claims against them. *See AEP2, LLC v. Buxton*, Case No. 2016-CP-10-02014 and *AEP2, LLC v. Harris*, Case No. 2017-CP-10-00626 (Attached as Exh. B). Indeed, these two actions were filed prior to Plaintiff's action against BMW.

In their Complaints against Attorneys Harris and Buxton, Plaintiff levies substantial claims for legal malpractice, negligence, and breach of fiduciary duties for their "fail[ure] to forward ... emails," their "attempt[] to respond to [emails] when he did not understand what they meant or

implied,” and, ultimately, for their “fail[ure] to protect [Plaintiff] from loss.” See Plaintiff’s Motion for Stay, Case No. 2016-CP-10-02014 (Attached as Exh. C). Plaintiff’s own Complaints highlight the real transgressors in this litigation, attorneys Harris and Buxton, by stating boldly that “[t]his was the **first time that Plaintiff had become aware** that this was an issue, as Plaintiff **was never placed on notice of this liability until the Teamsters’ letter.**” See Compl. at ¶ 31, Case No. 2017-CP-10-0626 (emphasis added). Defendant finds it difficult to comprehend how the Services Agreement between Plaintiff and Defendant could anticipate such an event that completely excludes Defendant. Plaintiff states that the transaction that resulted in their liability occurred because of the “legal malpractice” of their attorneys. See Compl. at ¶¶ 10-22, Case No. 2016-CP-42-594 (“This huge obligation triggered by the asset sale transaction was completely unanticipated by and unknown to Plaintiff and was not taken into account by Plaintiff in structuring the transaction’s terms.”).

Based on the foregoing, Defendant requests that this Court allow this case to proceed on its merits.

II. DEFENDANTS ARE ENTITLED TO RELIEF FROM THE DEFAULT JUDGMENT.

A. Courts Have Granted Relief in Similar Instances.

Plaintiff has committed a gross misinterpretation of the law of default judgment. Contrary to their assertions, courts are reluctant to award default judgment in situations where a party has established “good cause” for their delay in responding to a pleading and have a meritorious defense. See *Micronics, Inc. v. S.C. Dep’t of Revenue*, 345 S.C. 506, 508, 548 S.E. 2d 223, 224 (S.C. Ct. App. 2001); see also *Ricks v. Weinrauch*, 293 S.C. 372 (Ct. App. 1987). In fact, and as fully briefed in Defendant’s response to Plaintiff’s Motion for a Hearing on Damages, a court will set aside default judgment if: (1) there was excusable neglect on the part of the defaulting party

for not answering the complaint; (2) the defaulting party responded promptly after notice of the entry of default; (3) setting aside the default will not prejudice the non-defaulting party; and (4) the defaulting party has a meritorious defense. *See Top Value Homes v. Harden*, 319 S.C. 302, 306, 460 S.E.2d 427, 429 (S.C. Ct. App. 1995).

Courts will often grant a party relief from default judgment once they determine that their delay in responding is due to simple and excusable mistake, such as the case in this litigation. *See Ricks*, 293 S.C. 372 (citing *Sears, Roebuck & Co. v. Ramer*, 170 Ga. App. 873, 318 S.E.2d 740 (1984)). In the present case, Defendants have proven excusable neglect, warranting dismissal of the default judgment. Therefore, Defendants respectfully request that this court grant its request for relief.

B. Defendants Have Asserted Good Cause and a Meritorious Defense.

1. Defendants have satisfied a showing of excusable neglect warranting dismissal of the default judgment.

Excusable neglect encompasses situations in which the failure to comply with responding to a pleading can be attributed to negligence. *See Micronics*, 345 S.C. at 508. Contrary to Plaintiff's assertions, clerical errors, miscommunications, and mistakes, are all events that courts have interpreted as excusable neglect and vacated default judgments. *See Kinneer Corp. v. Crawford*, 49 F.R.D. 3, 6 (D.S.C. 1970) (noting human error in defendant's incorrect belief in timing deadline to file an answer and granting motion to vacate judgment) (citing to *Johnson v. Finger*, 102 S.C. 354, 86 S.E.673 (1915))

In fact, courts in South Carolina have held as follows:

The law should not blindly impose standards which require individuals, in the conduct of their daily business, to distrust the parties with whom they deal. Likewise, a litigant should not unnecessarily be forced into default as a consequence of having reasonably relied upon the word of his fellow, particularly when no innocent party will suffer if the default is opened.

See Ricks, 293 S.C. 372 (citing *Sears, Roebuck & Co. v. Ramer*, 170 Ga. App. 873, 318 S.E.2d 740 (1984)).

As fully briefed in Defendant's reply to Plaintiff's motion, Defendants' neglect in responding to Plaintiff's Complaint was the result of an excusable clerical error, simple human error, and mistaken communications. Specifically, the Department Coordinator for Defendant sent the Summons and Complaint in this action to the attention of in-house counsel on February 13, 2017 with a caption that read, "AEP2, LLC, etc. v. BMW of North America, LLC, Dft." *See* Second Affidavit of Richard Spitaleri, Jr., ¶¶ 6-8. In-house counsel for Defendant mistakenly believed that the pleadings were related to a separate matter with a similar case caption that read "AEP2, LLC, f/k/a 2AM Group, LLC v. Buxton." *See id.* Therefore, in the course of in-house counsel for Defendant sorting through hundreds, and at times thousands, of emails received each week, the pleading was moved in error to an incorrect electronic folder. *See id.*

Plaintiff filed their Complaint in this Court on February 8, 2017. *See* Motion to Set Aside Default Judgment, at 1. On February 21, 2017, Plaintiff filed an Affidavit of Service with this Court. Counsel for Defendant confirmed with in-house counsel for Defendant that the Complaint was received on February 21, 2017. *See* Abel Aff. ¶ 5. The undersigned counsel for Defendant had Defendant's in-house counsel confirm the date that notice, not service, was received as being February 21, 2017, which occurred on March 7, 2017. Abel Aff. ¶ 6, 11; *see* Spitaleri Aff. ¶¶ 5-6.

Counsel for Defendant then filed a Notice of Removal in the United States District Court on March 23, 2017, based on the identified date of service. *See* Defendant BMW's Notice of Removal. Additionally, on March 23, 2017, Defendant filed via overnight mail filed stamped March 24, 2017, a notice with this Court advising of the removal to federal court. *See* Abel Aff.

¶ 7. Thereafter, on March 28, 2017, Plaintiff filed a motion to remand the federal court action based on state court and mentioned in their motion that service had been made on Defendant through their registered agent at CT Corp. *See* Abel Aff. ¶ 9.

Based on the foregoing, Plaintiffs cannot assert, in good conscience, that Defendants have “turned a blind eye” to these proceedings, especially considering Defendants efforts at removal of this case to federal court and the numerous conversations counsel for Defendant engaged in with Plaintiff’s counsel. As described above, Defendant maintains internal processes that govern the administration and notification of filed pleadings. Therefore, by understandable mistake, in-house counsel was unaware of the pleading for some time and unable to act upon it.

2. Defendants have established a meritorious defense.

In the interests of justice, Defendant should be granted an opportunity to assert their defenses to the allegations Plaintiff levies against them. A party may establish a meritorious defense by attaching a proposed response to a pleading in their motion to vacate a default judgment. *See James v. Progress Energy Fla., Inc.*, 2011 U.S. Dist. LEXIS 91245 *6 (M.D. Fla. 2011). Defendant has presented the Court with a fully briefed response to Plaintiff’s assertions. *See* Motion to Set Aside Default Judgment, Ex. 3. Defendant’s proposed Answer expressly denies Plaintiff’s claims and evidences Defendant’s intention to assert meritorious and substantive defenses. As discussed above, Defendant has very convincing and potentially dispositive defenses to the Complaint “A mere ‘hint of a suggestion’ that there is a meritorious defense to the claims alleged is sufficient.” *See Bateh v. Colquett D. Trucking, Inc.*, 2011 U.S. Dist. LEXIS 110794 * 3 (M.D. Fla. 2011). Defendants have satisfied this requirement and have thus established a meritorious defense.

CONCLUSION

Based on the above, Defendant respectfully requests that this Court (i) deny Plaintiff's motion for a hearing on damages; (ii) allow Defendant to be heard regarding the merits of their Motion to Set Aside the Default Judgment; (iii) set aside the Order of Default entered against Defendant; and (iv) award such other and further relief as this Court deems just and proper.

Respectfully submitted this 12th day of June 2017.



Ashley B. Abel (State Bar No. 10097)
Cashida N. Okeke (State Bar No. 101825)

JACKSON LEWIS, P.C.
15 South Main Street, Suite 700
Greenville, South Carolina 29601
Telephone: 864-232-7000
Email: abela@jacksonlewis.com

*ATTORNEYS FOR DEFENDANT BMW OF
NORTH AMERICA, LLC*

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS

AEP2, LLC, f/k/a 2AM GROUP, LLC,

Plaintiff,

Civil Action No. 2017-10-644

v.

BMW OF NORTH AMERICA, LLC,

Defendant.

2017-cp-10-644

JULIE J. ARMSTRONG
CLERK OF COURT
2017 JUN 16 AM 11:35

FILED

SECOND AFFIDAVIT OF RICHARD SPITALERI, JR.

I, Richard Spitaleri, Jr., pursuant to 28 U.S.C. § 1746, declare as follows:

1. I am Corporate Counsel for BMW of North America, LLC ("BMW NA" or "Defendant") and as such my responsibilities include managing litigation brought against BMW NA. I am over the age of 18 and have personal knowledge of the matters set forth herein and believe the statements contained herein to be true and accurate.

2. I have reviewed the filings on June 8, 2017, by Plaintiff in this action.

3. Plaintiff placed before the Court an Affidavit of Bruce Wallace which attaches an unsigned document captioned as an "Assignment, Assumption and Consent Agreement" purportedly involving Defendant. Not only is this document unsigned but also attorney Bruce Wallace was not involved in any transaction involving Defendant and Plaintiff. Further, based on my knowledge and after consulting internally on this issue with Defendant's officials, I have not located any evidence to suggest that this document was ever executed by Defendant.

4. In late 2011, Defendant decided to outsource its parts logistics operation in Ontario, California to 2AM Group, LLC effective January 2012 and that business transaction was documented in a Services Agreement, whereby Defendant agreed to pay its withdrawal liability

for amounts owed as of the date of that agreement. That is why the language "withdrawal liability on the part of BMW to the Western Conference of Teamsters Pension Fund" appears in the indemnification paragraph 16(c) of the Services Agreement. We are in the process of confirming that BMW did indeed satisfy its obligation and made a payment of approximately \$863,811.59 before December 31, 2011. See Exhibit A (Letter from Western Conference of Teamsters Pension Trust, dated October 26, 2011, reflecting BMW's effort to pay its withdrawal liability before outsourcing the Ontario, California operations).

5. With regard to the service of process in this lawsuit, I gave my first affidavit and indicated that after the Complaint was served on our registered agent CT Corporation it was lost in the proverbial shuffle notwithstanding our internal requirements and protocols in place to facilitate timely responses to legal process. See Affidavit of Richard Spitaleri, Jr., dated April 25, 2017, at Paragraph 5.

6. To be more specific, this was nothing more than a simple human error attributable to this case having a similar name as another South Carolina matter that was on my desk when the Complaint was forwarded to me on February 13, 2017.

7. Our internal procedure for acting upon process served on CT Corporation is for our Department Coordinator to forward the Summons and Complaint to the attorney who handles the subject matter at issue in the Complaint. I am the attorney who handles labor and employment issues. Thus, any process that we receive that includes or involves labor and employment claims are forwarded to me for assignment to outside counsel.

8. Our Department Coordinator sent the Summons and Complaint in this action to my attention on February 13, 2017 with a caption that read, "AEP2, LLC, etc. v. BMW of North America, LLC, Dft." Operating under the mistaken belief this was related to a subpoena I was

handling relating to a different South Carolina captioned, "AEP2, LLC, f/k/a 2AM Group, LLC v. Buxton," I moved this e-mail to an incorrect electronic folder.

9. Note that this mistake described in the prior paragraph was made in the course of my sorting through the hundreds and sometimes thousands of e-mails I receive each week. The volume of my e-mail was particularly high during this time period as I had been bearing an extraordinary number of responsibilities since November 1, 2016 when a colleague of mine had left the Legal Department and I found myself handling many of her prior responsibilities in addition to my own.

10. Had the caption of the case in the subject line not been familiar to me, I would have surely inspected the e-mail and attachment more carefully and promptly acted upon it. This is exactly what I did when R. Bruce Wallace called the Complaint to my attention in a telephone conversation on February 21, 2017. On that same day, I forwarded the Complaint I received from Mr. Wallace via e-mail to our South Carolina counsel Mr. Abel.

11. Mr. Wallace's description of the substance of our February 21, 2017 telephone conversation is not entirely accurate. Mr. Wallace contacted me via telephone on February 21, 2017 in response to my e-mail to his New Jersey counsel on the prior day inquiring as to why he wanted to depose Courtney Anderson, Esq.

12. During our February 21, 2017 telephone conversation, Mr. Wallace explained to me that AEP2, LLC was suing his client alleging legal malpractice in connection with AEP2, LLC's February 2014 sale of assets to another company known as Sustained Quality, LLC. He explained that his defense of this action was that his clients did not provide legal advice to AEP2, LLC with regard to withdrawal liability as their in-house counsel Mr. Harris handled these issues on his own and without the aid of Mr. Wallace's clients. He further explained that he sought Ms.

Anderson's deposition to confirm that she did not even know who his clients were and that it was her understanding that BMW of North America, LLC only negotiated with Mr. Harris.

13. Mr. Wallace self-servingly claims that, "I told Mr. Spitaleri that I would have Courtney Anderson confirm that BMW of North America was obligated to indemnify AEP2 for \$605,000 in withdrawal liability alleged in the Complaint filed in this action." He was not this specific in our actual conversation on February 21, 2017. Our actual conversation focused largely on what I described above in the previous paragraph of this Affidavit. He simply pointed out that AEP2, LLC had sued us in a different action in South Carolina and agreed to forward me that Complaint which he was kind enough to do that same day. We did not get into specifics about AEP2, LLC's allegations that BMW NA was responsible for the withdrawal liability.

14. Mr. Wallace did not inform me that the Complaint in the above-captioned action had been purportedly served on Defendant on February 10, 2017 either in our February 21, 2017 telephone conference or in his e-mail to me on that same day attaching the Complaint. He simply told me that it was filed and when I advised him that I was not aware of this he agreed to forward me a copy. The statement in his affidavit that the complaint copy he sent me "bore the stamp of the clerk showing a filing date of February 8, 2017," has no bearing on the service of process in the action or the excusable neglect and good faith defense which warrant setting aside the default.

15. As internal counsel for BMW NA, I, with our outside counsel in this action, would ask the Court to strike the entirety of paragraph 3; the last sentence in paragraph 4; Exhibit A referenced in paragraph 4 and the entirety of paragraph 5 in Mr. Wallace's affidavit.

16. In these paragraphs, Mr. Wallace gave his non-expert and conflicted opinion of an unsigned document about which he admittedly has no personal knowledge. Paragraph 4 in attorney Frederick Jekel's affidavit should be stricken for the same reason.

This 12th day of June 2017.

FURTHER AFFIANT SAYETH NOT.

Richard Spitaleri, Jr.
Richard Spitaleri, Jr.

Sworn to and subscribed before me
this 12 day of June.

Diane Carbone
Notary Public of the State of New Jersey
My Commission Expires on

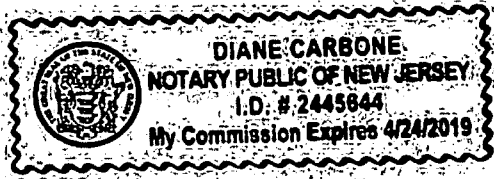


EXHIBIT A

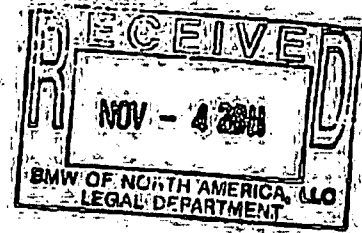


Western Conference of Teamsters Pension Trust

An Employer-Employee Jointly Administered Pension Plan - Founded 1955

Office of the Administrative Manager
1823 Eastlake Ave E, Seattle, WA 98102
(206) 339-6900

October 26, 2011



BMW of North America, LLC
ATTN: Herbert L. Klein
300 Chestnut Ridge Road
Woodcliff Lake, NJ 07677

RE: Employer Withdrawal Liability
BMW of North America, LLC - Account No(s): 200922; 216320

Dear Mr. Klein:

This is in response to your request for an estimate of potential employer withdrawal liability had your client withdrawn from the Trust Fund in a complete withdrawal. The estimate of potential withdrawal liability was calculated on the basis of the referenced employer account number(s) and includes all pension accounts, currently considered by the Fund to be under common control with the employer in accordance with the requirements of ERISA, Section 4001.

The estimate was prepared on the assumption that the termination of the above listed employer account(s) would constitute a complete withdrawal from the Fund. However, if the employer (control group) or employers affiliated with the employer have other accounts under the Fund, not listed above, the estimate is subject to recalculation upon identification of such other accounts as the law requires that all affiliated employers be treated as a single employer for withdrawal liability calculations. The estimated liability shown below is based upon a complete withdrawal in year 2011, and is the latest estimate possible for a complete withdrawal. This estimate was calculated using the one-pool, five-year rolling method and pertains exclusively to the year indicated; therefore, should not be interpreted to apply to a subsequent year.

For a Complete Withdrawal in Plan Year 2011 (ending 12/31/2011) the amount of the Plan's unfunded vested benefit liability is \$3,536,318,000.00. This sum is allocated to employers who withdraw in 2011 based on their share of the total employer contributions paid during the prior five-year period immediately preceding withdrawal.

The estimated withdrawal liability for BMW of North America, LLC is: \$863,811.59. The enclosed report provides a detailed listing of data utilized in the calculation of this estimate.

Please feel free to contact me at 206-726-3250 should you have questions regarding this estimate.

Sincerely yours,


Donald Ditter
Area Manager

DD/rc
Enclosure

**WESTERN CONFERENCE OF TEAMSTERS PENSION TRUST
 EMPLOYER WITHDRAWAL LIABILITY CALCULATIONS
 FOR A COMPLETE WITHDRAWAL IN PLAN YEAR 2011
 Estimate Worksheet**

10/25/2011

Control Group Employer: BMW OF NORTH AMERICA LLC

Link #: 04926

Withdrawal Date: 12/31/2011

1. Liability for the Amount of Western Conference of Teamsters Plan's Unfunded Vested Benefits as of December 31, 2010:

| a) Years (Inclusive) | Employers' Contributory Hours All Affiliated Accounts | Employer's Obligated Contributions All Affiliated Accounts |
|---|---|--|
| 2010 | 133,525.20 | \$309,721.92 |
| 2009 | 144,496.50 | \$378,686.42 |
| 2008 | 155,107.10 | \$316,705.26 |
| 2007 | 148,839.10 | \$280,897.57 |
| 2006 | 152,403.60 | \$269,362.51 |
| b) Sum of all contributions obligated to be made by the employer under the Plan, 2006 through 2010: | | \$1,505,573.68 |
| c) Sum of all contributions made, 2006 through 2010, by all employers who had an obligation to contribute under the Plan and had not withdrawn before 12/31/2010: | | \$6,163,597,980.84 |
| d) Factor for Employer's share of Unfunded Vested Benefits (Line 1b divided by Line 1c): | | 0.00024426864 |
| e) Amount of Plan's Unfunded Vested Benefits as of 12/31/2010: | | \$3,336,318,080.00 |
| f) Employer's share of Unfunded Vested Benefits (Line 1d multiplied by Line 1e): | | \$863,811.59 |
| g) Less Deductions. If Line F is less than \$100,000, then the Deduction is the smaller of \$50,000 or the amount of liability. If Line F is greater than \$100,000, then the Deduction is \$50,000 reduced by the amount in excess of \$100,000. The Deduction does not apply if Line F is greater than \$150,000. | | \$0.00 |
| h) Employer's Liability (Line 1f - Line 1g): | | \$863,811.59 |

2. Account Number(s) - Accounts under common control ("affiliated" accounts):

200922 216320

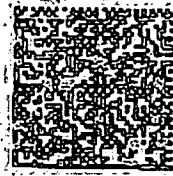


Western
Conference
of Insurance
Pension Trusts

Office of the Administrative Manager

2323 Eastlake Ave. East • Seattle, Washington 98102-3393

PRESORTED
FIRST CLASS



Master

012-16210430

\$00.390

10/27/2011

Serialized From 98102

US POSTAGE

BMW OF NORTH AMERICA LLC
ATTN: HERBERT L. KLEIN
300 CHESTNUT RIDGE ROAD
WOODCLIFF LAKE NJ 07677

ICXPSMB 07677



STATE OF SOUTH CAROLINA
 COUNTY OF CHARLESTON)
)
 AEP2, LLC f/k/a 2AM GROUP, LLC,)
)
 Plaintiff,)
)
 v.)
)
 BMW OF NORTH AMERICA, LLC,)
)
 Defendant.)

IN THE COURT OF COMMON PLEAS

Civil Action No.: 2017-10-644

FILED
 2017 JUN 13 PM 1:10
 JULIE J. ARMSTRONG
 CLERK OF COURT
 BY _____

SECOND AFFIDAVIT OF ASHLEY B. ABEL

I, Ashley B. Abel, Esquire, pursuant to 28 U.S.C. § 1746, declare as follows:

1. My name is Ashley B. Abel, Esquire and I am the attorney of record for BMW of North America, LLC (“BMW NA” or “Defendant”). I am a licensed member of the Bar of the State of South Carolina and am in good standing. My business address is JACKSON LEWIS, P.C., which is located at 15 South Main Street, Suite 700, Greenville, South Carolina, 29601.

2. I have personal knowledge concerning the matter set forth in this Affidavit, and believe the statements contained herein to be true and accurate.

3. South Carolina attorneys R. Bruce Wallace and Frederick Jekel have prepared and signed affidavits in connection with the pending motions in the instant action. Attorneys Wallace and Jekel represent the defendants in two legal malpractice actions by Plaintiff AEP2 seeking the exact same damages for the allegations in the instant action.

4. Attorneys Wallace and Jekel have opined in their affidavits in this lawsuit about the meaning of BMW NA’s agreement with AEP2 (2AM) and their views of liability in this lawsuit. (Wallace Aff. ¶ 3; Jekel Aff. ¶ 4). Neither Wallace nor Jekel has been identified as an expert witness in the case. Given that they act as counsel for other persons/entities who are

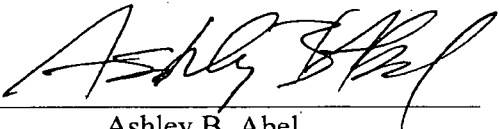
allegedly responsible for the same damages sought against BMW NA, their opinions are infected with personal/professional bias and should not have been provided in this action. The Court should strike these paragraphs from the affidavits of Wallace and Jekel.

5. Plaintiff's memorandum submitted June 8, 2017, is purportedly supported by other portions of the affidavit of attorney Wallace which attaches an unsigned document (a purported assignment agreement) and is not based on personal knowledge of the affiant. Wallace Aff. ¶¶ 4, 5. Plaintiff's memorandum relies on this unsigned document and urges the Court to give it force and effect in determining whether Defendant has a meritorious defense. Not only is attorney Wallace's affidavit inadmissible hearsay, it is also based exclusively on an unexecuted document and thus should be given no effect.

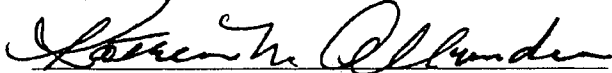
6. I have read the foregoing and declare under penalty of perjury that the statements set forth above are true and accurate.

This 12th day of June, 2017.

FURTHER AFFIANT SAYETH NOT.


Ashley B. Abel

Sworn to and subscribed before me
this 12th day of June, 2017.


Notary Public – State of South Carolina
My Commission Expires: 2/21/2018

STATE OF SOUTH CAROLINA

COUNTY OF Charleston

AEP2, LLC f/k/a 2AM Group LLC,

Plaintiff,

vs.

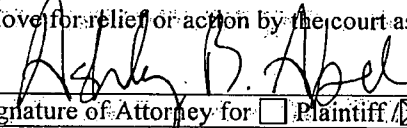
BMW of North America, LLC.

Defendant.

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT

CASE NO.: 2017-CP-10-⁶⁴⁴~~044~~

**MOTION AND ORDER INFORMATION
FORM AND COVERSHEET**

| | | | |
|---|--|--|--|
| Plaintiff's Attorney: Thomas H. Pope III, Bar No. _____ John P. Freeman Address: P. O. Box 190 Newberry, SC 29108 and 2329 Wilmot Ave., Columbia, SC 29203 Phone: 803-276-2532 Fax: _____ E-mail: thpope@popandhudgens.com Other: jfreemanusc@gmail.com | | Defendant's Attorney: _____, Bar No: Ashley B. Abel, Bar No. 10097 Address: 15 South Main St., Ste. 700 Greenville, SC 29601 Phone: 864-232-7000 Fax 864-235-1381 E-mail: _____ Other: abela@jacksonlewis.com | |
| <input type="checkbox"/> MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III) <input checked="" type="checkbox"/> FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III) <input type="checkbox"/> PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III) | | | |
| SECTION I: Hearing Information | | | |
| Nature of Motion: _____ | | Court Reporter Needed: <input type="checkbox"/> YES/ <input type="checkbox"/> NO | |
| Estimated Time Needed: _____ | | | |
| SECTION II: Motion/Order Type | | | |
| <input checked="" type="checkbox"/> Written motion attached <input type="checkbox"/> Form Motion/Order | | | |
| I hereby move for relief or action by the court as set forth in the attached proposed order. | | | |
|  Signature of Attorney for <input type="checkbox"/> Plaintiff / <input checked="" type="checkbox"/> Defendant | | 08/08/2017 Date submitted | |
| SECTION III: Motion Fee | | | |
| <input checked="" type="checkbox"/> PAID - AMOUNT: \$ 25.00 <input type="checkbox"/> EXEMPT: | | | |
| (check reason) <input type="checkbox"/> Rule to Show Cause in Child or Spousal Support <input type="checkbox"/> Domestic Abuse or Abuse and Neglect <input checked="" type="checkbox"/> Indigent Status <input type="checkbox"/> State Agency v. Indigent Party <input type="checkbox"/> Sexually Violent Predator Act <input type="checkbox"/> Post-Conviction Relief <input type="checkbox"/> Motion for Stay in Bankruptcy <input type="checkbox"/> Motion for Publication <input type="checkbox"/> Motion for Execution (Rule 69, SCRCP) <input type="checkbox"/> Proposed order submitted at request of the court, or, reduced to writing from motion made in open court per judge's instructions Name of Court Reporter: _____ <input type="checkbox"/> Other: _____ | | | |
| JUDGE'S SECTION | | | |
| <input type="checkbox"/> Motion Fee to be paid upon filing of the attached order: <input checked="" type="checkbox"/> Other: | | JUDGE CODE: _____ Date: _____ | |

CLERK'S VERIFICATION

Collected by: _____ Date Filed: _____

MOTION FEE COLLECTED: \$ _____

CONTESTED - AMOUNT DUE: \$ _____

SCCA 233 (11/2003)

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS

AEP2, LLC f/k/a 2AM GROUP, LLC,

Plaintiff,

v.

BMW OF NORTH AMERICA, LLC,

Defendant.

Civil Action No.: 2017-10-644

644
644
D5

JULIE J. ARMSTRONG
CLERK OF COURT

2017 AUG - 8 PM 4:40

FILED

DEFENDANT'S MOTION FOR RECONSIDERATION

Defendant BMW of North America, LLC (hereinafter "Defendant"), by and through its undersigned counsel, hereby moves the Court to reconsider its denial of Defendant's Motion to Set Aside Default pursuant to S.C. R. Civ. P. 55 (c). This motion is filed pursuant to S.C.R. Civ. P. 59(e) and 60(b). In support therefore, Defendant states as follows:

On July 20, 2017 this Honorable Court entered an order denying Defendant's Motion to Set Aside the Entry of Default and granting Plaintiff's Motion to Set a Damages Hearing. Defendant presents this Court with the following points for consideration in support of its motion for reconsideration which include but are not limited to:

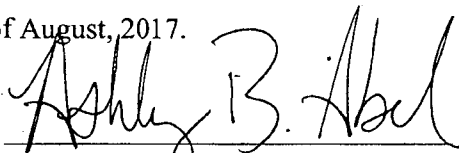
1. The Court erred in conflating mere "notice" to an in-house attorney with actual "service of process" which is the only trigger to a responsive pleading.
2. The Court erred in giving consideration to inadmissible affidavits of attorneys who represent other clients sued in prior lawsuits for the same damages and who obtained stays of those cases based on their affidavits.
3. The Court erred in giving consideration to an unsigned document and relying n it in holding that Defendant did not have a meritorious defense.

4. The Court erred in misconstruing the testimony of a BMW NA attorney and in ignoring the protocols set forth in that attorney's second affidavit.

5. The Court erred in holding BMW NA to the same standard of care as insurance companies who receive thousands of lawsuits each month.

For these reasons and those contained in Defendant's Motion to Set Aside Default, the Third Declaration of Richard Spitaleri and oral argument before the Court on June 13, 2017, Defendant's respectfully request this Court reconsider its prior ruling and set aside the default previously entered in this matter on March 23, 2017.

Respectfully submitted this 8th day of August, 2017.



Ashley B. Abel (State Bar No. 10097)
Cashida N. Okeke (State Bar No. 101825)
JACKSON LEWIS, P.C.
15 South Main Street, Suite 700
Greenville, South Carolina 29601
Telephone: 864-232-7000
Email: abela@jacksonlewis.com

*ATTORNEYS FOR DEFENDANT BMW OF
NORTH AMERICA, LLC*

CERTIFICATE OF SERVICE

I hereby certify that on the 8th day of August, 2017, I caused a copy of the foregoing Motion to be mailed to counsel for the Plaintiff with sufficient postage and correctly addressed as follows:

Thomas H. Pope, III
Post Office Box 190
Newberry, South Carolina 29108

John P. Freeman
2329 Wilmot Avenue
Columbia, South Carolina 29205

Ashley B. Abel
Jackson Lewis
15 South Main Street
Suite 700
Greenville, SC 29601

Barnwell Whaley Patterson & Helms, LLC

By: *Deborah Beck*
Legal Assistant

FILED
JULIE J. ARMSTRONG
CLERK OF COURT

2017 AUG -9 AM 9:36

FILED

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

AEP2, LLC, f/k/a 2AM GROUP, LLC,

Plaintiff,

vs.

BMW OF NORTH AMERICA,

Defendant.

IN THE COURT OF COMMON PLEAS

Civil Action No. 2017-CP-10-0644

**NOTICE OF APPEARANCE FOR
DEFENDANT BMW OF NORTH
AMERICA**

FILED
2017 AUG -9 AM 10:36
JULIE J. ARISTON
CLERK OF COURT

The undersigned have been retained as counsel to represent the interests of BMW of North America in the above-referenced matter. The undersigned notifies and advises this Court, the parties, and their attorneys that they are appearing as counsel on behalf of BMW of North America in this action.

Respectfully submitted,

BARNWELL WHALEY PATTERSON & HELMS, LLC

By: M. Dawes Cooke, Jr.

M. Dawes Cooke, Jr.
Anna L. Strandberg
288 Meeting Street, Suite 200
Charleston, South Carolina 29401
(843) 577-7700
(843) 577-7708 (fax)
mdc@barnwell-whaley.com
astrandberg@barnwell-whaley.com

Attorneys for BMW of North America

August 8, 2017

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS

COUNTY OF CHARLESTON)

Civil Action No. 2017-CP-10-0644

AEP2, LLC, f/k/a 2AM GROUP, LLC,)

Plaintiff,)

**NOTICE OF MOTION AND MOTION
TO ALTER OR AMEND JUDGMENT
OR FOR RELIEF FROM
JUDGMENT PURSUANT TO
RULES 59(e) AND 60(b)(1), SCRPC**

vs.)

BMW OF NORTH AMERICA,)

Defendant.)

FILED
17 AUG -9 AM 9:36
JULIE J. ARDRETT
CLERK OF COURTS

TO: THOMAS H. POPE, III, AND JOHN P. FREEMAN, ATTORNEYS FOR PLAINTIFF

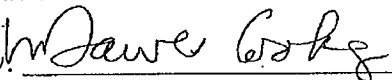
Defendant BMW of North America hereby files a Motion to Alter or Amend or for Relief from Judgment as to this Court's Order filed July 21, 2017. Defendant moves pursuant to SCRPC Rules 59(e) and 60(b)(1) and the inherent authority of this Court, on the grounds that the Court has overlooked matters of law and of fact and should be amended accordingly, and further that Defendant is entitled to relief from the Order for mistake, inadvertence, surprise, or excusable neglect. The Defendant will provide a Memorandum of Authorities and such other material as should be considered by the Court.

Defendant respectfully moves this Court for an Amended Order finding that Defendant has established "good cause" to set aside entry of default pursuant to Rule 55(c), SCRPC, or in the alternative that this Court grant Defendant relief from the July 21, 2017 Order under its inherent equitable authority and Rule 60(b)(1), SCRPC.

[Signature on following page]

Respectfully submitted,

BARNWELL WHALEY PATTERSON & HELMS, LLC

By: 

M. Dawes Cooke, Jr.

Anna L. Strandberg

288 Meeting Street, Suite 200

Charleston, South Carolina 29401

(843) 577-7700

(843) 577-7708 (fax)

mdc@barnwell-whaley.com

astrandberg@barnwell-whaley.com

CERTIFICATE OF SERVICE

I hereby certify that on the 8th day of August, 2017, I caused a copy of the foregoing Motion to be mailed to counsel for the Plaintiff with sufficient postage and correctly addressed as follows:

Thomas H. Pope, III
Post Office Box 190
Newberry, South Carolina 29108

John P. Freeman
2329 Wilmot Avenue
Columbia, South Carolina 29205

Ashley B. Abel
Jackson Lewis
15 South Main Street
Suite 700
Greenville, SC 29601

FILED
2017 AUG -9 AM 9:36
JULIE J. ARMSTRONGS
CLERK OF COURT
RY

Barnwell Whaley Patterson & Helms, LLC

By: *Rebecca C Back*
Legal Assistant

STATE OF SOUTH CAROLINA)

COUNTY OF CHARLESTON)

AEP2, LLC, f/k/a 2AM GROUP, LL)

Plaintiff)

v.)

BMW OF NORTH AMERICA,)

Defendant.)

IN THE COURT OF COMMON PLEAS

CASE NO.

2017-CP-10-0644

MOTION AND ORDER INFORMATION
FORM AND COVER SHEET

Plaintiff's Attorney:
Thomas H. Pope, Iii, Bar No.
Address:
P. O. Box 190, Newberry, SC 29108
phone: 803-276-2532 fax:
e-mail: thpope@popeandhudgens.com other:

Defendant's Attorney:
M. Dawes Cooke, Jr. / Anna Strandberg, Bar No.
1376 (Cooke)
Address:
P.O. Drawer H, Charleston, SC 29402
phone: 843-577-7700 fax: 843-577-7708
e-mail: mdc@Barnwell-Whaley.com other:

- MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)
- FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)
- PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)

SECTION I: Hearing Information

Nature of Motion: Notice of Motion and Motion to Alter or Amend Judgment or For Relief From Judgment Pursuant to Rules 59(3) and 60(b)(1), SCRP

Estimated Time Needed: 20 minutes Court Reporter Needed: YES / NO

SECTION II: Motion/Order Type

- Written motion attached
- Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.

M. Dawes Cooke, Jr.
Signature of Attorney for Plaintiff / Defendant

August 8, 2017
Date submitted

SECTION III: Motion Fee

- PAID -- AMOUNT: \$25.00
- EXEMPT:
 - Rule to Show Cause in Child or Spousal Support
 - (check reason) Domestic Abuse or Abuse and Neglect
 - Indigent Status State Agency v. Indigent Party
 - Sexually Violent Predator Act Post-Conviction Relief
 - Motion for Stay in Bankruptcy
 - Motion for Publication Motion for Execution (Rule 69, SCRPC)
 - Proposed order submitted at request of the court; or,
reduced to writing from motion made in open court per judge's instructions
- Name of Court Reporter:
- Other:

JUDGE'S SECTION

- Motion Fee to be paid upon filing of the attached order.
- Other:

JUDGE

CODE: _____ Date: _____

CLERK'S VERIFICATION

Collected by: _____

Date Filed: _____

| |
|--|
| <input type="checkbox"/> MOTION FEE COLLECTED: _____ |
| <input type="checkbox"/> CONTESTED - AMOUNT DUE: _____ |

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)
AEP2, LLC f/k/a 2AM GROUP, LLC,)
))
Plaintiff,)
))
v.)
))
BMW OF NORTH AMERICA, LLC,)
))
Defendant.)

IN THE COURT OF COMMON PLEAS

2017-CP-10-644

Civil Action No.: ~~2017-10-644~~

2017 OCT -9 PM 4:31
JULIE A. ANDERSON
CLERK OF COURT
BY *RB*

THIRD AFFIDAVIT OF RICHARD SPITALERI, JR.

I, Richard Spitaleri, Jr., pursuant to 28 U.S.C. § 1746, declare as follows:

1. I am Corporate Counsel for BMW of North America, LLC (“BMW NA” or “Defendant”) and as such my responsibilities include managing litigation brought against BMW NA. I am over the age of 18 and have personal knowledge of the matters set forth herein and believe the statements contained herein to be true and accurate.

2. On August 8, 2017, BMW NA’s outside counsel in this action, Mr. Abel, forwarded the Court’s Order Denying Motion to Set Aside Default Judgment, filed on July 21, 2017 (“July 21 Order”). I reviewed the July 21 Order and now submit this Third Affidavit In Support of BMW NA’s Motion for Reconsideration.

3. Through this Third Affidavit, I identify how the July 21 Order was predicated upon incorrect factual findings as to my conduct in the weeks following the February 8, 2017 filing of the above-captioned action and provide further detail regarding the events leading up to BMW NA’s filing of its Notice of Removal 10 days out of time.

4. The July 21 Order was predicated upon the Court’s finding that I failed to timely respond to this matter on two separate occasions. The first, on February 13, 2017, when I received

an e-mail from BMW NA's Legal Department Coordinator regarding the February 10, 2017 service of the Summons and Complaint upon BMW NA's registered agent for service of process (CT Corporation). And the second, on February 21, 2017, when Mr. Wallace forwarded the Summons and Complaint to me. With regard to the second occasion, the Court's finding is not correct.

5. Contrary to the Court's finding, I took immediate action to communicate with my colleagues and contact outside counsel after receiving the Summons and Complaint. Mr. Wallace sent me the Summons and Complaint via e-mail on February 21, 2017, at 11:42 AM. I did not leave the office that day until I analyzed the Complaint, consulted with my South Carolina colleagues to obtain a recommendation for outside counsel, assigned the matter to South Carolina outside counsel with instructions to remove the case to federal court, and received outside counsel's acknowledgement that he accepted the assignment and my instructions.

- a. At 11:42 AM, I received the e-mail from Mr. Wallace attaching the Complaint. He was kind enough to send this to me at my request during our telephone conversation that morning when I expressed to him that I was not aware of the separate lawsuit brought against BMW NA which I eventually learned was the above-captioned action.
- b. At 12:47 PM, 65 minutes after receiving Mr. Wallace's e-mail attaching the Complaint, I sent an e-mail to my colleagues Paul Lindemann, Esq. and Seann Tzouvelekas, Esq., the South Carolina attorneys who support BMW Manufacturing Co. in Greer, South Carolina.
- c. At 6:15 PM, I sent an e-mail to my outside counsel Mr. Abel requesting his representation and directing him to remove and defend the case.
- d. At 6:46 PM, Mr. Abel responded.

6. I was operating under a good faith, albeit mistaken, belief that my February 21, 2017 communications with Mr. Wallace represented BMW NA's first notice of the above-captioned action.

7. As the above reflects, I assigned this case to Mr. Abel – on the same day I received the copy of the Summons and Complaint from Mr. Wallace – when there were still 20 days for BMW NA to respond to file a timely response to the Complaint.

8. The Summons and Complaint forwarded by Mr. Wallace on February 21, 2017 was stamped “filed” on February 8, 2017 but there was no indication that the Summons and Complaint were actually served on BMW NA. I have no recollection of Mr. Wallace making any such representations in our February 21, 2017 communications, nor does he mention having done so in his Affidavit, dated May 24, 2017.

9. The Affidavit of Bruce Wallace, dated May 24, 2017, and in particular Mr. Wallace’s description of our February 21, 2017 telephone conference, is extremely misleading.

10. Mr. Wallace called me on February 21, 2017 in response to my February 20, 2017 e-mail to Mr. Gonzo inquiring about the New Jersey Subpoena¹ seeking to take the video deposition of Courtney Anderson, Esq. on March 14, 2017 in New Jersey. Ms. Anderson had already produced documents and any further testimony she might be able to provide would likely be protected by the attorney-client privilege. Thus, it did not make sense to me that someone would still want to pursue her deposition.

11. During our February 21, 2017 telephone conference, Mr. Wallace explained that he was representing Mr. Buxton in the Malpractice Action² arising out of AEP2 incurring withdrawal liability in connection with its 2014 sale of assets to Sustained Quality. Mr. Wallace further explained that Mr. Buxton provided legal advice in connection with the 2014 sale of assets to

¹ “New Jersey Subpoena” refers to the Subpoena Ad Testificandum that was served upon Courtney Anderson, Esq., pursuant to New Jersey Court Rule 4:11-4(B), to facilitate out of state discovery in aid of the action pending in this Court as Case Number 2016-CP-10-02014. A copy of the New Jersey Subpoena was previously submitted to the Court as Exhibit B to the Affidavit of R. Bruce Wallace, Esq., dated May 24, 2017.

² AEP2 filed a Complaint in Spartanburg County in February of 2016, alleging that Attorney Buxton was negligent in rendering legal services associated with the sale. The Complaint was transferred to Charleston County in April of 2016 and is currently stayed pending the outcome of this dispute as Case Number 2016-CP-10-02014.

Sustained Quality and was now being blamed for something that AEP2's in-house counsel Mr. Harris handled without Mr. Buxton's involvement or advice. Mr. Wallace further advised me that he needed Ms. Anderson's testimony to confirm that she only communicated with Mr. Harris. I agreed that this was an appropriate reason for them to seek out Ms. Anderson's testimony.

12. It would be unnecessary for Mr. Wallace to fly to New Jersey and depose Ms. Anderson for the sole purpose of figuring out whether the Assignment Agreement was ever executed when this inquiry could be addressed by asking the relevant parties to search their records for a signed version of the Assignment Agreement. This group of relevant parties includes BMW NA, AEP2, Mr. Buxton, Mr. Harris, and Sustained Quality, and the attorneys who represented Sustained Quality in its 2014 asset purchase.

13. The BMW NA Legal Department provides legal advice and does not sign business contracts like the Assignment Agreement. Once an attorney in the Legal Department provides final feedback on a business agreement, the agreement is routed on to the Purchasing Department which collects the signatures of all parties. The Legal Department does not receive fully executed contracts in the ordinary course of its work.

14. My version of what Mr. Wallace and I discussed on February 21, 2017 is corroborated by an e-mail that Mr. Wallace and I exchanged after our February 21, 2017 telephone conversation. In an e-mail, dated March 8, 2017, I asked Mr. Wallace if he could send me the e-mails that Ms. Anderson exchanged with Mr. Harris. I asked this question because this is what I recalled speaking to Mr. Wallace about on the phone when he told me he needed Ms. Anderson's testimony to establish that she dealt with Mr. Harris and not Mr. Buxton. If we had a conversation that focused on the Assignment Agreement, as Mr. Wallace claims, it would not make sense for my inquiry to focus on why Ms. Anderson was communicating with Mr. Harris.

15. AEP2 did not file the Affidavit of Service with the Court until 1:06 PM on February 21, 2017 (Affidavit of Service attached to Motion to Remand, true and correct copy of which is attached as Exhibit C). It was likely unavailable on the official court records immediately after my phone call with Mr. Wallace on that same day.

16. However, I did search my e-mail inbox on February 21, 2017 to see if our Legal Department Coordinator (Ms. Carbone) forwarded a Summons and Complaint to me which included a cover page from our registered agent for service of process (CT Corporation) noting that BMW NA had been served in the above-mentioned action. I did not find anything and explain why I believe this is the case below.

17. To clarify my prior sworn statements, the way our system works is that our Department Coordinator receives e-mail notice that process has been served on CT Corporation. Our Department Coordinator then logs into a secure portal to retrieve the served papers. After saving the served papers, the Department Coordinator then forwards the papers along to the appropriate attorney for handling.

18. My practice is to keep these e-mails in my inbox until I forward them to outside counsel. As my actions on February 21, 2017 reflect, I act with a sense of urgency to get these in the hands of outside counsel promptly when such action is necessary to protect the legal rights of my client.

19. As I admitted in my prior sworn statements, Ms. Carbone, our Department Coordinator, did in fact forward the Summons and Complaint in the above-captioned action to me on February 13, 2017 which I then misplaced in an incorrect electronic folder after associating the e-mail with the New Jersey Subpoena that I was already addressing contemporaneously.

20. This filing error occurred as I was sorting and filing the many e-mails that I receive each week. When I sort my e-mails to determine if and when I need to take action on a particular

matter, my practice is to focus on grouping related e-mails together to ensure that when I do take action I am doing so based on the most up to date information and that I am not dealing with something that has already been addressed by someone else or become moot by subsequent developments.

21. An effective strategy that I employ frequently to aggregate related e-mails is to use a unique name or word that is only associated with that matter. I suspect Ms. Carbone's February 13, 2017 e-mail ended up in the wrong electronic folder at some point when I was using the keyword "AEP2" as a search term to group together everything I had regarding the New Jersey Subpoena which I was dealing with at this precise time. This is a unique acronym that was never used in a business transaction or litigation that I dealt with prior to my dealing with the New Jersey Subpoena.

22. The misfiling of Ms. Carbone's February 13, 2017 e-mail did not reflect an intent on my part to flout my responsibilities or otherwise disrespect the Court. My great respect for my obligations to ensure that prompt responses are timely filed is reflected by the speed in which I acted on February 21, 2017 after being put on notice of the Summons and Complaint.

23. When Mr. Wallace informed me of the Summons and Complaint on February 21, 2017, I did take notice of the February 8, 2017 "filed" date on the copy of the Summons and Complaint. This very recent date was why it did not seem outside the ordinary course that service had yet to be effectuated. Only 13 days calendar days had passed since the filing date; 4 of which were weekend days and 1 the Presidents Day holiday.

24. My goal on February 21, 2017 – the same day I received the Summons and Complaint from Mr. Wallace – was to get this in the hands of my outside counsel with instructions to remove to federal court. I knew that I could not wait for formal service; my receipt of the

Summons and Complaint from Mr. Wallace on February 21, 2017 was enough to start the clock and we needed to get our removal papers filed sooner rather than later.

25. On March 30, 2017, Mr. Abel informed me that AEP2 filed a Motion to Remand to State Court on March 28, 2017, where they contended that BMW NA was served on February 10, 2017 through our registered agent CT Corporation. Within one hour of receiving the moving papers from Mr. Abel, I confirmed that this was indeed true and that we should consent to remand. It is my understanding that Mr. Abel then took prompt action to notify AEP2 that BMW NA consented to remand.

26. As the above and my prior sworn statements reflect, the mistakes I made here – which I have taken full responsibility for – all trace back to the unintentional misplacement of a single e-mail in an incorrect electronic folder because I mistakenly believed it was related to a case that begins with the same unique plaintiff's name which I never encountered before receiving the New Jersey Subpoena as AEP2, LLC was known as 2AM when we were doing business with it.

27. The speed in which I took action on February 21, 2017 after Mr. Wallace informed me of the above-captioned action demonstrates that I take legal process seriously. I can confidently submit to the Court that I would have had the same reaction to the February 13, 2017 e-mail had I recognized it for what it was before it was placed in the wrong electronic folder.

28. On November 1, 2016, my colleague Courtney Anderson left the Legal Department to become BMW NA's Head of Human Resources. The plan was for me to take over most of Ms. Anderson's prior responsibilities and to hire a successor to take over most of my prior responsibilities. I thus became the logical recipient of the extra workload as I was familiar with all of the responsibilities in question.

29. I was carrying the workload of two full-time attorneys during the busiest part of the calendar year. The burden I was carrying is best reflected by the fact that I e-mailed Mr. Gonzo

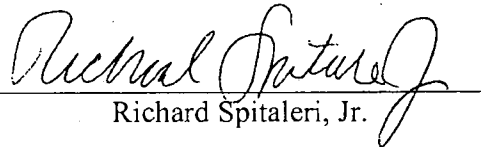
(Mr. Wallace's local New Jersey counsel) to inquire about the New Jersey Subpoena during the Presidents Day holiday even though BMW NA was officially closed for business that day.

30. My responsibilities at the time included managing the legal affairs – which includes all transactions and litigation – with respect to the following areas (the areas that appear in boldface are those that I retained after a new colleague joined on April 17, 2017): real estate, construction, stationary source environmental, customs, export controls, parts and service, vehicle logistics, apparel and accessories, **consumer warranty issues (lemon law) in 11 states in the Western Region (including California where I manage over 300 active matters at any given time), the Company Store in Manhattan, human resources, benefits, OFCCP compliance, the ethics hotline, and labor relations.**

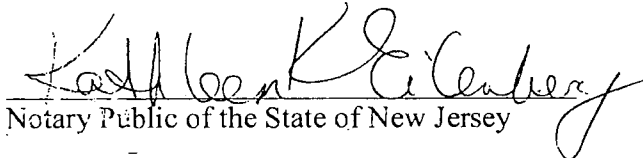
31. I have read the foregoing and declare under penalty of perjury that the statements set forth above are true and accurate.

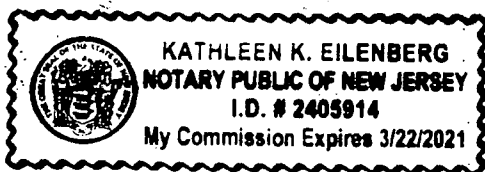
This 5th Day of October, 2017.

FURTHER AFFIANT SAYETH NOT.


Richard Spitaleri, Jr.

Sworn to and subscribed before me
this 5th Day of October, 2017


Notary Public of the State of New Jersey





Anna L. Strandberg
AStrandberg@Barnwell-Whaley.com

October 9, 2017

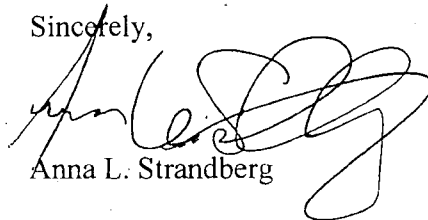
Honorable Julie J. Armstrong
Clerk of Court, Charleston
100 Broad Street, Suite 106
Charleston, SC 29401-2201

RE: AEP2, LLC, f/k/a 2AM Group, LLC v. BMW of North America
Case No.: 2017-CP-10-0644
Our File No.: 5213.002

Dear Madam Clerk:

Enclosed please find the original and one (1) copy of the Third Affidavit of Richard Spitaleri, Jr., which is being filed in support of BMW's Motion to Alter or Amend Judgment or For Relief From Judgment Pursuant to Rules 59(e) and 60(b)(1), SCRPC and BMW's Motion for Reconsideration, which are scheduled to be heard this Thursday, October 12. I would appreciate your filing the original and returning the filed copy via our courier.

Sincerely,



Anna L. Strandberg

ALS/klj

Attachment

c: Honorable J. C. Nicholson, Jr.
Thomas H. Pope, III, Esquire
John P. Freeman, Esquire
Ashley B. Abel, Esquire

{00738954.DOC.1}

www.barnwell-whaley.com

SOUTH CAROLINA OFFICE:
288 Meeting Street, Suite 200, Charleston, SC 29401
P 843.577.7700 F 843.577.7708

NORTH CAROLINA OFFICE:
1427 Military Cutoff Road, Suite 202, Wilmington, NC 28403
P 910.679.1388 F 910.679.4663

REPRESENTING CLIENTS IN ALL COURTS IN SOUTH CAROLINA AND NORTH CAROLINA AND IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

AEP2, LLC f/k/a 2AM GROUP, LLC,
Plaintiff,

vs.

BMW OF NORTH AMERICA, LLC,
Defendant.

IN THE CIRCUIT COURT

Case No. 2017-CP-10-006444

**SUPPLEMENTAL AFFIDAVIT OF
BRUCE WALLACE**

FILED
2017 OCT 12 AM 9:48
JULIE ARMSTRONG
CLERK OF COURT
BY

Personally appeared before me R. Bruce Wallace who, being duly sworn, testifies as follows:

1. I am an attorney licensed to practice law in South Carolina.
2. I represent Charleston lawyers as defendants in another action brought by AEP2 which is pending in Charleston County (“Legal Malpractice” case of *AEP2, LLC v. Buxton, et al.*, Case No. 2016-CP-10-02014).
3. I submit this affidavit in supplementation to my affidavit dated May 24, 2017, to clarify a detail in my prior affidavit.
4. In the Legal Malpractice case, I served a subpoena *duces tecum* on BMW North America, LLC. A true and correct copy of the subpoena *duces tecum* is attached hereto as Exhibit A. The subpoena sought in part:

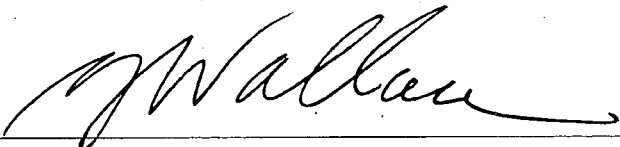
1. **Any and all contracts, commitments, compacts, including any amendments or codicils thereto between BMW of North America, LLC and Sustained Quality, LLC or 2AM Group Ontario CA, LLC.**
2. **Any and all contracts, commitments, compacts, including any amendments or codicils thereto between BMW of North America, LLC and 2AM Group, LLC or 2AM Group Aerospace, LLC.**
- ...
7. **Any and all communications with lawyers, representatives, employees, or agents of 2AM Group, LLC from December 1, 2013 and March 31, 2014.**

5. In response to the subpoena, BMW North America, LLC produced an Assignment, Assumption and Consent Agreement ("AAC Agreement"), a true and correct copy of the AAC Agreement which I received is attached as Exhibit "A" to my prior affidavit.

6. In further response to the subpoena *duces tecum*, BMW North America produced two emails from its in-house, Courtney Anderson, to AEP2's in-house counsel, Walter F. Harris, stating she would secure BMW's signatures on the AAC Agreement. A true and correct copy of the emails BMW North America produced in response to the subpoena are attached hereto as Exhibit B.

7. The subpoena *duces tecum* did not seek drafts of any agreements.

Further your affiant sayeth not.



R. Bruce Wallace

SWORN and subscribed to before me
this 25 day of September, 2017.

Cystal L. Leppert (L.S.)
Notary Public for South Carolina
My Commission Expires: 8-4-16

EXHIBIT A

To Supplemental Affidavit of R. Bruce Wallace

Case No. 2017-CP-10-00644

Subpoena *duces tecum* to BMW of North America, LLC

STATE OF SOUTH CAROLINA
COUNTY OF SPARTANBURG

| | |
|---|---|
| AEP2, LLC f/k/a 2AM GROUP, LLC, <p style="text-align: center;">Plaintiff,</p> | IN THE COURT OF COMMON PLEAS Case No. 2016-CP-42-594 |
| v. | SUBPOENA |
| JAMES BUXTON, ESQUIRE, BUXTON & COLLIE, LLC, <p style="text-align: center;">Defendants.</p> | Pending in Spartanburg County |

TO: **BMW of North America, LLC**
Attn: Legal Department
P. O. Box 1227
Westwood, NJ 07675-1227

YOU ARE COMMANDED to appear in the above named court at the place, and time specified below to testify in the above case.

| | |
|--------------------|----------------|
| PLACE OF TESTIMONY | COURTROOM: |
| | DATE AND TIME: |

YOU ARE COMMANDED to appear at the place, date, and time specified below to testify at the taking of a deposition in the above case.

| | |
|---------------------|---------------|
| PLACE OF DEPOSITION | DATE AND TIME |
|---------------------|---------------|

YOU ARE COMMANDED to produce and permit inspection and copying of the following documents or objects in your possession, custody or control at the place, date and time specified below: See Exhibit "A" attached for documents to be produced, unless previously provided.

| | |
|---|--|
| PLACE Nexsen Pruet, LLC 205 King Street, Suite 400 Charleston, SC 29401 | DATE AND TIME March 21, 2016 at 10:00 a.m. |
|---|--|

YOU ARE COMMANDED to permit inspection of the following premises at the date and time specified below.

| | |
|----------|---------------|
| PREMISES | DATE AND TIME |
|----------|---------------|

ANY SUBPOENAED ORGANIZATION NOT A PARTY TO THIS IS HEREBY DIRECTED TO RULE 30(b)(6), SOUTH CAROLINA RULES OF CIVIL PROCEDURE, TO FILE A DESIGNATION WITH THE COURT SPECIFYING ONE OR MORE OFFICERS, DIRECTORS, OR MANAGING AGENTS, OR OTHER PERSONS WHO CONSENT TO TESTIFY ON ITS BEHALF, SHALL SET FORTH, FOR EACH PERSON DESIGNATED, THE MATTERS ON WHICH HE WILL TESTIFY OR PRODUCE DOCUMENTS OR THINGS. THE PERSON SO DESIGNATED TESTIFY AS TO MATTERS KNOWN OR REASONABLY AVAILABLE TO THE ORGANIZATION

I CERTIFY THAT THE SUBPOENA IS ISSUED IN COMPLIANCE WITH RULE 45(c)(1), AND THAT NOTICE AS REQUIRED BY RULE 45(b)(1) HAS BEEN GIVEN TO ALL PARTIES.

| | | |
|--|-----------------------|------------------------------------|
| Attorney/Issuing Officer's Signature Indicate if Attorney for Plaintiff or Defendant Attorney's Address and Telephone Number : | Date 3/07/2016 | Print Name R. Bruce Wallace |
| R. Bruce Wallace, Attorney for Defendants Nexsen Pruet, LLC, 205 King Street, Suite 400, Charleston, SC 29401 (843) 577-9440 | | |
| Clerk of Court/Issuing Officer's Signature Pro Se Litigant's Name, Address and Telephone Number : | Date | Print Name |

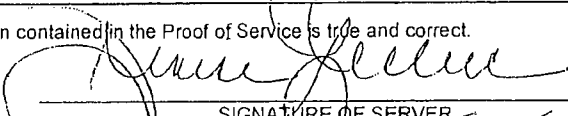
PROOF OF SERVICE

| | | |
|-----------|--------------------|---|
| SERVED | DATE <u>3-7-16</u> | FEES AND MILEAGE TENDERED TO WITNESS |
| | PLACE | <input type="checkbox"/> YES <input checked="" type="checkbox"/> NO AMOUNT \$ |
| SERVED ON | <u>3-7-16</u> | MANNER OF SERVICE <u>US Mail - Certified Mail</u> |
| SERVED BY | <u>Devin Lee</u> | TITLE <u>Paralegal</u> |

DECLARATION OF SERVER

I certify that the foregoing information contained in the Proof of Service is true and correct.

Executed on 3-7-16



 SIGNATURE OF SERVER
205 KING ST, Ste 400, Charleston, SC

 ADDRESS OF SERVER
29406

Rule 45, South Carolina Rules of Civil Procedures, Parts (c) and (d):

(c) Protection of Persons Subject to Subpoenas.

(1) A party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The court on behalf of which the subpoena was issued shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction, which may include, but is not limited to, lost earnings and a reasonable attorney's fee.

(2)(A) A person commanded to produce and permit inspection and copying of designated electronically stored information, books, papers, documents or tangible things, or inspection of premises need not appear in person at the place of production or inspection unless commanded to appear for deposition, hearing or trial. A party or an attorney responsible for the issuance and service of a subpoena for production of books, papers and documents without a deposition shall provide to another party copies of documents so produced upon written request. The party requesting copies shall pay the reasonable costs of reproduction.

(B) Subject to paragraph (d)(2) of this rule, a person commanded to produce and permit inspection and copying may, within 14 days after service of the subpoena or before the time specified for compliance if such time is less than 14 days after service, serve upon the party or attorney designated in the subpoena written objection to inspection or copying of any or all of the designated materials or of the premises—or to producing electronically stored information in the form or forms requested. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials or inspect the premises except pursuant to an order of the court by which the subpoena was issued. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move at any time in the court that issued the subpoena for an order to compel the production. Such an order to compel production shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection and copying commanded.

(3)(A) On timely motion, the court by which a subpoena was issued, or regarding a subpoena commanding appearance at a deposition, or production or inspection directed to a non-party, the court in the county where the non-party resides, is employed or regularly transacts business in person, shall quash or modify the subpoena if it:

- (i) fails to allow reasonable time for compliance; or
- (ii) requires a person who is not a party nor an officer, director or managing agent of a party, nor a general partner of a partnership that is a party, to travel more than 50 miles from the county where that person resides, is employed or regularly transacts business in person, except that, subject to the provisions of clause (c)(3)(B)(iii) of this rule, such a person may in order to attend trial be commanded to travel from any such place within the state in which the trial is held; or
- (iii) requires disclosure of privileged or otherwise protected matter and no exception or waiver applies; or
- (iv) subjects a person to undue burden.

(B) If a subpoena:

- (i) requires disclosure of a trade secret or other confidential research, development, or commercial information, or
- (ii) requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party, or

(iii) requires a person who is not a party nor an officer, director or managing agent of a party, nor a general partner of a partnership that is a party, to incur substantial expense to travel from the county where that person resides, is employed or regularly transacts business in person, the court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena or, if the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearance or production only upon specified conditions.

(d) Duties in Responding to Subpoena.

(1)(A) A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand.

(B) If a subpoena does not specify the form or forms for producing electronically stored information, a person responding to a subpoena must produce the information in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.

(C) A person responding to a subpoena need not produce the same electronically stored information in more than one form.

(D) A person responding to a subpoena need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or to quash, the person from whom discovery is sought must show that the information sought is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(6)(B). The court may specify conditions for the discovery.

(2)(A) When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

(B) If information produced in response to a subpoena is subject to a claim of privilege or of protection as trial preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has and may not use or disclose the information until the claim is resolved. A receiving party may promptly present the information to the court under seal for a determination of the claim. If the receiving party disclosed the information before being notified, the receiving party must take reasonable steps to retrieve the information. The person who produced the information must preserve the information until the claim is resolved.

DOCUMENTS TO BE PRODUCED

EXHIBIT A

1. Any and all contracts, commitments, compacts, including any amendments or codicils thereto between BMW of North America, LLC and Sustained Quality, LLC or 2AM Group Ontario CA, LLC.
2. Any and all contracts, commitments, compacts, including any amendments or codicils thereto between BMW of North America, LLC and 2AM Group, LLC or 2AM Group Aerospace, LLC.
3. Copy of the Services Agreement – Ontario RDC, dated as of January 1, 2012, as amended by Addendum, dated May 24, 2012, between BMW and 2AM Group, LLC.
4. Any and all communications with lawyers, representatives, employees, or agents of 2AM Group Aerospace, LLC from December 1, 2013 and March 31, 2014.
5. Any and all communications with lawyers, representatives, employees, or agents of Sustained Quality, LLC from December 1, 2013 and March 31, 2014.
6. Any and all communications with lawyers, representatives, employees, or agents of 2AM Group Ontario CA, LLC from December 1, 2013 and March 31, 2014.
7. Any and all communications with lawyers, representatives, employees, or agents of 2AM Group, LLC from December 1, 2013 and March 31, 2014.
8. Any and all communications with Walter F. Harris, III from December 1, 2013 and May 31, 2014, including but not limited to email communications with wharrislawsc@yahoo.com and walt.harris@2AMGroup.com.
9. Any letters sent to 2AM Group, LLC or 2AEP, LLC that were returned undelivered or unclaimed.

STATE OF SOUTH CAROLINA
COUNTY OF SPARTANBURG

IN THE CIRCUIT COURT

Case No. 2016-CP-42-00594

AEP2, LLC, f/k/a 2AM Group, LLC,
Plaintiff,

AFFIDAVIT OF AUTHENTICITY

vs.

JAMES BUXTON, ESQUIRE, and
BUXTON & COLLIE, LLC,
Defendants.

The undersigned, hereby certifies that the enclosed documents are a complete, true and accurate copy of the records as kept in the normal course of business of BMW of North America, LLC.

SIGNED: _____

PRINTED NAME: _____

TODAY'S DATE: _____

ADDRESS: _____

SWORN to before me this
_____ day of _____ 2016

Notary Public for South Carolina
My Commission Expires: _____

EXHIBIT B

To Supplemental Affidavit of R. Bruce Wallace

Case No. 2017-CP-10-00644

Emails between Courtney Anderson and Walter F. Harris

Anderson Courtney, AJ-NA

From: Anderson Courtney, AJ-NA
Sent: Monday, March 10, 2014 2:38 PM
To: 'Walter Harris'
Cc: Demski Lawrence, B2-US-A-3; scott.scholmer@bmwna.com
Subject: RE: Assignment of BMW Service Agreement - Ontario

Walt,

Happy to start working on signatures. I received the Jacksonville agreement in pdf so can you either send me the document and word, in which case I can make the change, or just send me a revised pdf version of that one? I can finalize the Ontario agreement for purposes of signatures.

Thanks,
Courtney

From: Walter Harris [mailto:wharrislawsc@yahoo.com]
Sent: Monday, March 10, 2014 2:22 PM
To: Anderson Courtney, AJ-NA
Cc: Demski Lawrence, B2-US-A-3; scott.scholmer@bmwna.com
Subject: Re: Assignment of BMW Service Agreement - Ontario

Courtney, thanks. I am in agreement with your changes. Can you convert to a pdf and submit to whomever needs to sign on your side? As soon as I get I will have it signed and ratified and then circulate. Does that work? Thanks again for your help. Best, Walt

Harris Law Firm, LLC
Walter F. Harris, III, Esquire
122 Codners Ferry Street
Charleston, SC 29492

Wharrislawsc@yahoo.com
(843)834-2024

This e-mail and any files transmitted with it are confidential and are intended solely for the use of the individual or entity to whom they are addressed. If you are not the intended original recipient, please be advised that you have received this e-mail in error, and any use, dissemination, forwarding, printing or copying of this e-mail is strictly prohibited.

IRS Circular 230 Disclosure: We are required by Internal Revenue Service (IRS) Circular 230 to inform you that any tax advice contained in the body of this e-mail was not intended or written to be used, and cannot be used, by the recipient or any other taxpayer for the purpose of avoiding penalties that may be imposed under the Internal Revenue Code or applicable state or local tax law provisions. This reliance paragraph applies to any and all attachments applicable to this e-mail.

This email is protected by the attorney-client rules governing attorney-client communication and attorney work product. The client receiving this email understands and agrees that their own email communications is secure, confidential and agrees to electronic communication with represented counsel with the protections above controlling.

From: "Courtney.Anderson@bmwna.com" <Courtney.Anderson@bmwna.com>
To: wharrislawsc@yahoo.com
Cc: Larry.Demski@bmwna.com; scott.scholmer@bmwna.com
Sent: Monday, March 10, 2014 2:11 PM
Subject: RE: Assignment of BMW Service Agreement - Ontario

Walter,

Thanks for following up. I had a few small changes on the Ontario assignment (attached). Also, in Paragraph 3 of the Jacksonville assignment, the reference to the "RMD" should be changed to the "RDC." Otherwise, these look fine. Please let me know if you have any questions or if you'd like to discuss.

Thanks,
Courtney

From: Walter Harris [<mailto:wharrislawsc@yahoo.com>]
Sent: Monday, March 10, 2014 1:22 PM
To: Anderson Courtney, AJ-NA
Cc: Demski Lawrence, B2-US-A-3; scott.scholmer
Subject: Assignment of BMW Service Agreement - Ontario

All: checking back on the assignment and if any questions? Please let me know. Thanks, Walt

Harris Law Firm, LLC
Walter F. Harris, III, Esquire
122 Codners Ferry Street
Charleston, SC 29492

Wharrislawsc@yahoo.com
(843)834-2024

This e-mail and any files transmitted with it are confidential and are intended solely for the use of the individual or entity to whom they are addressed. If you are not the intended original recipient, please be advised that you have received this e-mail in error, and any use, dissemination, forwarding, printing or copying of this e-mail is strictly prohibited.

IRS Circular 230 Disclosure: We are required by Internal Revenue Service (IRS) Circular 230 to inform you that any tax advice contained in the body of this e-mail was not intended or written to be used, and cannot be used, by the recipient or any other taxpayer for the purpose of avoiding penalties that may be imposed under the Internal Revenue Code or applicable state or local tax law provisions. This reliance paragraph applies to any and all attachments applicable to this e-mail.

This email is protected by the attorney-client rules governing attorney-client communication and attorney work product. The client receiving this email understands and agrees that their own email communications is secure, confidential and agrees to electronic communication with represented counsel with the protections above controlling.

Anderson Courtney, AJ-NA

From: Anderson Courtney, AJ-NA
Sent: Thursday, March 13, 2014 3:02 PM
To: 'Walter Harris'
Subject: RE: Assignment - RDC Jacksonville

Thanks Walter. I will try to get everything back to you by early next week. If you need it sooner, just let me know.
Courtney

From: Walter Harris [mailto:wharrislawsc@yahoo.com]
Sent: Thursday, March 13, 2014 9:35 AM
To: Anderson Courtney, AJ-NA
Subject: Fw: Assignment - RDC Jacksonville

Courtney, here is the JAX RDC Assignment with the scrivener error changing the proper acronym to "RDC" per your request. Thank you for your help on this and for getting signatures so we can ratify on our side.

Can you give me a rough timeline of when you think I can get these back? Thanks, Walt

Harris Law Firm, LLC
Walter F. Harris, III, Esquire
122 Codrers Ferry Street
Charleston, SC 29492

Wharrislawsc@yahoo.com
(843)834-2024

This e-mail and any files transmitted with it are confidential and are intended solely for the use of the individual or entity to whom they are addressed. If you are not the intended original recipient, please be advised that you have received this e-mail in error, and any use, dissemination, forwarding, printing or copying of this e-mail is strictly prohibited.

IRS Circular 230 Disclosure: We are required by Internal Revenue Service (IRS) Circular 230 to inform you that any tax advice contained in the body of this e-mail was not intended or written to be used, and cannot be used, by the recipient or any other taxpayer for the purpose of avoiding penalties that may be imposed under the Internal Revenue Code or applicable state or local tax law provisions. This reliance paragraph applies to any and all attachments applicable to this e-mail.

This email is protected by the attorney-client rules governing attorney-client communication and attorney work product. The client receiving this email understands and agrees that their own email communications is secure, confidential and agrees to electronic communication with represented counsel with the protections above controlling.

| | | |
|----------------------------|---|--------------------------|
| STATE OF SOUTH CAROLINA |) | COURT OF COMMON PLEAS |
| |) | NINTH JUDICIAL CIRCUIT |
| COUNTY OF CHARLESTON |) | |
| |) | |
| AEP2, LLC, |) | CASE NO. 2017-CP-10-0644 |
| |) | |
| PLAINTIFF, |) | TRANSCRIPT OF RECORD |
| |) | |
| VS. |) | |
| |) | |
| BMW of North America, LLC, |) | |
| |) | |
| DEFENDANT. |) | |
| |) | |

June 13, 2017

Charleston, South Carolina

B E F O R E:

The Honorable J. C. Nicholson

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

Thomas H. Pope, III, Esquire
For the Plaintiff

John Freeman, Esquire
For the Plaintiff

Ashley B. Abel, Esquire
For the Defense

Certified Transcript Provided For: Ashley B. Abel

Phyllis Norton, CVR-Master, Nationally Certified Verbatim Court Reporter
636 Long Point Road, Unit G, #74, Mt. Pleasant, South Carolina 29464
PNorton@sccourts.org

I N D E X

HEARING -- 03

EXHIBITS - None Proffered

CERTIFICATION OF TRANSCRIPT -- 35

If you need an additional copy of this transcript or a sealed transcript or if opposing counsel requires a copy of the transcript, you should contact the court reporter.

Certification will satisfy Rule 80, Stenographic Report of Transcript as Evidence.

1

1 THE CLERK: 2017-CP-644, AEP2 v BMW of North
2 America.

3 THE COURT: All right. Who is here representing
4 who?

5 MR. POPE: Your Honor, Tom Pope from Newberry. John
6 Freeman and I represent AEP2. And this is Mr. Arty Perry
7 who is the owner of AEP2.

8 THE COURT: Okay.

9 MR. ABEL: And I am Ashley Abel, Your Honor, here
10 representing the defendant BMW of North America.

11 THE COURT: All right. Let me see what it is. It
12 is a motion to set aside a default, a motion -- what, a
13 damage hearing? Actually did you file two motions or --
14 or is that -- 420, a motion of default, a damage hearing
15 on 3/24. Did you file two?

16 MR. POPE: No, we just we filed one motion for the
17 court to set a hearing on damages. Because Judge
18 Jefferson when she entered the default against the
19 defendant she said later the court would set a hearing on
20 damages. So ---

21 THE COURT: I am just showing -- it just shows two
22 different motions, one filed on 4/20 and one filed on
23 3/24.

24 MR. ABEL: The motion to set aside is my motion,
25 Your Honor.

1 THE COURT: I understand. But that is not what I
2 was talking about.

3 MR. ABEL: I understand, Your Honor.

4 MR. POPE: The motion for a damage hearing was ---

5 THE COURT: Yours filed was filed one -- five one.

6 MR. POPE: April 14 was the date of -- April 20th
7 was the date it was actually filed, the motion for damage
8 hearing. We didn't file two motions. I don't understand
9 why there is another one. I think the entry of default
10 was on March the 24th. Maybe that is it.

11 THE COURT: I don't know why it is on there. But we
12 will -- all right. Let me see. You filed your motion
13 for to set aside a default; is that correct?

14 MR. ABEL: I did. Yes, Your Honor.

15 THE COURT: All right. I will be glad to hear you.

16 MR. ABEL: Your Honor, we have outlined to the court
17 in our memorandum that we filed we filed an initial
18 memorandum back on May 1st outlining the excusable
19 neglect standard in South Carolina. We got the other
20 side's memorandum in opposition last Friday.

21 We prepared quickly a responsive memorandum that we
22 submitted to the court late yesterday afternoon. I am
23 not sure if Your Honor has had a chance to see that. It
24 attaches a second affidavit of an individual at BMW of
25 North America that is responsible for processing the

1 complaints. In-house counsel in New Jersey, Mr. Rich
2 Spitaleri he outlined ---

3 THE COURT: What rule are you moving under?

4 MR. ABEL: Rule 55, Your Honor.

5 THE COURT: All right. Rule 55. What is your good
6 cause?

7 MR. ABEL: The good cause it there was only a short
8 time period between when we thought it was served on
9 February 21st and it was actually served on February
10 11th.

11 Your Honor, we removed -- I removed the case to
12 federal court based on the incorrect service date. We
13 then consented to the remand of the case once we found
14 out that CT Service -- CT Corporation the registered
15 agent had actually been served earlier on a different
16 date. So we consented to the remand of the case back to
17 this court, Your Honor.

18 We have two affidavits from the individual at BMW of
19 North America. He has outlined what I believe, Your
20 Honor, is certainly good cause. The only ---

21 THE COURT: Tell me what you think is good cause
22 under the rule, okay.

23 MR. ABEL: Mr. -- BMW of North America processes
24 lots, hundreds, of subpoenas, any type of legal action
25 that falls under Mr. Spitaleri's jurisdiction ---

1 THE COURT: I understand that, but what ---

2 MR. ABEL: --- and ---

3 THE COURT: --- but what did you think y'all did
4 that the court should grant you your motion?

5 MR. ABEL: There was -- there was a common
6 mistake ---

7 THE COURT: I haven't read your memorandums. I
8 haven't read your affidavit.

9 MR. ABEL: That is what I wanted ---

10 THE COURT: But please tell me. There is a whole
11 line of cases about insurance company where they are
12 derelict and don't tend to their job and make a mistake
13 for whatever reason. That is not good cause.

14 MR. ABEL: Right.

15 THE COURT: And I would assume BMW would fall under
16 that type of cases. So what is your good cause?

17 MR. ABEL: This action ---

18 THE COURT: I mean it is a simple issue.

19 MR. ABEL: Well, it is a simple issue, Your Honor;
20 but it requires just a little bit of discussion.

21 Prior to this lawsuit being filed this same
22 plaintiff seeking these same damages sued two lawyers.
23 And those lawsuits are stayed right now, but they
24 preceded this action.

25 When the complaint for this action came into BMW of

1 North America the coordinator that processed it and Mr.
2 Spitaleri looked at the complaint. It was the same name
3 of the new complaint was on -- was the service -- was the
4 same name as a subpoena that had been received from this
5 same plaintiff, AEP2. We will call it 2AM. That was
6 the ---

7 THE COURT: They had different case numbers.

8 MR. ABEL: That had different case numbers. But it
9 was incorrectly inadvertently placed in the same
10 electronic folder and as a result Mr. Spitaleri thought
11 of when it was -- he was looking at the subpoena ---

12 THE COURT: So he made a mistake and didn't realize
13 it was a new lawsuit?

14 MR. ABEL: Correct, Your Honor. And so he gave me
15 the date that he believed that it was served, which was
16 the day that he actually received it. Which was the
17 21st.

18 We are only talking about ten days. We are not
19 talking about a month or two months or six months. We
20 realized the error. We consented to the remand.

21 THE COURT: When did you -- when did the 30 days go
22 by -- or when were you served?

23 MR. ABEL: Well, can I address the answer issue?
24 Because when the case was in -- because we removed it we
25 couldn't immediately file an answer in this court because

1 it had been removed and the federal court had
2 jurisdiction.

3 So once we found out about the error in service we
4 consented to be remand. Once it was back in this court
5 we immediately filed the motion and a proposed answer.

6 Your Honor, we further have outlined in our brief
7 not only the excusable neglect standard which was Mr.
8 Spidaleri's common mistake. It doesn't happen often with
9 him. This is a reputable company obviously.

10 THE COURT: I understand that. But my question to
11 you was real simple.

12 MR. ABEL: Yes, Your Honor.

13 THE COURT: When were you served? That is a simple
14 question.

15 MR. ABEL: February 21st I think was the correct --
16 February 11th I think was the correct date.

17 THE COURT: How about February the 10th?

18 MR. ABEL: February 10th.

19 THE COURT: 2017?

20 MR. ABEL: Correct, Your Honor.

21 THE COURT: Does that sound right?

22 MR. ABEL: That sounds right.

23 THE COURT: Okay. All right. And when was the
24 default judgment entered into?

25 MR. ABEL: I think

1 MR. POPE: Your Honor, the entry of default ---

2 THE COURT: Was that -- I understand. Don't
3 interrupt him.

4 MR. POPE: I'm sorry. I apologize.

5 THE COURT: It is his motion. Okay. I will hear
6 from you at the appropriate time.

7 All right. When was -- when did -- March the 23rd,
8 2017 sound correct?

9 MR. ABEL: Yes. The notice of entry of the order is
10 on 4/20/17.

11 THE COURT: All right. So the order was signed.
12 And then there was a motion filed for damages on April
13 the 20th; is that correct?

14 MR. ABEL: Correct, Your Honor.

15 THE COURT: All right. Now when did you get
16 involved; what are your dates?

17 MR. ABEL: The date that I got involved was in
18 February and we removed the case to federal court.

19 THE COURT: February of '14.

20 MR. ABEL: February of 2017.

21 THE COURT: I'm sorry.

22 MR. ABEL: And then we filed a notice of removal
23 which we thought was on the 30th day on March 23rd, 2017.

24 THE COURT: March the 23rd you filed a motion to
25 remove, right?

1 MR. ABEL: Right. We removed the case. And
2 because it had been removed once we found out that the
3 case that -- we had -- plaintiff's counsel provided us
4 with information about the service on CT Corporation. We
5 conducted an inquiry of BMW of North America.

6 They finally found this complaint in the other
7 folder with the other action by this plaintiff against
8 the lawyers. Those two lawsuits preceded this action.
9 And that was his error. And we suggest and submit to the
10 court that that was excusable neglect.

11 Once we found out that CT Corp was in fact served on
12 the earlier date and that our notice of removal therefore
13 exceeded the 30 days, the federal court really didn't
14 have jurisdiction so we consented to the remand. And
15 immediately after it was remanded to this court we
16 consented to the remand on April 11th ---

17 THE COURT: On April 11th?

18 MR. ABEL: Yes.

19 THE COURT: Okay.

20 MR. ABEL: And the order granting that remand was
21 April 20th. And we filed our motion to set aside on
22 April 25th attaching an answer.

23 THE COURT: So you filed your motion to set aside
24 the default on April when?

25 MR. ABEL: Twenty-fifth, Your Honor.

1 THE COURT: All right. So it sounds like you were
2 timely, right?

3 MR. ABEL: Yes, Your Honor.

4 THE COURT: What is your meritorious defense?

5 MR. ABEL: Our meritorious defense. This case comes
6 down to a particular provision in an agreement, a
7 services agreement between the parties.

8 THE COURT: A what kind of agreement?

9 MR. ABEL: It is an -- this is a services agreement
10 for a distribution center for BMW of North America in
11 Ontario, California.

12 THE COURT: Okay.

13 MR. ABEL: And so 2AM was the original contracting
14 party; and the plaintiff in this case, AEP2, took over
15 essentially. Plaintiff's counsel can probably describe
16 it better than I can. But they took over, involved the
17 assets of 2AM or something like that.

18 THE COURT: Okay.

19 MR. ABEL: But the contract that is at issue was
20 entered into in 2011. That date is actually very
21 important as to the meritorious defense.

22 The language -- there is indemnification language.
23 And that is what is at issue in this lawsuit, Your Honor.
24 And it says -- and we have quoted on Page 2 of our
25 memorandum. It says notwithstanding the above in the

1 event there is any liability arising out of any potential
2 withdrawal liability - and that is what this case is
3 about, withdrawal liability in a union pension fund.

4 This was a unionized facility you have in
5 California. And so whenever you are dealing with pension
6 funds you have to address the issue of withdrawal
7 liability.

8 So there are general indemnifications provisions.
9 And this is one that comes underneath that. And I will
10 describe why that is significant in just a second.

11 But it goes on to say if there is any liability
12 arising out of any potential withdrawal liability on the
13 part of BMW NA. We submit that that is the key language
14 in this entire case "on the part of BMW NA" to the
15 Western Conference pension fund BMW agrees to indemnify
16 and hold 2AM, plaintiff, harmless from any and all such
17 liability.

18 The plaintiff would have this document, this
19 contract, rewritten to delete or omit the words "on the
20 part of BMW North America" such that BMW would then be
21 responsible for all of 2AM's withdrawal liability.

22 A couple of things are important about that, Your
23 Honor. You can't rewrite the contract. That is the
24 meritorious defense. It says BMW is not going to seek to
25 indemnify -- be indemnified from 2AM for BMW's own

1 withdrawal liability.

2 The affidavit from Mr. Spitaleri reflects that in
3 2011 there was in fact withdrawal liability that was
4 attributable to BMW incurred prior to the transaction
5 that we are talking about in the amount of eight hundred
6 and something thousand dollars.

7 Mr. Spitaleri's affidavit reflects that BMW in fact
8 paid that rent. So BMW -- the provision says what it
9 says; and it can't be rewritten. It says BMW's own
10 withdrawal liability.

11 Secondly, that provision actually played out exactly
12 the way it was drafted. BMW's own withdrawal liability
13 was paid in 2011 pursuant to that 2011 contract that is
14 the subject of this lawsuit.

15 And the plaintiff would have those language -- that
16 word rewritten because the pension fund that is at issue
17 in 2014 sought to have this plaintiff pay an additional
18 \$600,000 of its withdrawal liability.

19 And, Your Honor, this really makes sense when you
20 think about it. Why would a contracting party like BMW
21 of North America indemnify a plaintiff, the plaintiff in
22 this action who has taken over this facility and signed
23 on to the collective bargaining agreement. Plaintiff
24 assumed those obligations to make those payments.

25 Why would any contracting party agree that if you

1 stiff the union pension fund we are going to cover it.

2 It doesn't make any sense.

3 So the language says what it says. And we suggest
4 that what it says is what really happened.

5 THE COURT: Okay.

6 MR. ABEL: BMW paid its own. And it doesn't make
7 any sense for BMW to agree to pay them whatever they
8 decide to should ---

9 THE COURT: Okay. Talk to me about prejudice.

10 MR. ABEL: Your Honor, there is no prejudice. They
11 had -- the two prior lawsuits against lawyers that they
12 blame for not drafting this language correctly and
13 informing them they may have potential withdrawal
14 liability. And they would have done something I guess is
15 their argument, in drafting this document or other
16 documents to address this.

17 That is what those complaints say is that 2AM didn't
18 know about this withdrawal liability issue. Yet they are
19 going to come into this court in this case and say oh,
20 yeah, we know what that means and it means you are
21 supposed to pay 2AM's withdrawal liability from the
22 pension fund. Because they withdrew in 2014 from that
23 fund.

24 That doesn't make any sense. There is no prejudice
25 here. BMW of North America lived up to its contract. It

1 was signed.

2 In the documents before the court there is a more
3 recent document that is unsigned that the plaintiff would
4 have this court look at and say, oh, well, this is clear;
5 it says that BMW is going to pay for all of this
6 withdrawal liability.

7 The document was never signed. The court has not
8 been provided a signed copy. Mr. Spitaleri's affidavit
9 says it has never been signed.

10 And if anyone knew about whether this document was
11 signed or not, it is with 2AM, AEP, the plaintiff in this
12 case. So they know that there is no signed copy of that
13 document.

14 So we think that is a bit of a rouse, Your Honor.
15 But I wanted to mention it in case it comes up when the
16 other side argues.

17 But so we submit that the only document is a
18 services agreement in 2011.

19 THE COURT: Well, the prejudice is how it is going
20 to affect the plaintiff, not you.

21 MR. ABEL: Well, it is not going to affect the
22 plaintiff at all.

23 THE COURT: My question is why do you think the
24 plaintiff would not be prejudiced by the court granting
25 this ---

1 MR. ABEL: Well, prejudice isn't we can't
2 collect ---

3 THE COURT: --- request to set aside default.

4 MR. ABEL: Right. Your Honor, prejudice is not, oh,
5 we don't get to collect. That is not the standard.

6 The question is whether that short delay resulted in
7 or created any prejudice for them. They haven't
8 identified any prejudice whatsoever.

9 THE COURT: I know. But I am just asking you your
10 opinion. I will get to them next, okay.

11 MR. ABEL: Right. Well, Your Honor, there is a
12 short timeframe of a couple of weeks really between when
13 it was served and when we responded and they knew that we
14 were involved. There is no prejudice that could result
15 in that.

16 I can tell you that they have not changed any
17 position in any other case since that time. The other
18 cases are stayed. They can clearly proceed with those.
19 They can lift the stay.

20 And so their prejudice cannot be they don't get to
21 collect. That is not the standard. The question is
22 whether they took any action between that time February
23 10th and February 21st in reliance on that that somehow
24 prejudiced them. And they have demonstrated none to the
25 court, Your Honor.

1 THE COURT: Okay.

2 MR. ABEL: Thank you, Your Honor.

3 THE COURT: Thank you.

4 Mr. Pope.

5 MR. POPE: May it please the court. Your Honor, the
6 memo I submitted last week deals with the standard. In
7 2014 the Supreme Court in the White Oak case made very
8 clear what you look at in Rule 55 as to good cause.

9 And they held on that case citing a case from 2009
10 from their old -- the same court that the defendant --
11 the defaulting party if he wants to get relief from the
12 entry of default, which is where we are in this case, had
13 to provide an explanation for the default and give
14 reasons why vacation of the default entry would serve the
15 interest of justice.

16 And in the White Oak case they lost the pleadings.
17 The lower court denied the motion to set aside that
18 default. The Court of Appeals for some reason reversed
19 it. The Supreme Court reversed him and said, no, that is
20 not good cause; losing pleadings is not good cause.

21 In this case, Your Honor, BMW has 15 lawyers in New
22 Jersey in their corporate office. I provided a list of
23 them in my -- with my affidavit. Fifteen of them. And
24 one of them is Mr. Spitaleri.

25 And Mr. Spitaleri had an opportunity to find out

1 when the process was served on him. The plaintiff
2 followed the book. We served CT Corporation. They are
3 designated agent for service. On February the 10th, two
4 days after we filed it. They got it shortly thereafter.

5 They never called CT to find out when they were --
6 when they were served until after they went into default.
7 They never called me to ask when they were served. They
8 would have gotten a truthful answer; they were served on
9 February the 10th. And they never called the Clerk of
10 Court of Charleston County who would have told them the
11 same thing.

12 So Mr. Spitaleri and his 14 other co-corporate
13 counsel in New Jersey had three places they could have
14 called. One phone call, a one-minute phone call, would
15 have told them what they needed to know. They just
16 ignored it. They ignored their responsibilities.

17 And for them to say they were confused because he
18 was dealing with a subpoena that Mr. Wallace issued - who
19 is in the courtroom, Bruce Wallace - on behalf of a
20 lawyer, a local lawyer named Buxton, that he could be
21 confused by seeing a caption that said Buxton versus BMW
22 is mind-boggling. BMW paid Mr. Spitaleri's pay every
23 week.

24 And so here is what happened factually. As to the
25 service we had a depo- ---

1 THE COURT: What is the caption of the other two
2 cases?

3 MR. POPE: AEP2 versus Buxton and Buxton & Collie,
4 and AEP2 versus Harris.

5 THE COURT: So BMW is not involved in the other ---

6 MR. POPE: BMW is not listed on any of those.

7 THE COURT: They are not listed on any other -- the
8 other two lawsuits?

9 MR. POPE: Yes, sir.

10 THE COURT: I thought you said they were listed in
11 the other two lawsuits.

12 MR. ABEL: They were not listed, Your Honor. What I
13 -- what I was explaining was the reason that they got it
14 was ---

15 THE COURT: So the caption ---

16 MR. ABEL: --- they were serving a subpoena ---

17 THE COURT: --- of the other two -- the other two
18 lawsuits didn't even include BMW and he got it confused?

19 MR. ABEL: It was because -- yes, he got it
20 confused.

21 THE COURT: Can he read?

22 MR. ABEL: Yes, he can. Your Honor, let me explain,
23 please.

24 THE COURT: Okay.

25 MR. ABEL: They opened a folder. When one of the

1 other lawsuits they served a subpoena on BMW, so BMW
2 gets ---

3 THE COURT: Well, putting it in the wrong electronic
4 file is just the same as losing it and throwing it in the
5 trashcan.

6 MR. ABEL: I understand that, Your Honor. But let
7 me explain the excuse -- the excusable neglect that we
8 are talking about.

9 The first thing that BMW got was not this complaint.
10 It was ---

11 THE COURT: I have heard that ---

12 MR. ABEL: --- a subpoena in the other action.

13 THE COURT: I have heard that.

14 MR. ABEL: Okay.

15 THE COURT: And let me finish with Mr. Pope and you
16 will get a chance to reply, okay?

17 MR. ABEL: Thank you, Your Honor.

18 THE COURT: Thank you very much. I just asked you
19 one question whether BMW was a party to the other lawsuit
20 since -- but it is inconceivable how they could confuse
21 that. But please proceed.

22 MR. POPE: Your Honor, so -- so they were duly
23 served. It was sent to BMW. They, whatever, lost it,
24 didn't pay any attention to it, turned a blind eye,
25 whatever they did. BMW got a subpoena from Mr. Bruce

1 Wallace who is representing Lawyer Buxton from Mt.
2 Pleasant. He is seated in the courtroom. He sent a
3 subpoena wanting all the documents relating to the
4 transaction where the AEP2 was -- or 2AM was sold to a
5 Sustained Quality.

6 So in getting those documents Mr. Spitaleri calls
7 him and says, well, you are going -- you are going to
8 take the deposition of Courtney Anderson another one of
9 the corporate counsel in New Jersey; I want to know why
10 you are deposing her.

11 And Mr. Wallace who has submitted an affidavit in
12 this case says I want to depose her to get her to admit
13 that BMW owes this withdrawal liability and has to
14 indemnify the plaintiffs for it, not Mr. Buxton. He told
15 him why he wanted it.

16 And Mr. Spitaleri said, well, let me see the
17 allegations. And the same day, February the 21st, ten
18 days after service, eleven days after service, Mr.
19 Wallace sends him the complaint in this case against BMW
20 and it has a Bate stamp on it filed February the 8th.

21 So they -- he was on notice twice. He was on
22 inquiry -- no, he was on actual service on the company
23 through CT on February the 10th. And he had inquiry
24 notice on February the 21st when he not only got the
25 complaint he talked to Mr. Wallace about it and

1 understood from Mr. Wallace that it was Mr. Wallace's
2 position that BMW, not his client, was responsible for
3 this withdrawal liability of \$605,000.

4 So he then has the complaint three weeks before he
5 is in default or two-and-a-half weeks. And he does
6 nothing with it. So that is absolutely not good cause
7 under any cases that are cited.

8 And I would note that my brief -- our brief, Mr.
9 Freeman's and I memo, cites about eight cases which are
10 fairly recent; and BMW did not address any of them.

11 Roche versus the Young Brothers, Supreme Court 1995
12 going back that far they said that losing a summons and
13 complaint within the corporation was not a ground to set
14 aside default.

15 In Richardson versus PV, a 2009 Supreme Court case,
16 the Supreme Court said the courts of this state have
17 consistently held that the negligence of an attorney or
18 an insurance company is imputable to a defaulting
19 litigant.

20 And in Sundown Operating versus ---

21 THE COURT: In this case it is the defaulting
22 litigant, not an insurance company.

23 MR. POPE: Right. Well, and here we have -- we have
24 an in-house lawyer who is trained in these things.

25 THE COURT: Right.

1 MR. POPE: He says he has procedures.

2 THE COURT: Now you said you had ---

3 MR. POPE: And his ---

4 THE COURT: What affidavit did you have from which
5 lawyer? Or did you submit an affidavit ---

6 MR. POPE: We have an affidavit from Mr. Bruce
7 Wallace.

8 THE COURT: All right. And Mr. Wallace stated he
9 talked to corporate counsel?

10 MR. POPE: He talked to Mr. Spitaleri.

11 THE COURT: And told him about this lawsuit?

12 MR. POPE: Talked about this lawsuit with him.

13 THE COURT: Okay.

14 MR. POPE: And told him why he wanted to depose Mr.
15 Spitaleri's colleague, Courtney Anderson. And he said,
16 here is what I want to ask her; I want to ask her to
17 admit that BMW owed a withdrawal liability to AEP2 for
18 the \$605,000.

19 So he was told specifically the importance of this
20 lawsuit. And he sent him an e-mail with a clocked copy
21 of the actual lawsuit.

22 Now we have Mr. Wallace's affidavit is there. And
23 it clarifies all of that. But bottom line is Mr.
24 Spitaleri now says that his reason for being in default
25 is because it was lost in the proverbial shuffle. Those

1 are his words. His words. Which I submit are flippant
2 words.

3 This court has made very clear -- the Supreme Court
4 of this state has made clear that you cannot -- you
5 cannot ignore legal process. And if you do, you do it at
6 your own risk.

7 And in this case the dilemma BMW is in is because of
8 Mr. Spitaleri who loses things in the proverbial shuffle
9 and thinks that is an excuse. But it is not.

10 And the record also says that initially we were told
11 that it was due to a clerical error. But it was never
12 explained what clerical error existed that caused them to
13 be in default.

14 BMW had plenty of opportunity to call their ---

15 THE COURT: All right. I understand the argument,
16 Mr. Pope. Assuming there is good cause -- and I am not
17 taking a position right now whether you have good cause
18 or don't have good cause.

19 Address the other three elements after the court
20 determines there is good cause, i.e., I believe timely
21 and meritorious and prejudice.

22 MR. POPE: And prejudice, yes, sir.

23 THE COURT: If you can address those three items for
24 me, please, sir.

25 MR. POPE: Yes, sir, I will. I believe on Page 12

1 of my brief. But in this case the timeliness of it I
2 think they filed their motion to set aside default 43
3 days after they were in default. So ---

4 THE COURT: Well, they filed -- they filed a motion
5 to remand it or remove it to federal court after the 30
6 days.

7 MR. POPE: They did. They were out of time when
8 they removed -- removed it. They were.

9 THE COURT: And it got remanded back for that
10 reason -- well, it didn't get remanded. Agreed to remand
11 it back, right?

12 MR. POPE: They did. Well, I moved to remand it;
13 and they didn't object.

14 THE COURT: Okay. All right.

15 MR. POPE: So then the following -- so April the
16 26th is when they filed a motion to set aside default.
17 So we don't think there's any timeliness issue there.
18 There were 43 days of default filed on that motion.

19 As far as the meritorious defense, you know, we have
20 got -- we have got Bruce Wallace of Nexsen Pruet telling
21 them that they are liable for this. And they are in
22 default.

23 And I don't see that -- he argued -- dancing --
24 needles on the -- I mean angels on the head of a pin
25 about whether they are liable or not.

1 There are three lawyers in this case who have said
2 they are liable for this withdrawal liability including
3 Bruce Wallace and Fritz Jekel and Mr. Freeman and I.

4 And so I don't think there is any meritorious
5 defense. They have pled general denial, and now it is
6 one sentence estoppel argument.

7 As far as prejudice, Your Honor, our client had paid
8 this withdrawal liability of \$605,000 starting in 2014.
9 So I think it is prejudice that -- if justice delayed is
10 justice denied. And so I think the plaintiff is
11 prejudice where this has been steaming for some time now.

12 And it is my -- and Mr. Perry's company has paid a
13 large sum of money for this withdrawal liability which
14 should be borne by BMW based on the 2011 agreement and/or
15 its consent to the sale in the 2014 of the assignment and
16 assumption contained in that document.

17 So the crucial issue, Your Honor, is that ---

18 THE COURT: I think the crucial issue is probably
19 good cause.

20 MR. POPE: I'm sorry?

21 THE COURT: I say I think the crucial issue is
22 probably good cause.

23 MR. POPE: Yes, sir. It is. And I think if the
24 plaintiff can't produce an explanation that convinces
25 this court of good cause then you really hardly look at

1 those other -- those other factors ---

2 THE COURT: I understand. You have got to -- you
3 have got to assume there is good cause before you look at
4 the other three elements.

5 MR. POPE: Yes, sir, that is correct. And here you
6 have a sophisticated lawyer, a man with a law degree; and
7 he cannot -- a lawyer cannot turn a blind eye to an
8 obligation. He can't do that. And not get away with it.
9 I mean he is not going to jail, but his company is bound
10 by his lack of diligence.

11 He turned a blind eye to an obligation that was
12 staring him right in the face. And you have a phone call
13 ten days after service telling him what the suit is about
14 and he doesn't take action.

15 He assumed things that he shouldn't have. He
16 assumed they hadn't been served yet. But he didn't
17 inquire. He never called CT Corporation. He never
18 called me. He never called the Clerk of Court.

19 All three of those would have given him a very quick
20 response. He would have known exactly when he was
21 served, his company was served. And he should have
22 alerted local counsel before then.

23 So then it is not the fault of local counsel. It is
24 the fault of New Jersey. Spitaleri. He fell down on the
25 job. He turned a blind eye to his obligation. And BMW

1 is holding the bag as they should. And so we say the
2 motion should be denied.

3 THE COURT: Okay, Mr. Pope.

4 Mr. Freeman, is there anything you would like to
5 add? I would be glad to hear you since you are here.

6 MR. FREEMAN: I appreciate it, Your Honor. But I
7 thought counsel covered it very well.

8 THE COURT: Okay. Thank you very much. Be glad to
9 hear you in your reply.

10 MR. ABEL: Thank you, Your Honor. Let me correct a
11 couple of things for the record. First of all, this 15
12 attorneys in New Jersey thing is a fiction.

13 THE COURT: Well, let me tell you what bothers me,
14 okay. Number one, he loses the complaint. I say lose
15 it. By putting it in the wrong file electronically.

16 And then Mr. Wallace according to his affidavit,
17 which I just read, has a conversation with him about this
18 lawsuit.

19 MR. ABEL: Yes.

20 THE COURT: And he still doesn't bother to check
21 when he was served. And then, number three, the caption
22 of the cases are entirely different. How could anybody
23 read them and think it is part of those other two
24 lawsuits.

25 I understand it would say subpoena, but how could

1 you possi- -- even the subpoena had a different caption.
2 How could you possibly make that mistake. Other than you
3 are busy and not paying attention to your business.

4 MR. ABEL: Your Honor, at the time that first matter
5 came in it -- the complaint looks very much like the same
6 thing. It has the same plaintiff's name. A mistake is
7 just that, a mistake.

8 THE COURT: It looks like the same thing?

9 MR. ABEL: It looks like the complaint is prepared
10 in a very simpler format. The one against Buxton versus
11 the one that we are here about ---

12 THE COURT: Well, yeah, they all in this format.
13 They have got a complaint. They have got a summons on
14 top of them.

15 MR. ABEL: Yes, Your Honor.

16 THE COURT: Did it have a summons on top of it?

17 MR. ABEL: I don't know whether the summons were on
18 top or below.

19 THE COURT: Okay.

20 MR. ABEL: But -- but he gets it. He -- it comes
21 in. There is already a folder created for an AEP2 case.
22 When the new complaint -- the document came in to a
23 coordinator it was placed in the wrong file.

24 THE COURT: But he didn't even read it to see what
25 it was? What does he think it was another subpoena?

1 MR. ABEL: No, Your Honor, it was ---

2 THE COURT: He didn't even read -- did he even read
3 the summons and the complaint?

4 MR. ABEL: The way that the affidavit ---

5 THE COURT: My question is real simple.

6 MR. ABEL: Yes, Your Honor.

7 THE COURT: Did he read the summons and the
8 complaint?

9 MR. ABEL: I do not -- I do not know. What I do
10 know is that he had a conversation about the subpoena
11 with the attorney in that case.

12 He had the subpoena at that point in time when he
13 was looking at the subpoena. He did not look behind the
14 subpoena because he was asking the attorney about dates
15 and times and things like that.

16 So he did not see this complaint in this lawsuit
17 sitting behind it in the electronic folder. He just saw
18 the summons -- I mean --

19 THE COURT: Well, that is after ---

20 MR. ABEL: --- excuse me, the subpoena.

21 THE COURT: --- he had already placed it in the
22 electronic folder. How about before he put it there did
23 he read it then?

24 MR. ABEL: I think that that was done according to
25 the affidavits before the court I think that was done by

1 a coordinator who intakes that information and places it
2 in the folders ---

3 THE COURT: Okay.

4 MR. ABEL: --- for the attorneys.

5 THE COURT: So he didn't put it in an electronic
6 folder?

7 MR. ABEL: He didn't put it in the electronic
8 folder.

9 THE COURT: Okay. All right.

10 MR. ABEL: Someone did before him. And he also
11 outlined in his affidavit what the correct process is.

12 THE COURT: Well ---

13 MR. ABEL: This is clearly an error. And ---

14 THE COURT: Don't attorneys when they receive
15 something read it? Do you read when you receive
16 something? Do you read a letter that another lawyer
17 sends you? Do you read pleadings that another lawyer
18 sends you?

19 MR. ABEL: Yes, Your Honor. But here is what
20 happened in this case ---

21 THE COURT: Well, why didn't he read the thing?

22 MR. ABEL: He didn't get it hard copy, Your Honor.
23 He gets -- it is in a folder. He gets a call from the
24 lawyer about that other Buxton case. He pulls it up in
25 that folder and sees a subpoena. He doesn't see all of

1 the documents behind it because he doesn't have -- he is
2 not looking at it for that purpose. He doesn't know that
3 there is a complaint behind it in another matter.

4 So and but one other thing, Your Honor. This -- the
5 idea that he turned a blind eye. When Attorney Wallace
6 called him ---

7 THE COURT: Well, I haven't read his affidavit. Did
8 he say it got lost in the shuffle; is that his language
9 in the affidavit?

10 MR. ABEL: In his first affidavit he said it was ---

11 THE COURT: In his first affidavit that is his
12 language?

13 MR. ABEL: He said it ---

14 THE COURT: It got lost in the shuffle?

15 MR. ABEL: --- got lost in the process. Yes.

16 THE COURT: In the process or the shuffle?

17 MR. ABEL: I think he may have used the word
18 shuffle. But in his second affidavit ---

19 THE COURT: Does he use the word shuffle?

20 MR. FREEMAN: Proverbial shuffle.

21 THE COURT: Proverbial shuffle.

22 MR. FREEMAN: Lost in the proverbial -- and, Your
23 Honor ---

24 MR. ABEL: And I think that is exactly what
25 happened, Your Honor.

1 MR. FREEMAN: Your Honor, ---

2 MR. ABEL: And ---

3 THE COURT: Okay.

4 MR. ABEL: --- it is -- it got lost in the
5 proverbial shuffle.

6 THE COURT: I thank you. I understand. That is the
7 language.

8 MR. ABEL: Right. That is his first affidavit. In
9 his second affidavit he goes into more detail. We had
10 hoped that once we came up with his first affidavit the
11 other side would consent to withdraw their default
12 judgment.

13 THE COURT: Well ---

14 MR. ABEL: They continued to press it, so we gave
15 them more detail. And which is exactly what Your Honor
16 wanted in terms of what happened.

17 THE COURT: Okay. Thank ---

18 MR. ABEL: But also he didn't turn ---

19 THE COURT: --- you, Mr. Abel.

20 MR. ABEL: I'm sorry.

21 THE COURT: I appreciate it. Thank you so very
22 much.

23 MR. ABEL: Can I do one more thing, Your Honor?

24 THE COURT: No, sir. You are in reply. You made a
25 very eloquent reply. And I appreciate it. Thank you for

1 your efforts.

2 MR. ABEL: Thank you, Your Honor.

3 Motion denied. Mr. Pope, type me up a proposed
4 order, please. Lay out the facts of the entire case of
5 what transpired and what took place, please, sir.

6 MR. POPE: Yes, sir.

7 THE COURT: And the court finds there is no good
8 cause. Thank you very much.

9 MR. POPE: Thank you, Your Honor.

10 THE COURT: On the damage request we are going to
11 continue that, okay, until a later time. Thank you very
12 much.

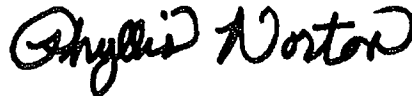
13 (WHEREUPON, the hearing concluded.)

(NOTE: Please contact the court reporter for additional copies or certified transcripts.)

CERTIFICATE

I, the undersigned Phyllis Norton, Official Court Reporter for the Ninth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete transcript of record of all proceedings had and evidence introduced in the captioned case, relative to appeal, in the court for South, Carolina, on June 13, 2017.

I do further certify that I am neither of kin, counsel, nor interest to any party hereto.



PHYLLIS NORTON, CVR

Date: July 5, 2017

Certified Transcript Provided For: Ashley B. Abel
Certification Reference #070517

| | | | |
|---|----------------------------|---|----------------------|
| 1 | STATE OF SOUTH CAROLINA |) | IN THE CIRCUIT COURT |
| | COUNTY OF CHARLESTON |) | 2017-CP-10-00644 |
| 2 | |) | |
| | AEP2, LLC, |) | |
| 3 | |) | |
| | PLAINTIFF, |) | DAMAGES HEARING |
| 4 | |) | |
| | vs. |) | TRANSCRIPT OF RECORD |
| 5 | |) | |
| | BMW OF NORTH AMERICA, LLC, |) | |
| 6 | |) | |
| | |) | |
| 7 | DEFENDANT. |) | |
| | _____ |) | |

8

9

Thursday, October 12, 2017
Charleston, South Carolina

10

11

12

B E F O R E:

13

The Honorable John C. Hayes, III, Courtroom 3E

14

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

16

John P. Freeman, Esq.
Attorney for Plaintiff

17

18

M. Dawes Cooke, Jr. Esq.
Anna Louise Strandberg, Esq.
Attorneys for Defendant

19

20

21

22

Maria Dempsey, RPR
Official Court Reporter
Charleston County Family Court
Ninth Judicial Circuit
Charleston, South Carolina

23

24

25

INDEX TO PROCEEDINGS

| | | | |
|----|-----------------------------------|--|-------------|
| 1 | | | |
| 2 | | | <u>PAGE</u> |
| 3 | DAMAGES HEARING | | |
| 4 | DENISE GARTMAN HADEN | | |
| 5 | DIRECT BY MR. FREEMAN | | 7 |
| 6 | CROSS BY MR. COOKE | | 20 |
| 7 | REDIRECT BY MR. FREEMAN | | 20 |
| 8 | OLIVER GENE WOOD, JR. | | |
| 9 | DIRECT BY MR. FREEMAN | | 22 |
| 10 | REDIRECT BY MR. FREEMAN | | 32 |
| 11 | CERTIFICATE OF THE COURT REPORTER | | 36 |

INDEX TO EXHIBITS

| | | | | |
|----|-----|---|-----|-----|
| 12 | | | | |
| 13 | | | | |
| 14 | | | | |
| 15 | NO. | DESCRIPTION | ID. | EV. |
| 16 | P-1 | Packet of exhibits premarked by attorney as P-1 through P-15 | 12 | 13 |
| 17 | P-2 | Chart 1, calculation sheet testified to in Dr. Woods' portion of testimony | 23 | 25 |
| 18 | | | | |
| 19 | | | | |
| 20 | | | | |
| 21 | | | | |
| 22 | | | | |
| 23 | | | | |
| 24 | | | | |
| 25 | | | | |

1 MR. COOKE: I'm Dawes Cooke and Anna Strandberg with
2 Barnwell, Whaley, Patterson & Helms. We represent the
3 defendants BMW. Originally, this was scheduled as a hearing
4 on a motion to reconsider, an order holding BMW in default.
5 And also, they had a motion for damages hearing. Judge
6 Nicholson ruled on the motion, denied the motion for
7 reconsideration without the hearing, and so the only thing
8 left was the damages hearing.

9 We were scrambling around yesterday trying to save
10 Mr. Freeman a trip from the West Coast, but he was already
11 on the plane by the time we figured out what we needed to
12 do. So he came on, and here we are.

13 THE COURT: Okay. And your co-counsel?

14 MR. COOKE: This is Anna Strandberg.

15 THE COURT: Plaintiff?

16 MR. FREEMAN: May it please the Court. John Freeman on
17 behalf of the plaintiff in this case. And Mr. Pope is even
18 further away than I was yesterday. He's been lecturing in
19 the country of Georgia, and so he couldn't make it today.

20 THE COURT: He's a little man from Newberry, South
21 Carolina, all the way to Georgia.

22 MR. COOKE: Well, his reputation is broader, obviously,
23 than Newberry County.

24 THE COURT: He and I served in the senate together, so
25 I know him for many, many years. Know his dad very well

1 also.

2 MR. FREEMAN: Well, he's left big shoes for me to fill
3 today, but I'm going to do my best, Your Honor.

4 THE COURT: All right.

5 MR. FREEMAN: This is purely damages. We sued BMW on
6 behalf of AEP2, arguing in our complaint that we were owed
7 indemnification by BMW for what's called withdrawal
8 liability that AEP2 had to pay when it sold assets in a
9 company that was working with and for BMW. That company,
10 being an outfit by the name of 2AM, which later changed its
11 name in that transaction to AEP2, which is the plaintiff
12 here, and because they went in default, because they've been
13 held in default, it's our understanding and belief that
14 we're not here to talk about the liability. We're not here
15 to talk about whether they owed this obligation to pay
16 indemnity. It's established that they owe the obligation.
17 The question is, have we suffered damages because of that,
18 and that's what we're here to establish.

19 We have two witnesses. One from the company,
20 Ms. Denise Haden, who will take the Court through the actual
21 damages, the actual payments that were made, and her
22 testimony will establish that the amount of actual damages
23 and the form of payments on this liability for which we are
24 still waiting for indemnification, \$605,669, and these
25 payments were made some time ago. And we are -- have sought

1 in our complaint, not just for the damages, actual damages,
2 but we have sought prejudgment interest on these amounts
3 that we were paid, to which we are entitled indemnification,
4 and have received nothing, prejudgment interest.

5 And we have Dr. Oliver Wood, well-known to everybody
6 in the courtroom, to testify as to the prejudgment interest
7 calculation. And these would be our two witness here today,
8 Your Honor.

9 THE COURT: Mr. Cooke, anything before I start hearing
10 from witnesses?

11 MR. COOKE: Well, of course, we have no witnesses,
12 since we're in default. I would simply say that we preserve
13 all of our positions under the motions previously filed.
14 There is a legal issue the Court will have to consider. The
15 complaint alleges that there was a liability owed up to the
16 amount of \$605,669. It doesn't actually allege that AEP2
17 agreed to pay that amount, does not allege that the demand
18 was made on BMW, but maybe we'll hear that from the witness,
19 but prejudgment interest is also an issue in this case.

20 THE COURT: Yeah, I've got to hear some more about
21 prejudgment interest. Their position is that it's a
22 liquidated amount.

23 MR. COOKE: Right.

24 THE COURT: But I'll have to let the parties -- I'll be
25 glad to hear what his analysis is on the monetary aspect of.

1 it, not legal aspect.

2 MR. COOKE: Correct, but there's a twist, and that is
3 that the compliant alleges that this contract, 2011 services
4 agreement, is the operative agreement that creates the
5 liability, but that agreement has a -- and it's attached and
6 incorporated as an exhibit, but that has a choice of law
7 provision in it, which says that New Jersey law applies, and
8 the New Jersey law and prejudgment interest is different.

9 The good news is that New Jersey law doesn't really
10 differentiate between liquidated and unliquidated claims.
11 The bad news is that you don't get 8.75 percent interest,
12 you get a much lower interest rate.

13 MR. FREEMAN: All right. Your Honor, and just to
14 briefly respond before we go to the witnesses. We sued them
15 for relief arising out of a contractual indemnity obligation
16 owed it by BMW. That is an allegation in the complaint, the
17 complaint to be liberally construed. They are in default.
18 Later on in the complaint, there's a statement that
19 plaintiff is being assessed liability of \$605,669.06 arising
20 out of the potential withdrawal liability for which BMW owes
21 indemnity obligation. And we paid that. We paid that
22 money.

23 And those are allegations in the complaint that
24 they're taking to be true, the complaints to be liberally
25 construed, and we think beyond question, they owe that

1 money. Now we've got to establish the 605 et cetera
2 numbers. So that's what where we are.

3 THE COURT: And Mr. Cooke, you'd be entitled to cross.
4 Even though you're in default, you can cross-examine.

5 MR. COOKE: Thank you.

6 THE COURT: All right. Call your first witness.

7 MR. FREEMAN: Yes. The plaintiff calls Ms. Denise
8 Haden.

9 THE CLERK: Please place your left hand on the Bible,
10 raise your right hand. Do you swear or affirm the testimony
11 you shall give the Court shall be the truth, the whole
12 truth, and nothing but the truth, so help you God?

13 MS. HADEN: Yes, I do.

14 THE CLERK: Please have a seat, Ms. Haden, and once
15 you're situated, please state your full name for the record,
16 spelling your last name for us.

17 THE WITNESS: Denise Gartman Haden, H-A-D-E-N.

18 DENISE GARTMAN HADEN, after being duly sworn, testified as
19 follows:

20 DIRECT EXAMINATION

21 BY MR. FREEMAN:

22 Q. Please state your address, Ms. Haden.

23 A. 4717 Warden Drive, Spartanburg, South Carolina.

24 Q. Have you ever testified in court before?

25 A. No, sir.

1 Q. What is your present job, please?

2 A. My present job is working at Gogo Greens.

3 Q. What do you do for Mr. Perry?

4 A. I am the administration manager.

5 Q. Any other job duties?

6 A. It's everything.

7 Q. Okay. When did you begin work with Mr. Perry in 2AM
8 Group?

9 A. I began working with him in 2005.

10 Q. Did you prepare or request that the bank prepare checks
11 that were issued from or on behalf of 2AM, now known as
12 AEP2, in connection with the sale of the company?

13 A. Yes.

14 Q. What was the physical address of 2AM Group until 2013;
15 where was it located?

16 A. The last address was on Highway 101 in Greer.

17 Q. What county is that in?

18 A. That is -- I believe that was Spartanburg County. Yes,
19 it was.

20 Q. And what were the origins of 2AM Group?

21 A. 2AM Group was a quality assurance supplier for BMW, and
22 we did labor management. We did logistics, rework, sorting.
23 We also worked with office suppliers.

24 Q. And who did -- who is the chief beneficiary, got the
25 benefit of the work that 2AM did?

1 A. BMW.

2 Q. Could you briefly describe to the Court kind of how 2AM
3 fit into BMW's operations when you were there?

4 A. BMW was the manufacturer of the automobiles, and
5 therefore, 2AM Group would work with the suppliers on
6 different parts. We also did labor management and logistics
7 for BMW directly, and the Jacksonville location, and the
8 Ontario location.

9 Q. In terms of labor management, who were these laborers
10 working for?

11 A. They actually were working directly for BMW.

12 Q. And how were they being paid?

13 A. We had them on our payroll.

14 Q. And where was the money coming from to pay these
15 people?

16 A. The money was coming from BMW. It was flow-through.

17 Q. Okay. And if I talk about providing logistics, do you
18 know what I'm talking about, for BMW?

19 A. Not exactly.

20 Q. Okay. Let me ask you this way: Did 2AM Group provide
21 services to BMW in its warehouses?

22 A. Yes.

23 Q. And where were those warehouses?

24 A. One was in Ontario, California; and the other was in
25 Jacksonville, Florida.

1 Q. And this case, insofar as you're aware of, concerns
2 which warehouse?

3 A. Ontario.

4 Q. Okay. And what did 2AM do in connection with the
5 management of the Ontario warehouse in overseeing the labor
6 there?

7 A. I don't quite understand.

8 Q. What services did 2AM render in connection with the
9 Ontario warehouse and the employees?

10 A. 2AM would handle all the labor. We took care of the
11 staff, did payroll, pension, taxes, et cetera.

12 Q. In terms of payroll or pension, where did the money
13 come from to make those payments?

14 A. BMW.

15 Q. Okay. And did it flow through 2AM or what role did 2AM
16 play in it?

17 A. It flowed through the -- BMW would pay 2AM Group, and
18 2AM Group would pay the employees.

19 Q. And how did 2AM get paid on that?

20 A. There was a commission, a percentage that we got paid.

21 Q. So basically, you're like a payroll master; is that
22 right?

23 A. Pretty much, yes.

24 Q. Okay. Sort of like BMW has outsourced payroll labor
25 payments to 2AM?

1 A. Yes.

2 Q. Okay. What was the length of the contract between BMW
3 and 2AM at the Ontario plant?

4 A. Five years, I believe.

5 Q. And when was it to end, and when did it end?

6 A. It was to end 2016.

7 Q. December of what?

8 A. 2016.

9 Q. Okay. During the early part of 2014, before the end of
10 their contract, did 2AM Group sell its assets and its name
11 to another company?

12 A. Yes, it did.

13 Q. And who was that company?

14 A. Sustained Quality.

15 Q. What's the date of that transaction?

16 A. February the 16th, 2014.

17 Q. As of February 16, 2014, to your knowledge, was 2AM
18 Group current on all payroll accounts, payable on pension
19 payments it made to or on behalf of BMW?

20 A. Yes, it was.

21 Q. Who was the successor company after the sale -- was the
22 name of 2AM Group's part of the transaction passed on to
23 somebody else?

24 A. Repeat the question, please.

25 Q. Well, let me ask this: Was there a successor to 2AM

1 Group after the sale of the company that took over?

2 A. Yes.

3 Q. And what's that company?

4 A. Sustained Quality.

5 Q. Were you copied on any emails or in any way in the loop
6 over legal issues regarding the sale of assets from 2AM to
7 Sustained Quality, or with regard to the issue of pension
8 withdrawal liability?

9 A. In regards to the sale, no.

10 MR. FREEMAN: I've got some documents now, Judge.

11 (PLF. EXH. 1, Packet of exhibits premarked by
12 attorney as P-1 through P-15, was marked for
13 identification.)

14 BY MR. FREEMAN:

15 Q. Ms. Haden, I've handed you a group of documents, and
16 they're marked -- this has been marked by the court reporter
17 as Exhibit 1, and the documents that are part of this
18 Exhibit 1 through Exhibit 15; do you see that?

19 A. Yes, sir.

20 Q. Okay. And I'm going to have questions for you about
21 these documents.

22 THE COURT: All right. You're offering them into
23 evidence at this time?

24 MR. FREEMAN: I'm going to offer them.

25 MR. COOKE: No particular objection, other than

1 reserving our position under the --

2 THE COURT: Right. Okay. So they're in without
3 objection, subject to what may happen in the future
4 regarding Judge Nicholson's order.

5 MR. FREEMAN: Thank you, Your Honor.

6 BY MR. FREEMAN:

7 Q. The first exhibit is Exhibit 1, the first part of it,
8 Composite Exhibit 1, also marked as Exhibit 1, and that's a
9 letter from the Western Conference of Teamsters Pension
10 Trust to 2AM Group. Do you see that?

11 A. Yes, sir.

12 Q. And did you receive this letter?

13 A. Yes, I did.

14 Q. And as the staff are in charge of administration, we'll
15 call it, and to some extent payments for 2AM Group and AEP2,
16 the successor, you remember receiving this?

17 A. Yes, I do.

18 Q. And if you look at Page 2, there's a mention of a claim
19 of withdrawal liability, and let me just ask: Do you
20 remember the issue of withdrawal liability coming up within
21 the company after the transaction occurred, after the
22 closing, after 2AM had become AEP2, do you remember that
23 issue arising after that transaction?

24 A. Not until I received this letter.

25 Q. Pardon?

1 A. Not until I received this letter.

2 Q. Was it this letter?

3 A. Yes, it was this letter that brought it up.

4 Q. Okay. And there's a mention there of the unpaid
5 balance of your, quote, your total withdrawal liability,
6 plus accrued interest, and then there's a number there that
7 states what that accrued -- what that liability is; do you
8 see that?

9 A. Yes, sir.

10 Q. And it says the total amount due is, and read that into
11 the record, please.

12 A. \$605,669.06.

13 Q. Let me just ask this question: Was that amount of
14 withdrawal liability actually paid by 2AM, later known now
15 known as AEP2?

16 A. Yes, it was.

17 Q. Upon receiving this letter, what did 2AM do with this
18 news?

19 A. We provided it to legal counsel.

20 Q. And concerning providing it to legal counsel, after
21 conferring with legal counsel -- I'm not asking you to
22 disclose what counsel said -- did 2AM actually pay the
23 money?

24 A. Yes, we did.

25 Q. Were checks for the money cut by this Lake Street Bank

1 and sent to Seattle?

2 A. Lake City Bank, yes.

3 Q. Lake City. Let's look at the checks now, and let's
4 turn first to Exhibit 2 within Composite 1. Are you there?

5 A. Yes, sir.

6 Q. Okay. Do you see a check for \$24,684.85?

7 A. Yes, sir.

8 Q. And that's a check that Lake City Bank sent to the
9 Teamsters?

10 A. Yes.

11 Q. And that actually was cashed and paid, true?

12 A. Yes.

13 Q. As to Exhibit 3, next check, these documents are
14 receipts that were sent back through the company by the
15 pension fund?

16 A. Yes, sir.

17 Q. Okay. And it was in the regular course of business for
18 the company, as part of its business record collection, to
19 keep these receipts and to keep these letters; is that
20 correct --

21 A. Yes.

22 Q. -- that are in Exhibit 1?

23 A. Yes.

24 Q. Okay. So Exhibit 3 comes in, and it shows a check that
25 went out from Lake City and was actually cashed on 2/17/15,

1 right?

2 A. Correct.

3 Q. And again, that's \$24,648 and so forth, right?

4 A. Yes, sir.

5 Q. And then if you look at 4, we see the next check again,
6 this would be one that was cashed on 3/11/15, and again, the
7 same amount, \$24,000 and so forth, right?

8 A. Yes.

9 Q. And just to move along as quickly as we can, 5 is the
10 same thing, it's another check. This one is 4/16/2015,
11 right?

12 A. Yes, sir.

13 Q. That's when it was deposited.

14 And Exhibit 6, ledger date 5/11/15, and that is
15 \$24,000 again, and change, right?

16 A. Yes, sir.

17 Q. Exhibit 7, deposited 6/11/2015, same number again,
18 \$24,000 and change, and that payment was made --

19 A. Yes.

20 Q. -- by you through Lake City to the Pension Fund, true?

21 A. Correct.

22 Q. And when I say you, I'm talking about the company,
23 right?

24 A. Right.

25 Q. And all this has happened under your supervision, true?

1 A. Yes, sir.

2 Q. Then Exhibit 8, 7/6/2015, another check for \$24,000 --

3 A. Yes, sir.

4 Q. -- same thing, right?

5 Exhibit 9 ledgered 8/10/2015, another check goes
6 out, same type of thing, right, you're paying your bill; is
7 that true?

8 A. Yes, sir.

9 Q. Plaintiff's 10, ledger date 9/18/2015, same thing,
10 true?

11 A. Correct.

12 Q. Okay. Plaintiff's Exhibit 11, check goes out
13 11/18/2015. This check amount is \$49,369.70, true?

14 A. Yes, sir.

15 Q. Okay. Exhibit 12, check goes out, \$24,684 and change.
16 And this one is Exhibit 12, is cashed. This check is cashed
17 on 12/7/2015, again by the pension fund, true?

18 A. Yes, sir.

19 Q. And then there's a final check, if you look at Exhibit
20 13. Are you there?

21 A. I am.

22 Q. This is a big one. This goes out at the end of 2015.
23 It's deposited 1/4/16, and this check, read the amount,
24 please?

25 A. \$309,450.86.

1 Q. Thank you. Now, look at Exhibit 14, if you would,
2 please.

3 A. Okay.

4 Q. That's the employer withdrawal liability ledger. Do
5 you see that?

6 A. Yes, sir.

7 Q. And this withdrawal liability ledger there's -- first
8 of all, did you get this from the pension fund?

9 A. Yes, sir.

10 Q. Okay. And it shows these different withdrawal
11 liability payments, and then it's got handwriting on the
12 right-hand side. Was that handwriting on there when you got
13 it?

14 A. Yes, sir.

15 Q. That would have been something that the Teamsters would
16 have put on there?

17 A. Yes.

18 Q. Okay. And those dates for deposits of check jibe with
19 the register that we've been looking at --

20 A. Yes, sir.

21 Q. -- that they sent you?

22 Okay. And the total amount of payments, according
23 to these numbers, are written down by the Teamsters total
24 amount was what?

25 A. \$605,669.06.

1 Q. Okay. And if we look at Exhibit 15, that's a Teamsters
2 letter to you --

3 A. Right.

4 Q. -- true?

5 A. Yes.

6 Q. A. Perry & Company, LLC, attention Denise G. Haden; do
7 you see that?

8 A. Yes, sir.

9 Q. Okay. And this is confirming receipt of the last check
10 that we just talked, about the \$309,000 check?

11 A. Yes, sir.

12 Q. And read the last sentence, please, in this Exhibit 15.

13 A. This was the remaining withdrawal liability amount owed
14 for the 2014 complete withdrawal AEP2, LLC. Control Group
15 Number 05845 was assessed. The AEP2, LLC liability has been
16 paid in full.

17 Q. Paid in full. And that total liability again was
18 \$605,669.06, true?

19 A. Yes, sir.

20 Q. Have you, in any way, been involved in the legal
21 dispute concerning obligations, contracts concerning BMW and
22 AEP2?

23 A. No.

24 MR. FREEMAN: Completes testimony of this witness, Your
25 Honor.

1 THE COURT: Mr. Cooke?

2 CROSS-EXAMINATION

3 BY MR. COOKE:

4 Q. Just briefly. Ms. Haden, do your records show whether
5 and when your company -- you call it 2AM or AEP2?

6 A. Currently, AEP2.

7 Q. Made a demand of BMW to reimburse it for this
8 withdrawal liability?

9 A. I was not involved in that.

10 Q. Okay. Do you know whether they ever did before
11 bringing this lawsuit?

12 A. I do not know.

13 Q. Okay. And none of your exhibits here show that any of
14 this information was ever given to BMW, do they?

15 A. None of this in front of me, no.

16 Q. You don't have -- BMW's name isn't even on any of these
17 documents, is it?

18 A. No, sir.

19 MR. COOKE: Okay. Thank you.

20 THE COURT: Redirect?

21 REDIRECT EXAMINATION

22 BY MR. FREEMAN:

23 Q. The fact is, is it not, that certainly at the time that
24 BMW was sued and served, process server received the
25 complaint --

1 MR. FREEMAN: And the record reflects, Your Honor, this
2 happened on 2/10/17.

3 BY MR. FREEMAN:

4 Q. Certainly, at that point, they knew that there was a
5 dispute, and that there was a question, and that there was
6 an amount owed, correct?

7 A. Yes, sir.

8 MR. FREEMAN: Thank you.

9 MR. COOKE: Notice I didn't object, even though that
10 was a leading question.

11 THE COURT: All right. You can step down.

12 MS. HADEN: Thank you.

13 THE COURT: Call your next witness.

14 MR. FREEMAN: The plaintiff calls Dr. Oliver Wood.

15 THE CLERK: Do you swear or affirm the testimony you
16 shall give the Court shall be the truth, the whole truth,
17 and nothing but the truth, so help you God?

18 DR. WOOD: I do.

19 THE CLERK: Please have a seat, sir. State your full
20 name for the record, and spell your last name once you're
21 situated. Thank you.

22 DR. WOOD: Oliver Gene Wood, Jr. W-O-O-D.

23 OLIVER GENE WOOD, JR., after being duly sworn, testified
24 as follows:

25 DIRECT EXAMINATION

1 BY MR. FREEMAN:

2 Q. Will you please state your address, Dr. Wood.

3 A. Columbia.

4 Q. Where are you from originally?

5 A. Greer.

6 Q. How long have you lived there?

7 A. Eighteen years.

8 Q. Please describe your educational background.

9 A. I have a bachelor's of science degree in business from
10 the University of South Carolina. Master's degree in
11 economics, University of South Carolina. Doctorate of
12 economics, University of Florida.

13 MR. FREEMAN: Your Honor, I can go through a lot more
14 with Dr. Wood.

15 THE COURT: Any objection?

16 MR. FREEMAN: Can we stipulate that he's qualified to
17 talk about interest payments?

18 MR. COOKE: I will stipulate, yes.

19 MR. FREEMAN: Okay.

20 THE COURT: I have had Dr. Wood in my courtroom several
21 times. He testified against me when I was practicing law,
22 so I know his expertise very well. I find that he's
23 qualified.

24 MR. FREEMAN: Thank you, your Honor.

25 BY MR. FREEMAN:

1 Q. Dr. Wood, have you been asked to calculate prejudgment
2 interest in this case?

3 A. Yes.

4 Q. And have you made a calculation?

5 A. I have.

6 Q. Do you have it with you?

7 A. Yes.

8 Q. Do you have some copies?

9 A. Yes. I have three copies.

10 (PLF. EXH. 2, Chart 1, calculation sheet testified
11 to in Dr. Woods' portion of testimony, was marked for
12 identification.)

13 BY MR. FREEMAN:

14 Q. And have you taken into account that, in this
15 indemnification case, payment dates of where we know that
16 payments were actually made and received by the Teamsters
17 from AEP2?

18 A. Yes.

19 Q. And is that shown on the second column?

20 A. Yes.

21 Q. And you took into account, legally, the interest rate
22 in South Carolina, why was that?

23 A. Eight three quarters percent simple, is my
24 understanding, this is an identifiable sum, and it's my
25 understanding, from the law section, that's the rate

1 applicable to identifiable sums.

2 Q. And have you calculated, from the date payment was
3 received to the present, to today, what the interest due on
4 those sums would be if you multiply each of the payments out
5 times the time or times the interest rate?

6 A. \$107,087.

7 Q. And assuming that the employer withdrawal liability,
8 which we were talking about Ms. Haden, talking about with
9 Ms. Haden was \$605,669, how much would be due today,
10 assuming the accuracy of your prejudgment interest payment?

11 A. \$712,756.

12 Q. And just so the record is clear, you're here being
13 paid, true?

14 A. Yes.

15 Q. What would be the total amount of payments that,
16 through today, that are due to you?

17 A. This lady has the statement.

18 Q. Does the number \$5,873 ring a bell?

19 A. Yes.

20 MR. FREEMAN: Your Honor, that's our testimony on
21 prejudgment interest. He's made the calculation, and I move
22 this into evidence, his report on that.

23 MR. COOKE: We object that it lacks foundation, and
24 that it's not relevant because it doesn't reflect the
25 interest rates from New Jersey.

1 THE COURT: All right. I'm going to allow him over
2 objection. If BMW is in default, how do we get to New
3 Jersey law applying?

4 MR. COOKE: Because it's in the complaint. The
5 complaint attaches and alleges that this agreement is the
6 source of the liability, and the agreement itself, which is
7 an exhibit to the complaint says that New Jersey law
8 applies.

9 THE COURT: I haven't looked at that, but I'll take a
10 look at that.

11 MR. FREEMAN: Well, Your Honor, we would add that that
12 would be as to substantive law, but the law prejudgment
13 interest or post judgment interest on judgments in, and
14 legal matters in South Carolina, we maintain as a matter of
15 South Carolina law with our interest rates being applicable.

16 And that's our testimony from Dr. Wood, Your Honor,
17 that the amount -- the correct amount is \$107,087, and the
18 total amount due is \$712,756, and we would again move this
19 into evidence, I believe it's Exhibit 2.

20 THE COURT: Over objection. An objection is based on
21 the use of 8.75 as the prejudgment interest rate.

22 MR. FREEMAN: Thank you.

23 THE COURT: Do you have any questions?

24 MR. COOKE: I don't think so. I'm just making a --
25 when he closes, I'll make a legal argument, if that's

1 permissible. I don't think I need to cross-examine.

2 THE COURT: You can step down and be excused. We
3 appreciate your time.

4 DR. WOOD: Yes, sir.

5 THE COURT: Anything else from the plaintiff?

6 MR. FREEMAN: The only other thing that we would add,
7 Your Honor, is that the complaint seeks actual damages,
8 which we've established, in the amount of \$605,669
9 prejudgment interest, and we've given you that number and
10 stick to that number. And also costs, and we have \$200
11 total costs in this case, which are a matter of record. We
12 ask you to take judicial notice, those being filing fees of
13 \$150 for the case, and two motion fees of \$25 each along the
14 way, \$200 there. And he would ask as well for compensation
15 for Dr. Wood's fee in establishing, through his expert
16 testimony of prejudgment --

17 THE COURT: What authority would I have to -- that's
18 not a taxable cost.

19 MR. FREEMAN: Your Honor, there's a saying that I grew
20 up with that the door not knocked on --

21 THE COURT: I understand. Okay. You knock on that
22 door.

23 MR. FREEMAN: I had to knock.

24 THE COURT: Okay. Mr. Cooke?

25 MR. COOKE: Thank you, Your Honor. Obviously, we have

1 no witnesses or exhibits, but can I make a brief argument?

2 THE COURT: You certainly can, yes.

3 MR. COOKE: Thank you. Exhibit 1 to the complaint, and
4 the complaint alleges that this is the source of the
5 liability, so it's established this agreement creates
6 liability, that's not for today, but it has several
7 provisions that are significant. One is that it says that
8 there's a provision that requires AEP2 to give prompt
9 written notice to BMW when a liability that's been incurred,
10 Section 18, Claims for Damages. Claims shall be made in
11 writing to such other party within a reasonable time after
12 the first observation of such injury or damage.

13 And then in Paragraph 29, Governing Law, it says,
14 New Jersey law applicable to contracts made and fully
15 performed within the State of New Jersey shall govern this
16 agreement and the performance hereunder. In other words, it
17 will be treated as though the contract was completely made
18 and performed within New Jersey.

19 There are a couple of South Carolina cases that are
20 relevant. One is Turner Coleman, Inc. versus Ohio
21 Construction 272 S.C. 289, 251 S.E. 2d 738, and I'll say
22 that I didn't believe this was the law until I saw it some
23 years ago, but this says that a contractual interest
24 provision supersedes the South Carolina code for interest.
25 And that case actually involved post judgment interest,

1 which was stunning to me to see that our Supreme Court would
2 hold that a contractual interest rate overrides even the
3 statutory post judgment rate, but the statute is the same as
4 the one that controls prejudgment, so we would contend that
5 that allows you contractually to change the provisions for
6 prejudgment interest.

7 And then, of course, there's a whole line of cases
8 that hold that Choice of Law provisions generally are
9 enforced in South Carolina. So if you go to New Jersey --
10 for a long time, people believed that you couldn't get
11 prejudgment interest on a contract claim. There's a statute
12 that actually provides for prejudgment interest on tort
13 cases, but their Supreme Court came out and said, in about
14 1985 -- actually, it was the Superior Court and then the
15 Supreme Court endorsed that, that the common law allowed the
16 Court, in its discretion, to allow prejudgment interest even
17 in contract cases.

18 And then they since said that they're not going to
19 really split hairs over whether it's a liquidated claim or
20 unliquidated claim. I think in this case they would
21 probably say that this claim is liquidated, but for the fact
22 that there's no evidence that a claim was ever made to BMW.

23 And so we would contend, with all due respect, first
24 of all, that no prejudgment interest should be due prior to
25 the first evidence of notice to BMW and demand, which would

1 be a lawsuit, was filed on February 10th of 2017. And the
2 second to that, if prejudgment interest is to be awarded,
3 New Jersey actually publishes a schedule of interest rates,
4 and I would offer that up for the Court.

5 THE COURT: Hand that up. Do you have a copy of the
6 case you mentioned?

7 MR. COOKE: I've got copies of the Turner Coleman case.

8 THE COURT: Yes.

9 MR. COOKE: And then I'm going to hand the Court a case
10 called Elemex (ph) Construction versus Republic Insurance,
11 which is the New Jersey case that first speaks of recovery
12 of prejudgment interest in contract cases.

13 And then I'll hand up the interest schedule. And as
14 Your Honor will see, on its face, this reflects the New
15 Jersey statute, which is Section 4:42-11, which governs the
16 interest, and as I mentioned earlier, on its face, that
17 statute appears to apply only to tort cases, but the Supreme
18 Court has said that you can get prejudgment interest in
19 contract cases as well, and this actually prescribes a rate
20 for 2015 of .25 percent; 2016, .25 percent; 2017, .5
21 percent, but then they get to add 2 percent, because based
22 on that note down at the bottom, says 2 percent should be
23 added if it's -- in the amounts above \$15,000. So our
24 contention would be that no interest was due until a demand
25 was made in accordance with the contract. Earliest evidence

1 we have of demand would be February 10th of 2017, and that
2 the interest rate would be two and a half percent applicable
3 from that date forward.

4 THE COURT: All right. Looking at the Turner Coleman
5 case just real quickly, that has to do not with the
6 difference in the interest rate as applied between states,
7 that has to do with whether or not the parties -- the
8 interest rate is lessened. The parties apparently agree on
9 12 percent interest rate, and they got a judgment, and the
10 Courts apparently had that the party owing the judgment
11 claimed that it all dropped from 12 percent to the legal
12 rate once retained the judgment for the prejudgment
13 interest. And of course, if now you agree to the 12 percent
14 and you got to pay it, and then once the judgment was
15 entered, it doesn't go into what happens there, but I think
16 that's a little factually different.

17 MR. COOKE: It is, Your Honor, and I acknowledge that,
18 but the reason that I think it applies is that the statute
19 that it interprets is the same statute that governs
20 prejudgment interest. There's two sections of that statute,
21 and then of course, we got the Lima (ph) cases. I didn't
22 give you the citation, but it's Team 1A, Inc. versus Lucas,
23 395 S.C. 237, 717 S.E. 2d 103, which just says choice of law
24 clauses are generally honored in South Carolina.

25 So I believe we could apply those two cases and say

1 that the parties agree that a New Jersey law applies. New
2 Jersey law calls for a different interest rate than the
3 South Carolina statute applies, and therefore, under Turner
4 Coleman, that would govern the parties.

5 THE COURT: All right. Mr. Freeman?

6 MR. FREEMAN: I completely disagree, and you would be
7 not shocked to hear. First of all, the governing law
8 provision in the contract decided deals with New Jersey law
9 applicable to contracts made and fully performed within the
10 State of New Jersey shall govern the agreement, and
11 prejudgment interest governs prejudgment interest on any
12 claim. It doesn't cover -- it's not a contract lump (ph)
13 provision. And this is the deal with construction of this
14 contract when it comes to performance, and the making of the
15 contract, not necessarily to a post default interest rate,
16 which has customarily been applied in South Carolina, and
17 that's what Dr. Wood said.

18 And you're quite right on your reading of this case.
19 This case says that essentially, we'll let the statute go or
20 be overwritten if the parties have a meeting of the minds on
21 a different interest rate. There's no sign here that
22 there's any meeting of the minds on any different interest
23 rate whatsoever by simply saying that or pointing to New
24 Jersey law.

25 The final thing I'd say is, I'd be happy -- I didn't

1 know this was coming, but Dr. Wood is still here. He can
2 provide testimony, I'd like it in the record, as to,
3 assuming that Your Honor were to accept the cutoff of the
4 date suit was brought and served, he can give you a
5 prejudgment interest number from that date.

6 THE COURT: Actually, I thought Mr. Cooke would
7 probably ask him to do that, but he didn't.

8 MR. COOKE: And I think my cell phone will actually do
9 that, Your Honor, if we get to that point.

10 MR. FREEMAN: Well, we would put it on the record.

11 MR. COOKE: I would agree to allow him to supplement
12 that.

13 MR. FREEMAN: Come on up, Dr. Wood. Thank you.

14 REDIRECT EXAMINATION

15 BY MR. FREEMAN:

16 Q. Dr. Wood, you're still under oath.

17 A. Yes, sir.

18 Q. And have you done a calculation, at my request, of
19 prejudgment interest, assuming the rate is 8.75 percent, and
20 assuming that the date of accrual starts on 2/10/17, the
21 date of service of process, and runs to today.

22 A. Yes, I've done that at eight and three quarters percent
23 and that interest is \$35,507.35.

24 Q. Okay. And that's based on those assumptions?

25 A. Right.

1 THE COURT: What was that number again?

2 MR. FREEMAN: \$35,507.35.

3 BY MR. FREEMAN:

4 Q. That simply takes the \$605,669 amount, which was owed
5 at that point in time and sued for and served, and at that
6 point it's in your hands. They know that we're sore about
7 it, and we're seeking indemnification.

8 Are you in a position, sir, where you could make a
9 calculation, assuming the rate was two and a half percent?

10 A. Yes.

11 Q. Okay. Would you make that calculation and then tell us
12 all what you come up with?

13 A. Two and a half percent is 28.57 percent of eight and
14 three quarters. So if we take the interest calculated, all
15 this is because of a set amount compound. So we take the
16 107, 087 and multiply by .28, that means the interest would
17 be 30,596.

18 Q. And if you take it from February 10th, in other words,
19 your 35,507 number, and reduce that, assuming the Judge were
20 to find New Jersey law to apply, what do you get?

21 A. That would be 10,144.96.

22 MR. FREEMAN: Thank you for doing those calculations.
23 Answer any questions that Mr. Cooke may have.

24 MR. COOKE: No questions.

25 THE COURT: All right. You can step down, Dr. Wood.

1 Thank you for being here. It's good to see you.

2 Here's what I'm going to do. I'm going to ask
3 Mr. Freeman to go ahead and prepare a proposed order using
4 8.75, reserving the right, which I don't know if I have to
5 reserve, for me to need to look at the interest, prejudgment
6 interest issued. And if I need to alter it, we can do that.
7 If we not, at least we'll be on track.

8 MR. FREEMAN: By sheer coincidence, Your Honor, we have
9 a draft order here.

10 MR. COOKE: Judge, could I make one more point?

11 THE COURT: Yes.

12 MR. COOKE: Mr. Freeman misreads the contract the same
13 way I misread it the first time I read it, so I'd like to
14 read it slowly. Section 29, governing law, it says, New
15 Jersey law applicable to contracts made and fully performed
16 within the State of New Jersey shall govern this agreement
17 and the performance hereunder. In other words, it doesn't
18 say New Jersey law applies only if the contract is performed
19 in New Jersey. It says, this contract will be governed by
20 the law that applies to contracts that are formed and fully
21 performed in New Jersey. I misread it the same way the
22 first time.

23 THE COURT: Two readings, and I'll give it a third.

24 MR. COOKE: Thank you, Your Honor.

25 MR. FREEMAN: Here's a proposed order. I'm giving a

1 copy to counsel.

2 MR. COOKE: And could I also just hand up for Your
3 Honor a copy of that agreement which is --

4 THE COURT: Yes. That will save me looking through the
5 file for it.

6 (END OF TRANSCRIPT OF RECORD.)

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

CERTIFICATE OF REPORTER

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

State of South Carolina)
)
County of Charleston)

I, Maria Dempsey, Official Court Reporter for the Ninth
Judicial Circuit of the State of South Carolina, do hereby
certify that the foregoing is a true, accurate and complete
Transcript of Record of the proceedings had and evidence
introduced in the trial of the captioned case, relative to
appeal, in the Family Court for Charleston County, South
Carolina, on the 12th day of October 2017.

I do further certify that I am neither of kin, counsel,
nor interest to any party hereto.

December 7, 2017

Maria Dempsey, RPR
Official Court Reporter
Charleston County Family Court
Ninth Judicial Circuit
Charleston, South Carolina

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
In the Court of Common Pleas for the Ninth Circuit

J.C. Nicholson, Jr., Circuit Court Judge

Appellate Case No. 2017-002481

AEP2, LLC f/k/a 2AM Group, LLCRespondent

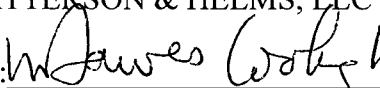
v.

BMW of North America, LLCAppellant

CERTIFICATE OF COUNSEL

I hereby certify that the Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

BARNWELL WHALEY
PATTERSON & HELMS, LLC

By: 

M. Dawes Cooke, Jr., Esq.

S.C. Bar No. 1376

Anna L. Strandberg, Esq.

S.C. Bar No. 102432

288 Meeting Street, Ste 200

Charleston, SC 29401

(843) 577-7700 Fax: (843) 577-7708

Attorneys for Appellant

RECEIVED

JUL 25 2018

SC Court of Appeals