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**Feb 16 2023**

**SC Court of Appeals**

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM YORK COUNTY  
Court of Common Pleas

The Honorable Daniel D. Hall, Circuit Court Judge

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Appellate Case No. 2020-001449

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Wanderlove Travel, LLC,

Respondent,

v.

Avanti Destinations, LLC,

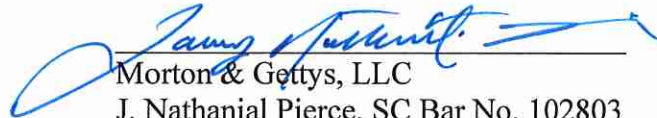
Appellant.

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**APPELLANT'S PETITION FOR REHEARING**

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February 16, 2023



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Pursuant to Rules 221 and 240 of the South Carolina Appellate Court Rules (“SCACR”), Appellant respectfully moves this Court for rehearing with respect to this Court’s decision in Wanderlove Travel, LLC, Respondent v. Avanti Destinations, LLC, Appellant, Unpublished Opinion No. 2023-UP-032, which affirmed the Circuit Court’s ruling in this case. Appellant respectfully suggests the Court overlooked or misapprehended the following points in affirming the Circuit Court’s denial of Appellant’s motion to compel arbitration.

**ARGUMENT**

**I. The Court of Appeals misapprehended or overlooked the law or the facts regarding Respondent’s notice or knowledge of the arbitration provision contained in the terms and conditions (“Terms and Conditions”) of Appellant’s website.**

Arbitration is available where the parties contractually agree to arbitrate. *Towles v. United HealthCare Corp.*, 338 S.C. 29, 37, 524 S.E.2d 839, 843-44 (Ct. App. 1999). Whether the parties have formed an agreement to arbitrate is determined by applying South Carolina contract law. *Id.* A party cannot assent to something it does not know about, and the party must have reasonable notice of a term in order to be bound by it. *See id.* One who is capable of reading and understanding but fails to read a contract before signing is bound by the terms thereof. *Sims v. Tyler*, 276 S.C. 640, 281 S.E.2d 229, 230 (1981). Absent a showing of fraud, mistake, unfair dealing or the like, a party to a contract incorporating an arbitration provision cannot escape the obligation of such a provision simply by declaring they did not read the whole agreement. *First Baptist Church of Timmonsville v. George A. Creed & Son, Inc.*, 276 S.C. 597, 281 S.E.2d 121, 123 (1981).

A contract of the type containing the Terms and Conditions may be determined to be either a clickwrap or browsewrap agreement. A clickwrap agreement exists where a party clicks on a box stating “I Agree” or the like before using a company’s online services, thus assenting to terms and conditions. *Kraft Real Estate Invs., LLC v. Homeaway.com, Inc.*, No. 4:08-CV-3788, at 5-6

(D.S.C. 2012). A browsewrap agreement exists where terms and conditions are posted on a website, but the user is not required to click an “I Agree” box or the like. *See id* at n. 21. Most courts analyzing the enforceability of the terms and conditions of browsewrap contracts focus on whether the user had *actual or constructive knowledge* of the terms and conditions such that their use of the website can constitute assent to the terms. *Kraft Real Estate*, No. 4:08-CV-3788 at n. 21 (citing *Cvent, Inc. v. Eventbrite, Inc.*, 739 F. Supp. 2d 927, 937 (E.D. Va. 2010)) (emphasis added); *Nicosia v. Amazon.com, Inc.*, 834 F.3d 220, 233 (2nd Cir. 2016) (citing *Cvent, Inc. v. Eventbrite, Inc.*, 739 F. Supp. 2d 927, 937 (E.D. Va. 2010)); *In re Zappos.com, Inc., Customer Data Sec. Breach Litig.*, 893 F.Supp.2d 1058, 1063-64 (D. Nev. 2012). Courts analyzing browsewrap agreements will look to the size and font of the hyperlink or the language used to alert the website users to the terms and conditions. *See Kraft Real Estate*, No. 4:08-CV-3788 at n. 21.

In affirming the order of the trial judge, the Honorable Daniel Hall, this Court pointed out the following salient facts in its opinion: (1) to book services through Avanti’s website, a travel agent is required to create an account and would subsequently be directed to a portal designed specifically for travel agents and (2) the travel agents’ portal displays several tabs, including one entitled “Legal,” which contains the arbitration clause at issue as well as a notice that continued use of the portal constitutes an agreement to the terms and conditions. Relying on the testimony of Wanderlove’s principal, this Court found Wanderlove did not, in four years of using Avanti’s website, ever view the terms and conditions. Further, the Court accepted Wanderlove’s assertion that it was never directed to view the Terms and Conditions to book services or use Avanti’s website nor was it ever otherwise made aware of the Terms and Conditions. Based on these facts, this Court found Wanderlove did not have reasonable notice of the terms of the agreement and did not agree to the arbitration clause.

The record establishes additional facts pertinent to the issue of Wanderlove's notice of the Terms and Conditions. First, Wanderlove's principal, Rachel Settle ("Settle") states Avanti affirmatively required her to create an account to be able to access Avanti's website to book services. (R. p. 49). Second, the record contains an image of the portal Settle admitted to using for four years in the course of her business. (R. pp. 50-51). The portal contains six tiles, each of equal size and prominence. (R. p. 51). One of the six tiles is labeled "Legal," under which is a link to the Terms and Conditions. (R. p. 51). The link to the Terms and Conditions is of the same size and quality of the other links Settle would necessarily need to use to conduct its business, including "New Quote," "Request a Quote," "Request a Change," and others. (R. p. 51). The record also contains the affidavit of Mark Grundy, the Chief Operating Officer of Avanti Destinations. (R. pp. 29-31). In his affidavit, Grundy states "[e]ach customer who uses Avanti's website or purchases services from Avanti affirmatively agrees to certain terms and conditions ("Terms and Conditions") . . . ." (R. p. 30). Grundy goes on to state "[w]hen it logged in to Avanti's website, Wanderlove affirmatively agreed to the Terms and Conditions contained on the website." (R. p. 31).


Grundy asserts customers who use Avanti's website affirmatively agree to the Terms and Conditions when logging on. (R. P. 30-31). Settle states she created an account through Avanti's website and logged into it for four years. (R. p. 49). These portions of the record establish Wanderlove is bound by the Terms and Conditions in that Settle affirmatively assented to them when creating her account and logging into the website. To the extent this Court accepts Wanderlove's argument to the contrary, the facts and circumstances establish Wanderlove, via Settle, had constructive knowledge of the Terms and Conditions. The hyperlink to the Terms and Conditions is not hidden, inconspicuous, nor of a different size or quality than any other hyperlink

Settle used to conduct Wanderlove’s business. Wanderlove had notice of the Terms and Conditions as well as the means and opportunity to access them and cannot reasonably argue that for four years it remained ignorant of the Terms and Conditions as it used Avanti’s website to operate its business. The record reflects that Avanti had actual notice of the Terms and Conditions or, at the least, constructive notice. Because Wanderlove had actual or constructive notice of the Terms and Conditions, it is bound by them.

**CONCLUSION**

Based on the above, Appellant respectfully requests this Court amend its prior holding and reverse the Circuit Court’s denial of Appellant’s motion to compel arbitration.

February 16, 2023



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**PROOF OF SERVICE**

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The undersigned certifies that he has served this Appellant's Petition for Rehearing by depositing a copy of it in the United States Mail, postage prepaid, on February 16, 2023, addressed to its attorney of record to the below address:

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February 16, 2023

  
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