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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM AIKEN COUNTY
Court of Common Pleas

J. Cordell Maddox, Jr., Circuit Court Judge

Appellate Case No. 2023-001211
Case No. 2021-CP-02-00889

Julianne Foster, ... Plaintiff,

v.

Rhett Riviere, Katherine A. Thomas, Chase Enterprises, LLC of South Carolina, and Airbnb, Inc., ... Defendants,

Of which

Rhett Riviere, is the ..... Appellant,

AND

Airbnb, Inc., ... Respondent,

v.

Rhett Riviere, ... Appellant.

/s/ Deborah B. Barbier
Deborah B. Barbier, S.C. Bar No. 6920
DEBORAH B. BARBIER, LLC
1811 Pickens Street
Columbia, South Carolina 29201
Phone: (803) 445-1032
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MOTION TO DISMISS

Pursuant to Rule 269, SCACR, Plaintiff Julianne Foster moves for dismissal of this appeal on the grounds that it is frivolous and taken solely for the purposes of delay. The reality is that both Third-Party Defendant/Appellant Rhett Riviere ("Riviere") and Third-Party Respondent Airbnb, Inc. ("Airbnb") want to arbitrate Airbnb's claims against Riviere, and this appeal is being used to stay Plaintiff's claims against Airbnb and delay any further discovery. [1]

Background Facts and Procedural History

This action stems from Plaintiff's stay at an Airbnb in Aiken from May 17-18, 2019. Plaintiff's friend, Michelle Jain, booked the Airbnb rental owned and/or hosted by Airbnb Hosts Riviere and Defendant Kathryn Thomas. Plaintiff never entered into any agreement with Airbnb. During the stay, Riviere surreptitiously recorded Plaintiff in various states of undress in the bedroom of the Airbnb rental.

Based on this egregious invasion of her privacy while staying in an Airbnb rental, Plaintiff brought several claims against Riviere, Thomas, and Airbnb. After Plaintiff settled with Riviere, Airbnb brought a Third-Party Complaint against Rivere for indemnification. On May 26, 2023, Riviere filed a Motion to Compel Arbitration of Airbnb's Third-Party claims against him and a separate Motion to Dismiss or Stay pending arbitration. *See* Riviere's Mot. to Compel Arbitration, attached as **Exhibit A**; and Riviere's Mot. to Dismiss or Stay, Attached as **Exhibit B**. Airbnb did not file any response to the motion. Further, at the hearing on the motion, Airbnb did not voice any opposition to Rivier's Motion to Compel Arbitration; instead Airbnb appeared to agree that the claims were arbitrable. *See* Tr. of June 13, 2023 Hearing at 14:10-15:2, attached as **Exhibit C.**

Thereafter, despite there being no opposition, on July 26, 2023, the circuit court denied Riviere's Motion to Compel Arbitration. *See* Order Denying Motion to Compel Arbitration,

[1] Plaintiff has simultaneously filed a Motion to Expedite this Appeal.

attached hereto as **Exhibit D**. Riviere immediately filed this interlocutory appeal of that Order. Additionally, on July 28, 2023, Riviere and Airbnb filed a Joint Motion to Stay the entire action pending the resolution of this appeal, which the circuit court granted on August 24, 2023. *See* Order Granting Joint Mot. to Stay, attached as **Exhibit E**.

Argument

"The function of appellate courts is not to give opinions on merely abstract or theoretical matters, but only to decide actual controversies injuriously affecting the rights of some party to the litigation." *Sloan v. Greenville Cnty.*, 356 S.C. 531, 552, 590 S.E.2d 338, 349 (Ct. App. 2003). "An appellate court will not pass on moot and academic questions or make an adjudication where there remains no actual controversy." *Curtis v. State*, 345 S.C. 557, 567, 549 S.E.2d 591, 596 (2001); see also). *Sloan v. Friends of the Hunley, Inc.*, 369 S.C. 20, 25, 630 S.E.2d 474, 477 (2006) ("Generally, th[e] Court only considers cases presenting a justiciable controversy.") Thus, "[a] threshold inquiry for any court is a determination of justiciability, i.e., whether the litigation presents an active case or controversy." *Holden v. Cribb*, 349 S.C. 132, 137, 561 S.E.2d 634, 637 (Ct. App. 2002). Here, Riviere's appeal does not raise a justiciable controversy.

Airbnb has never expressed any opposition to Rivere's Motion to Compel Arbitration, and, in fact, Airbnb has unequivocally stated that it wants to arbitrate the claims it has asserted against Riviere. When Riviere moved to compel arbitration of Airbnb's indemnification claims against him, Airbnb did not file any response to the motion. Further, at the hearing on the motion, Airbnb did not voice any opposition to Rivier's Motion to Compel Arbitration; instead Airbnb appeared to agree that the claims were arbitrable. *See* **Exhibit C**, Tr. of June 13, 2023, Hearing at 14:10-15:2. And reviewing other filings in the Circuit Court, Airbnb has expressly stated that it wants to arbitrate its Third-Party indemnification claims against Riviere. *See* Airbnb's Reply in Supp. of

Mot. to Compel Arb. at 8, attached as **Exhibit F** (arguing that "the Court should grant Airbnb's motion and compel the parties to arbitrate the entire dispute, including Plaintiff's claims against Airbnb and the crossclaims and counterclaims that Airbnb asserted against Thomas and Riviere, respectively."); and Airbnb's Supp. Mem. in Supp. of its Mot. to Compel Arb. at 8, attached as **Exhibit G** (arguing that "the Court should grant Airbnb's motion and compel the parties to arbitrate the entire dispute, including Plaintiff's claims against Airbnb and the claims that Airbnb asserted against Thomas and Riviere."). In short, there is no justiciable controversy as Riviere and Airbnb both seek to arbitrate Airbnb's third-party claims against Riviere.

Because Riviere and Airbnb agree that Airbnb's third-party claims against Riviere are arbitrable, there is not, and never has been, a justiciable controversy as to this issue. Both Riviere's Motion to Compel Arbitration and this appeal were unnecessary. Riviere's appeal and Riviere and Airbnb's Joint Motion to Stay the entire case pending this appeal, including Plaintiff's claims against Airbnb, are simply a means to delay discovery and resolution of this case. Plaintiff has been victimized by Airbnb during two years of litigation in which it has objected to every single discovery request and boldly defied Orders from South Carolina circuit court judges compelling them to produce and to participate in discovery in good faith. As the circuit court found when granting Plaintiff's Motion for a Rule to Show Cause based upon Airbnb's failure to comply with discovery, Airbnb's actions have shown continuing "contemptuous conduct." *See* Order granting Plaintiff's Motion for a Rule to Show Cause at 3, attached as **Exhibit H**. This conduct should not be allowed to continue. Pursuant to Rule 269, SCACR, the Court should dismiss this appeal as frivolous or taken solely for the purposes of delay.

Conclusion

Based on the foregoing, Plaintiff respectfully request the Court dismiss this appeal. Further, the Court should order the stay granted pending resolution of the appeal be lifted.

Respectfully submitted,

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Attorneys for Plaintiff Julianne Foster

October 4, 2023
Columbia, South Carolina

EXHIBIT A

RE: Julianne Foster v. Airbnb et al.

1 message

Andrew Watson <awatson@butler.legal> Wed, Jul 14, 2021 at 4:30 PM
To: Ryan Duffy <rduffy@butler.legal>, Deborah Barbier <dbb@deborahbarbier.com>, "wes@wesleyfew.com" <wes@wesleyfew.com>, "rlb@ryanbeasleylaw.com" <rlb@ryanbeasleylaw.com>
Cc: Julie D'Aeth <jdaeth@butler.legal>, Whitney Hill <whill@butler.legal>

Debbie – I'm interjecting so our intentions are transparent here – we plan on filing a Motion to Compel Arbitration with our Answer in response to the Complaint on 8/3. It will include a motion to stay discovery as to Airbnb until the motion is ruled upon.

Given that the hearing on our Motions is not likely to be heard imminently after we file it, we will need some additional time after that Motion is filed to prepare objections to the discovery in order to preserve them. They won't be ready on 8/3. Whatever number of days you can give us is appreciated, whether 30, 45, or 60 as Ryan requested. Thanks.

Thanks

Andy

L. Andrew Watson | Partner | Licensed in NC, SC, FL & GA

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From: Ryan Duffy <rduffy@butler.legal>
Sent: Wednesday, July 14, 2021 4:15 PM
To: 'Deborah Barbier' <dbb@deborahbarbier.com>; Andrew Watson <awatson@butler.legal>; 'wes@wesleyfew.com' <wes@wesleyfew.com>; 'rlb@ryanbeasleylaw.com' <rlb@ryanbeasleylaw.com>
Cc: Julie D'Aeth <jdaeth@butler.legal>; Whitney Hill <whill@butler.legal>
Subject: RE: Julianne Foster v. Airbnb et al.

Hi Debbie,

We appreciate your providing us with 14 additional days to respond to the Complaint / file the Motion to Compel by 8/3/21. With regard to the discovery that was served along with the Complaint, we understand you cannot agree to suspend it until the Motion to Compel is decided. However, are you able to provide us with additional time to respond to the discovery such that responses would be due on October 4, 2021? As I'm sure you can understand, Andy is currently in trial and our client needs time to review its records when it responds to discovery.

Thank you,

Ryan

Ryan P. Duffy | Attorney at Law

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From: Deborah Barbier <dbb@deborahbarbier.com>
Sent: Friday, July 9, 2021 4:42 PM
To: Andrew Watson <awatson@butler.legal>; 'wes@wesleyfew.com' <wes@wesleyfew.com>; 'rlb@ryanbeasleylaw.com' <rlb@ryanbeasleylaw.com>
Cc: Julie D'Aeth <jdaeth@butler.legal>; Whitney Hill <whill@butler.legal>; Ryan Duffy <rduffy@butler.legal>
Subject: RE: Julianne Foster v. Airbnb et al.

Andrew – We certainly understand the demands of trial, so we are pleased to give you an additional extension of 14 days through August 3, 2021. As to your other requests, we cannot agree to suspend discovery until the arbitration motion is ruled upon. We intend to start taking discovery very soon. We also do not agree to a dismissal without prejudice or that we are bound by an arbitration provision. We look forward to working with you on this matter – Good luck on your trial!

Best regards,

Debbie

Deborah B. Barbier

Deborah B. Barbier, LLC

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From: Andrew Watson <awatson@butler.legal>
Sent: Wednesday, July 7, 2021 9:16 AM
To: 'wes@wesleyfew.com' <wes@wesleyfew.com>; Deborah Barbier <dbb@deborahbarbier.com>; 'rlb@ryanbeasleylaw.com' <rlb@ryanbeasleylaw.com>
Cc: Julie D'Aeth <jdaeth@butler.legal>; Whitney Hill <whill@butler.legal>; Ryan Duffy <rduffy@butler.legal>
Subject: RE: Julianne Foster v. Airbnb et al.
Importance: High

Ryan, Wes and Deborah,

Following up on my e-mail below and on recent call / e-mail on 6/16 with Ryan about the Airbnb role in this case.

My client intends to file a Motion to Compel Arbitration, per the below extension which Wes was kind enough to give us, currently through 7/19. However, due to a trial I have in federal court in the next 2 weeks, may I request an additional extension of 14 days, through Tuesday 8/3/21?

Similarly, given that we intend to file this Motion, and intend to ask discovery to be stayed as to Airbnb, may we agree that the obligation to respond to the discovery is stayed until the Motion is ruled upon, rather than being required to prepare formal objections to the discovery based on the arbitration demand?

Lastly and most importantly, as I have mentioned to Ryan directly already, if there is any way for a dismissal without prejudice as to Airbnb, that would seem the most sensible approach, given that there was no criminal record known to Airbnb from its background check – the only history for Mr. Riviere was apparently expunged, making it self-evident that a background check would not have revealed it. I am happy to try and secure discovery materials from Airbnb on an informal basis, even after dismissal, if you are concerned about having a clear avenue to gather discovery materials.

Please let me know if the extension on the MTC is OK, if we can stay the discovery, and if there is any response re: dismissal without prejudice for Airbnb at your first opportunity. Happy to jump on a call with you as needed also.

Thanks

Andy

L. Andrew Watson | Partner | Licensed in NC, SC, FL & GA

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From: Andrew Watson
Sent: Thursday, May 27, 2021 10:13 AM
To: 'wes@wesleyfew.com' <wes@wesleyfew.com>; 'dbb@deborahbarbier.com' <dbb@deborahbarbier.com>; 'rlb@ryanbeasleylaw.com' <rlb@ryanbeasleylaw.com>
Cc: Julie D'Aeth <jdaeth@butler.legal>; Whitney Hill <whill@butler.legal>; Ryan Duffy <rduffy@butler.legal>
Subject: Julianne Foster v. Airbnb et al.

Good morning everyone.

My law firm and I have been retained by Airbnb, Inc. to represent them in this new Foster litigation in Aiken County, SC. I look forward to working with you. I am getting up to speed on the facts of the case.

My first order of business is to inquire whether Plaintiff would consider dismissing Airbnb without prejudice from this action. Your allegations make clear that the non-Airbnb Defendants were the ones responsible for the presence of these cameras and their own conduct in using them. While the allegations are obviously distasteful to read, Airbnb was not on any sort of notice that such activity was occurring or in a position to prevent it, as it was only providing the platform for the Guest/Host transaction for rental of the property. Given the other cases I have seen filed against these same individuals (Riviere, Thomas, Chase Enterprises) there appears to have been a pattern on their part, having nothing to do with Airbnb.

Also, Airbnb has an arbitration provision in its Terms of Service Agreement. I expect I may be filing a Motion to Compel Arbitration to take the Airbnb part of the dispute out of state court. If you dismiss Airbnb, that avoids the potential for fighting multiple battles in different venues. If you are willing to dismiss Airbnb without prejudice, I will recommend to Airbnb to cooperate informally to share any pertinent materials with you, with sufficient protective orders in place as to proprietary or confidential information.

Lastly, I've been alerted that service may have been made on Airbnb Inc. on May 20th. May we have 30 additional days to respond past the existing deadline, making a new response deadline Monday July 19th?

I am in the office all day today if any of you wish to discuss the case. I've copied my associate (Ryan Duffy), paralegal (Whitney Hill) and assistant (Julie D'Aeth) here for future reference. Please copy the four of us on any case-related e-mails whenever possible. Please also let us know who we should be including on future e-mail communications.

Thanks,

Andy

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EXHIBIT B

STATE OF SOUTH CAROLINA COUNTY OF AIKEN	)))	IN THE COURT OF COMMON PLEAS SECOND JUDICIAL CIRCUIT
Julianne Foster, Plaintiff, vs. Rhett Riviere, Katherine A. Thomas, Chase Enterprises, LLC of South Carolina, and Airbnb, Inc., Defendants.	)	Civil Action No. 2021-CP-02-00889 **AIRBNB, INC.'S MOTION TO COMPEL ARBITRATION**

Pursuant to Rules 12(b)(1), (3), and (6) of the South Carolina Rules of Civil Procedure and any other applicable Rule, and pursuant to 9 U.S.C. §§ 3 and 4 of the Federal Arbitration Act ("FAA"), Defendant Airbnb, Inc. ("Airbnb") moves Compel Arbitration of the above-captioned action and dismiss. All of Plaintiff's claims against Airbnb arise out of a transaction involving interstate commerce and are subject to a binding arbitration agreement that is governed by the FAA. Moreover, Airbnb's crossclaims and third-party claims are also subject to a binding arbitration agreement, and Airbnb is opting to compel those claims to arbitration as well. This entire action, therefore, should be dismissed and compelled to arbitration.[1]

FACTUAL BACKGROUND

This action arose from an incident that occurred from May 17–18, 2019. (Am. Compl. ¶ 89.) Plaintiff alleges that her friend used Airbnb to locate a rental property in Aiken, South Carolina. (*Id*. ¶ 93.) This property was owned by Defendant Chase Enterprises, which was

[1] Airbnb denies that Plaintiff's claims have any merit whatsoever. It reserves all defenses to Plaintiff's claims and does not waive any available defenses. In Airbnb's answers to the original Complaint and Amended Complaint, it expressly reserved "all rights to compel mandatory contractual arbitration," and submitted its answers "without waiving such rights."

managed by Defendant Riviere. (*Id*. ¶¶ 89–91.) Defendant Thomas held herself out to be the "host" or property manager for the property. (*Id*. ¶ 95.) Plaintiff and her friends rented the property through Airbnb and all "paid the Defendants to rent the Airbnb property." (*Id*. ¶ 100.)

Plaintiff alleges that during the time she was staying at the property, Defendant Riviere had a hidden camera placed in a bedroom which captured recordings of her. (*Id*. ¶ 100.)

Plaintiff filed her initial Complaint on April 28, 2021. That pleading was 83 paragraphs and asserted claims for: (1) negligence (all Defendants), (2) invasion of privacy (Defendant Riviere), (3) intentional infliction of emotional distress (Defendant Riviere), (4) constructive fraud/misrepresentation (Defendant Riviere), and (5) negligence per se (Defendants Riviere, Thomas, and Airbnb). Plaintiff filed her Amended Complaint on November 30, 2022. This new pleading ballooned to 257 paragraphs and added a significant amount of new factual allegations as well as several new claims and prayers for relief. The Amended Complaint asserts claims for: (1) negligence (all Defendants), (2) *negligent hiring, supervision, or retention of employees (Defendant Airbnb)*, (3) *negligent hiring, supervision, or retention of employees, or alternatively independent contractors (Defendant Airbnb)*, (4) *premises liability (all Defendants)*, (5) invasion of privacy (Defendant Riviere), (6) *vicarious liability for invasion of privacy (Defendant Airbnb)*, (7) intentional infliction of emotional distress (Defendant Riviere), (8) constructive fraud/misrepresentation (Defendant Riviere), and (9) negligence per se (all Defendants), and (10) *violation of the South Carolina Unfair Trade Practices Act (all Defendants)*. (The newly added claims are italicized above.)

Airbnb's Terms of Service governed this transaction. (*See* **Exhibit A**, Terms of Service, AIRBNB-000272–314.) As detailed more fully below, Plaintiff's friend expressly agreed to the terms in booking the rental and Plaintiff directly benefited from the transaction making her subject

to those Terms. Moreover, Defendants Riviere and Thomas both agreed to the Terms of Service as a condition of their being allowed to list their properties on Airbnb's online platform. (Airbnb's Third Party Compl. ¶ 1.)

The Terms of Service in effect at the time of the booking provide in bold on page one:

> **Please note: Section 19 of these Terms contains an arbitration clause and class action waiver that applies to all Airbnb Members. If your country of residence is the United States, this provision applies to all disputes with Airbnb. If your country of residence is outside of the United States, this provision applies to any action you bring against Airbnb in the United States. It affects how disputes with Airbnb are resolved. By accepting these Terms, you agree to be bound by this arbitration clause and class action waiver. Please read it carefully.**

(Exhibit A, Terms of Service at 272.) Section 19 is entitled "Dispute Resolution and Arbitration Agreement" and provides that it applies to all residents of the United States. (*Id.* at 290–93.) Section 19.4 then states in bold:

> **Agreement to Arbitrate. You and Airbnb mutually agree that any dispute, claim or controversy arising out of or relating to these Terms or the applicability, breach, termination, validity, enforcement or interpretation thereof, or to the use of the Airbnb Platform, the Host Services, the Group Payment Service, or the Collective Content (collectively, "Disputes") will be settled by binding individual arbitration (the "Arbitration Agreement"). If there is a dispute about whether this Arbitration Agreement can be enforced or applies to our Dispute, you and Airbnb agree that the arbitrator will decide that issue.**

(*Id.* at 291.)

Section 19.6 provides that the Arbitration Agreement "evidences a transaction in interstate commerce and thus the Federal Arbitration Act governs the interpretation and enforcement of this provision." (*Id.*)

ARGUMENT

Plaintiff is bound by the Arbitration Agreement set forth above. As detailed below, the issue of arbitrability is for the arbitrator to decide and that alone warrants the Court granting Airbnb's motion. Moreover, the Agreement provides, among other things, that ***any dispute, claim, or controversy*** arising out of or relating to the Terms and Conditions ***or*** the use of the Airbnb platform. (*See* Exhibit A, Terms of Service at 291.) All of Plaintiff's claims, therefore, fall within the Arbitration Agreement's broad scope. Likewise, Airbnb's crossclaims against Defendant Thomas and third-party claims against Defendant Riviere also fall within the Arbitration Agreement's broad scope and Airbnb will pursue those in arbitration as well. Airbnb, therefore, respectfully moves this Court to compel the matter to arbitration and to dismiss this action with prejudice, or, in the alternative, stay it until the arbitration is completed.

I. Standard of law for arbitration

There is a strong policy in favor of arbitration which requires courts to "rigorously enforce agreements to arbitrate." *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 221 (1985). The FAA "leaves no place for the exercise of discretion by a . . . court, but instead mandates that . . . courts *shall* direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed." *Id.* at 218; *Cox v. Assisted Living Concepts, Inc.*, No. 6:13-00747, 2014 WL 1094394, at *10 (D.S.C. Mar. 18, 2014) ("[A] court . . . has no choice but to grant a motion to compel arbitration where a valid agreement exists and the issues in a case fall within its purview." (quoting *Adkins v. Labor Ready, Inc.*, 303 F.3d 496, 50 (4th Cir. 2002))).

Moreover, federal law dictates that arbitration agreements are to be construed as broadly as possible, and any doubts must be resolved in favor of arbitration. *See Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24–25 (1983) ("The Arbitration Act establishes that,

as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration . . . ."); *see also S&ME, Inc. v. STV Inc.*, No. 3:19-CV-03567-JFA, 2020 WL 4700643, at *3 (D.S.C. July 22, 2020) (same). Any state law standing "as an obstacle to the accomplishment and execution of the full purposes and objectives" of the FAA, is preempted. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 352 (2011); *see also Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 539–41, 542 S.E.2d 360, 364 (2001) (holding that South Carolina's Consumer Protection Code cannot invalidate arbitration agreements in consumer contracts).[2]

II. The Court should compel the matter to arbitration because the issue of arbitrability is for the arbitrator to decide.

A. The Airbnb Terms of Service contemplate the arbitrator will decide issues of arbitrability.

The arbitration agreement provides that "[i]f there is a dispute about whether this Arbitration Agreement can be enforced or applies to our Dispute, you and Airbnb agree that the arbitrator will decide that issue." (Exhibit A, Terms of Service at 291, § 19.4.) Therefore, this matter must be compelled to arbitration to permit the arbitrator to make this threshold determination at a minimum.

The U.S. Supreme Court has recognized that the parties may agree to have an arbitrator decide not only the merits but also "gateway" questions such as arbitrability. *Palmetto Wildlife Extractors, LLC v. Ludy*, 435 S.C. 690, 699–700, 869 S.E.2d 859, 864 (Ct. App. 2022), *reh'g*

[2] Because the Arbitration Agreement is governed by the FAA, the South Carolina Uniform Arbitration Act does not apply here. *Cox*, 2014 WL 1094394, at *11 ("[E]ven where an arbitration agreement specifically states that the SCUAA is applicable, if the arbitration agreement is covered by the FAA and cannot be enforced under state law because of failure to comply with the notification requirements of the SCUAA, the FAA preempts the state law."); *see also Walden v. Harrelson Nissan, Inc.*, 399 S.C. 205, 208, 731 S.E.2d 324, 325 (Ct. App. 2012) ("Generally, if the contract providing for arbitration involves interstate commerce, the Federal Arbitration Act (FAA) displaces the state arbitration statute.").

denied (Feb. 25, 2022) (discussing *Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S. 63, 68–69 (2010)). "As long as the parties' agreement delegates the arbitrability question to an arbitrator 'by clear and unmistakable evidence,' a court may not override the contract and decide the arbitrability question." *Id.* (quoting *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 529–30 (2019)). In *Palmetto Wildlife*, the Court of Appeals found that the parties had agreed to have the arbitrator decide issues of arbitrability and held that "if there is any dispute over the arbitrability of [respondent's] counterclaims, the circuit court should send the counterclaims to the arbitrator to decide which are arbitrable under the Agreement." *Id.* at 706, 869 S.E.2d at 867.

Here, the Terms of Service unequivocally provided that an arbitrator shall decide questions of arbitrability. Other courts have found that this provision in Airbnb's terms is enforceable and compelled actions to arbitration for the arbitrator to decide arbitrability. *Airbnb, Inc. v. Rice*, 518 P.3d 88, 91 (Nev. 2022) (finding that the Airbnb arbitration agreement had a "clear delegation clause requiring that an arbitrator decide any dispute as to whether the agreement applies to the claims at issue," and reversing the lower court's refusal to compel the matter to arbitration based on its finding that the claims did not arise out of the Terms of Service, explaining that this issue was for the arbitrator to decide); *Airbnb, Inc. v. Doe*, 336 So. 3d 698, 705 (Fla. 2022), *cert. denied*, 143 S. Ct. 484 (2022) (reaching the same conclusion). As the *Rice* court explained, under applicable U.S. Supreme Court precedent, "when a contract delegates the arbitrability question to the arbitrator, a court has no authority to decide whether the arbitration agreement applies to the dispute, even where the argument for arbitrability is wholly groundless." *Rice*, 518 P.3d at 91 (quoting *Henry Schein*, 139 S. Ct. at 528–29).

Therefore, because the Terms of Service expressly and unequivocally contemplate that the arbitrator must decide issues of arbitrability, the Court should compel this matter to arbitration.

B. Plaintiff is bound by the Airbnb Terms of Service.

It is undisputed that Plaintiff's friend expressly agreed to the Terms of Service in booking the rental. Although she was the person who physically booked the property, there is also no dispute that Plaintiff learned the property was booked through Airbnb and that she paid the friend for her portion of the stay. Thus, Plaintiff became aware that an agreement existed with Airbnb. Plaintiff received the direct benefit of use of the property through this rental transaction and thus the Terms of Service also cover her claims. She obtained the same contractual benefits as her signatory friend in the transaction and, therefore, must accept the corresponding obligations, including the agreement to submit any claims to arbitration. *See Wilson v. Willis*, 426 S.C. 326, 340–41, 827 S.E.2d 167, 175 (2019) (explaining that under direct benefits estoppel, a "nonsignatory is estopped from refusing to comply with an arbitration clause when it receives a direct benefit from a contract containing an arbitration clause" (quoting *Pearson v. Hilton Head Hosp.*, 400 S.C. 281, 290, 733 S.E.2d 597, 601 (Ct. App. 2012)));[3] *see also R.J. Griffin & Co. v. Beach Club II Homeowners Assoc., Inc.*, 384 F.3d 157, 160 (4th Cir. 2004) (holding that a party cannot try to "hold another party to the terms of an agreement while simultaneously trying to avoid the agreement's arbitration clause").

As the Court of Appeals recently reiterated, a non-signatory is estopped from refusing to comply with an arbitration provision if (1) the nonsigner's claim arises from the contractual relationship, (2) the nonsigner has "exploited" other parts of the contract by reaping its benefits,

[3] Direct benefits estoppel "recognizes that a party may be estopped from asserting that the lack of his signature on a written contract precludes enforcement of the contract's arbitration clause when he has consistently maintained that other provisions of the same contract should be enforced to benefit him." *Willis*, 426 S.C. at 344, 827 S.E.2d at 177. As *Willis* explained, where plaintiffs "sue and seek relief based on contracts containing arbitration clauses, courts have applied equitable estoppel." *Id.*

and (3) the claim relies solely on the contract terms to impose liability. *Weaver v. Brookdale Senior Living, Inc.*, 431 S.C. 223, 230–31, 847 S.E.2d 268, 272 (Ct. App. 2020). Again, Plaintiff's claims all arise out of the Airbnb booking and she reaped the benefits of the contract through her use of the property. Moreover, all of her claims rely on the contract terms to impose liability since the ***only*** relationship between Plaintiff and Airbnb is through the booking agreement and the Terms of Service and Plaintiff relies on that relationship in contending that Airbnb owed her a duty. (*See* Am. Compl. ¶ 140 ("Airbnb owed a duty to Plaintiff because Plaintiff has a special relationship with Airbnb, by virtue of their staying at an accommodation rented through Airbnb . . . .").)

Thus, because Plaintiff is subject to the Terms of Service and those terms provide that the issue of arbitrability is properly directed to the arbitrator, the Court should grant Airbnb's motion.

III. Even if the Court found that it could decide arbitrability, it should conclude that Plaintiff's claims are subject to the arbitration agreement.

A. The FAA applies and requires enforcement of the arbitration agreement.

The FAA governs the enforceability of the Arbitration Agreement in the Contract. As provided in the FAA, a two-part test is used to determine whether a dispute is arbitrable. First, the court must decide if a valid agreement to arbitrate exists; and second, the court must find that the specific dispute falls within the substantive scope of the agreement. *See Knight v. Rent-A-Ctr. E., Inc.*, No. 4:13-1734-MGL, 2013 WL 6826963, at *1 (D.S.C. Dec. 23, 2013) ("[A] court's role is limited to determining (1) whether the parties agreed to arbitrate and, if so, (2) whether the scope of the agreement to arbitrate encompasses the claims at issue."). Any question relating to the scope of arbitrable issues is resolved in favor of enforcing the agreement to arbitrate. *See, e.g.*, *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 24–25. As discussed below, this two-part test is met in the instant case. Hence, the Court should grant this Motion, compel the parties to arbitration, and dismiss this action, or, in the alternative, stay it until the arbitration is completed.

The FAA applies to any arbitration agreement that is executed in connection with a transaction involving interstate commerce in any way. *See* 9 U.S.C. § 2; *see also Allied-Bruce Terminix Companies v. Dobson*, 513 U.S. 265, 281 (1995) (explaining that FAA applies to arbitration agreement involving transaction in interstate commerce, even if parties do not contemplate an interstate commerce connection). The FAA provides that a written arbitration agreement contained in a "contract evidencing a transaction involving commerce . . . shall be valid, irrevocable and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. The FAA defines "commerce" as "commerce among the several states." 9 U.S.C. § 1. In section 2 of the FAA, "[t]he word 'involving'. . . signals an intent to exercise Congress's commerce power to the full," and the phrase "'evidencing a transaction' mean[s] only that the transaction . . . turn[s] out, *in fact*, to have involved interstate commerce." *Allied-Bruce Terminix Cos.*, 513 U.S. at 276, 277.

First, the Arbitration Agreement in the Contract specifically provides that the transaction involved interstate commerce and that the FAA governs. (Exhibit A, Terms of Service at 291, § 19.6.) Courts consider such language evidence of the satisfaction of the interstate commerce requirement. *See Zabinski v. Bright Acres Assoc.*, 346 S.C. 580, 592, 553 S.E.2d 110, 116 (2008) (stating that choice of law provisions in arbitration agreements are enforceable); *Credit Acceptance Corp. v. Davisson*, 644 F. Supp. 2d 948, 954 (N.D. Ohio 2009) (finding FAA applied because "the Contract itself provides that '[t]he Federal Arbitration Act governs this Arbitration Clause. . . . The Arbitration Clause is governed by the Federal Arbitration Act . . . and not by any state arbitration law.'"); *Staples v. Money Tree, Inc.*, 936 F. Supp. 856, 858 (M.D. Ala. 1996) (same).

Further, the facts as alleged in Plaintiff's Amended Complaint demonstrate that the transaction involved interstate commerce. Plaintiff is a resident of South Carolina and Airbnb is

a Delaware corporation with its principal place of business in San Francisco, California. (Am. Compl. ¶¶ 49, 53.) The Airbnb rental was booked in South Carolina and associated fees were paid to Airbnb in California. Thus, in the instant case, monies were necessarily transmitted across interstate lines. These facts establish interstate commerce within the meaning of section 2 of the FAA. *See, e.g.*, *Walden*, 399 S.C. at 208, 731 S.E.2d at 326 ("There is no dispute the transaction here . . . involved interstate commerce as Mary is a South Carolina resident, Harrelson is a North Carolina corporation, the vehicle was manufactured in Tennessee, and financing was provided by Nissan-Infiniti LT of California").

Accordingly, the transaction at issue in this case involved interstate commerce, and therefore, the FAA applies to this action.

B. Plaintiff's claims are subject to a valid Arbitration Agreement with Airbnb.

The FAA provides that arbitration agreements are enforceable according to their terms:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or any agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2. In this case, the Arbitration Agreement provides that ***any*** claim arising out of the Terms of Service or ***use of the Airbnb platform*** is subject to binding arbitration.

Plaintiff's friend expressly agreed to the Terms of Service in booking the rental. As detailed above, although the friend was the person who physically booked the property, Plaintiff learned the property was booked through Airbnb, and she paid for her portion of the stay. Plaintiff received the direct benefit of the property rental through this transaction. Therefore, the Terms of Service also cover her claims as well.

Plaintiff bears the burden of any challenge to the validity of the Arbitration Agreement. *See Swanson v. Prof'l Serv. Indus.*, No. 2:11-cv-2880, 2012 WL 1130664 at *4–5 (D.S.C. Jan. 4, 2012). Courts may only invalidate arbitration agreements based upon generally applicable contract defenses. 9 U.S.C. § 2; *see also Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996). A court should uphold and enforce an arbitration agreement even if an arbitrator may later hold the remainder of the contract invalid. *See Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403–04 (1967); *see also Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 448 (2006) ("It is true . . . that the *Prima Paint* rule permits a court to enforce an arbitration agreement in a contract that the arbitrator later finds to be void."). Moreover, even when using doctrines of general applicability in examining an arbitration agreement, such as unconscionability, courts are not permitted to employ those doctrines in a manner which would subject arbitration agreements to special scrutiny. *See, e.g.*, *Perry v. Thomas*, 482 U.S. 483, 492 n.9 (1987) ("A court may not, then, in assessing the rights of litigants to enforce an arbitration agreement, construe that agreement in a manner different from that in which it otherwise construes nonarbitration agreements . . . .").

Under this standard, Plaintiff cannot overcome the validity of the Arbitration Agreement in the Terms of Service. Therefore, Plaintiff is bound to arbitrate the claims against Airbnb in accordance with the Arbitration Agreement.

C. The scope of the Arbitration Agreement encompasses Plaintiff's claims in this action.

The FAA mandates that "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Moses H. Cone Mem. Hosp.*, 460 U.S. at 24-25; *see also Brown v. Santander Consumer USA, Inc.*, No. CA 0:12-2825-CMC-PJG, 2013 WL 4017162, at *2 (D.S.C. Aug. 5, 2013) ("Arbitration is compelled 'unless it may be said with positive assurance

that the arbitration [agreement] is not susceptible of an interpretation that covers the asserted dispute." (quoting *Peoples Sec. Life Ins. Co. v. Monumental Life Ins. Co.*, 867 F.2d 809, 812 (4th Cir. 1989))). The Supreme Court dictates that a presumption of arbitrability exists where a contract contains an arbitration clause. *AT&T Technologies, Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 650 (1986). The presumption in favor of arbitrability "is particularly applicable where the [arbitration] clause is . . . broad," as it is in this case. *Id*.

Here, each of Plaintiff's claims fall within the Arbitration Agreement's broad scope. The Arbitration Agreement requires that Plaintiff arbitrate "any claim" arising out of the Terms of Service or use of the Airbnb platform. (Exhibit A, Terms of Service at 291.) All of Plaintiff's claims arise out of her stay at the property, which booked through Airbnb, and thus arise out of both the Terms of Service and the Airbnb platform. As noted above, the ***only*** tie between Airbnb and any of the relevant parties in this matter was the online booking. Thus, all of Plaintiff's claims have a significant relationship to the Terms of Service and fall within the scope of the Arbitration Agreement. Therefore, all claims are subject to arbitration.

IV. This action should be dismissed because arbitration is the proper forum.

Because the issue of arbitrability should be decided by the arbitrator and all of Plaintiff's claims are subject to arbitration in any event, the Court lacks subject matter jurisdiction and, additionally, is not a proper venue for the adjudication of those claims. Therefore, the Court should dismiss all claims asserted against Airbnb in this matter with prejudice, or in the alternative, without prejudice. *See Cox*, 2014 WL 1094394, at *7 ("Where all claims pled by a plaintiff are subject to an arbitration agreement, the court should dismiss the claims rather than merely stay further judicial proceedings." (quoting *Choice Hotels Int'l, Inc. v. BSR Tropicana Resort, Inc.*, 252 F.3d 707, 709-10 (4th Cir. 2001) ("Notwithstanding the terms of § 3 [of the FAA] . . . dismissal is

a proper remedy when all of the issues presented in a lawsuit are arbitrable."))); *see also Brown*, 2013 WL 4017162, at *2 ("If all of the claims asserted in a complaint are subject to arbitration, dismissal of the complaint is appropriate.").

Failing this, should the Court decide not to dismiss this action, in the alternative Airbnb requests that the Court stay the action until the completion of the arbitration action. 9 U.S.C. § 3 (providing that "the court . . . upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration . . . ***shall*** on application of one of the parties stay the trial of the action . . . .") (emphasis added); *Hensel v. Cargill*, 198 F.3d 145, 1999 WL 993775, at *4 (6th Cir. Oct 19, 1999) (unpublished table decision) ("Under § 3 of the FAA, if any separate claim is referable to arbitration, then a stay of proceedings on the remaining claims is ***mandatory***." (emphasis added)).

V. Airbnb has not waived the arbitration agreement.

Lastly, Airbnb anticipates that Plaintiff will contend that it has waived its right to arbitrate by participating in the litigation. This is not correct. As detailed above, Airbnb has reserved its right to compel arbitration from the time of its initial answer, and has continued to reiterate this right in its most recent answer. Moreover, Plaintiff's recent amendment adding over 150 new paragraphs of allegations and five claims fundamentally altered the nature and scope of the lawsuit, which further supports the propriety of Airbnb's assertion of its arbitration right at this juncture.

South Carolina traditionally followed a three-part test in assessing whether a party has waived its right to compel arbitration: "(1) whether a substantial length of time transpired between the commencement of the action and the commencement of the motion to compel arbitration; (2) whether the party requesting arbitration engaged in extensive discovery before moving to compel arbitration; and (3) whether the non-moving party was prejudiced by the delay in seeking arbitration. These factors, of course, are not mutually exclusive, as one factor may be inextricably

connected to, and influenced by, the others." *Benson Chrysler-Plymouth, Inc.*, 374 S.C. 122, 125, 647 S.E.2d 249, 250 (Ct. App. 2007).

However, the Supreme Court of the United States recently clarified that courts could not develop an arbitration specific variant of procedural rules such as requiring, for example, a showing of prejudice. *Morgan v. Sundance, Inc.*, 142 S. Ct. 1708, 1714 (2022). *Morgan* emphasized the general waiver rule of "voluntary relinquishment of a known right" and noted that the analysis should focus on the actions of the party who held the right. *Id.*

Therefore, the Court's analysis should turn on whether Airbnb has voluntarily relinquished its right to arbitrate. By maintaining this right in its pleading and providing Plaintiff notice of the same, Airbnb has made it clear that it was maintaining this right and was not voluntarily relinquishing it. *See, e.g., Soriano v. Experian Info. Sols., Inc.*, No. 2:22-CV-197-SPC-KCD, 2022 WL 6734860, at *3 (M.D. Fla. Oct. 11, 2022) (highlighting the importance of a party's pleading of arbitration as an affirmative defense in assessing waiver); *Armstrong v. Michaels Stores, Inc.*, 59 F.4th 1011, 1015 (9th Cir. 2023) (compelling arbitration and noting that defendant pleaded arbitration as an defense in its two filed answers and in the initial case management conference)

Moreover, the Terms of Service, which apply here for the reasons discussed above, contain an express non-waiver provision. Section 22.5 states that "Airbnb's failure to enforce any right or provision in these Terms will not constitute a waiver of such right or provision unless acknowledged and agreed to by us in writing. Except as expressly set forth in these Terms, the exercise by either party of any of its remedies under these Terms will be without prejudice to its other remedies under these Terms or otherwise permitted under law." (*See* Exhibit A, Terms of Service at 294.) This also supports that Airbnb did not waive its right to arbitrate.

Finally, Plaintiff's addition of considerably more allegations and new claims in recent months also weighs against any claim that Airbnb waived its right. This is particularly so in light of Plaintiff's new claim for violation of the South Carolina Unfair Trade Practices Act. A central element of such a claim requires demonstrating impact on the public interest, which is shown through capability of repetition, *see Crary v. Djebelli*, 329 S.C. 385, 387, 496 S.E.2d 21, 22–23 (1998), significantly expanding the scope of this lawsuit and potentially involve government regulators. *See Daisy Outdoor Adver. Co. v. Abbott*, 322 S.C. 489, 496, 473 S.E.2d 47, 51 (1996) (providing that generally to establish the potential for repetition requirement, the claimant must make a "(1) showing the same kind of actions occurred in the past, thus making it likely they will occur absent deterrence, or (2) . . . showing the company's procedures create a potential for repetition of the unfair and deceptive acts").

In these circumstances, the relevant waiver analysis should be as to the amended complaint, not the original pleading. *Haarslev, Inc. v. Nissen*, No. 5:19-CV-06128-BCW, 2023 WL 2782313, at *7 (W.D. Mo. Jan. 30, 2023); *see also Cannon Equip. Co. v. Troisi*, No. CV 08-2391 (PAM/AJB), 2009 WL 10710732, at *2 (D. Minn. Oct. 30, 2009). As the *Haarslev* court explained, "[w]hen a plaintiff files an amended complaint which changes the theory or scope of the case, the [d]efendant is allowed to plead anew as though it were the original complaint filed by the [p]laintiff." *Haarslev*, 2023 WL 2782313, at *7 (quoting *Troisi*, 2009 WL 10710732, at *2); *see also Solis v. Experian Info. Sols., Inc.*, No. SACV2200102CJCKESX, 2022 WL 4376077, at *3 (C.D. Cal. Sept. 21, 2022) ("The Court need not—and therefore does not—decide whether Experian in fact waived its right to compel arbitration, because Cantong's amended complaint

revived the right even if it were waived.").[4] Here, Plaintiff's voluntary decision to expand the scope of this suit also weighs against a finding of waiver.

For all these reasons, the Court should reject any argument from Plaintiff that Airbnb waived its right to arbitrate.

CONCLUSION

Airbnb respectfully requests that the Court grant its motion and compel the parties to arbitrate their dispute. As detailed above, Plaintiff's claims are subject to a binding arbitration agreement and, therefore, Airbnb is properly asserting its right to demand arbitration. Airbnb's crossclaims and third-party claims also fall within the scope of the arbitration agreement and Airbnb is opting to arbitrate those claims as well.

If the Court grants this motion, Airbnb also requests the Court to dismiss this action with prejudice, or in the alternative, dismiss this action without prejudice. In the second alternative, Airbnb requests the Court stay this action, including further discovery, pending the completion of the arbitration.

[**Signature on following page.**]

[4] The District of South Carolina has also held that where the amended complaint altered the lawsuit significantly by adding additional allegations, the defendant would not have been "deemed to have waived its right to compel arbitration merely because of the delay [of 13 months]." *Brown v. Green Tree Servs., LLC,* 585 F. Supp. 2d 770, 782 (D.S.C. 2008).

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May 15, 2023

EXHIBIT C

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STATE OF SOUTHCAROLINA
COUNTY OF AIKEN

IN THE COURT OF COMMON PLEAS
SECOND JUDICIAL CIRCUIT

JULIANNE FOSTER,

Plaintiff,

v.

RHETT RIVIERE, KATHERINE A. THOMAS, CHASE ENTERPRISES, LLC OF SOUTH CAROLINA, AND AIRBNB, INC,

Defendants.

C/A No. 2021-CP-02-00889

ORDER DENYING DEFENDANT AIRBNB'S MOTION TO COMPEL ARBITRATION

This matter came before the Court pursuant to Defendant Airbnb's Motion to Compel Arbitration filed on May 15. The motion has been fully briefed, and a hearing was held on the matter on June 13, 2023. Having fully considered the matter, including the motion, responses, exhibits, and the parties' oral arguments, it is hereby **ORDERED** that Defendant Airbnb's Motion to Compel Arbitration is **DENIED**.

BACKGROUND

This action stems from Plaintiff's stay at an Airbnb in Aiken from May 17-18, 2019. Plaintiff's friend, Michelle Jain, booked the Airbnb rental owned and/or hosted by Defendants Rhett Riviere and Kathryn Thomas through her Airbnb account. During the stay, Riviere surreptitiously recorded Plaintiff in various states of undress in the bedroom of the Airbnb rental.

Airbnb alleges that its Terms of Service ("TOS") in effect at the time of the rental provided:

> **Please note: Section 19 of these Terms contains an arbitration clause and class action waiver that applies to all Airbnb Members. If your country of residence is the United States, this provision applies to all disputes with Airbnb. If your country of residence is outside of the United States, this provision applies to any action you bring against Airbnb in the United States. It affects how**

> **disputes with Airbnb are resolved. By accepting these Terms, you agree to be bound by this arbitration clause and class action waiver. Please read it carefully.**

(Mot. to Compel, Ex. A, Terms of Service at 272) (emphasis in original). Section 19, "Dispute Resolution and Arbitration Agreement," is a delegations clause that provides:

> **Agreement to Arbitrate. You and Airbnb mutually agree that any dispute, claim or controversy arising out of or relating to these Terms or the applicability, breach, termination, validity, enforcement or interpretation thereof, or to the use of the Airbnb Platform, the Host Services, the Group Payment Service, or the Collective Content (collectively, "Disputes") will be settled by binding individual arbitration (the "Arbitration Agreement"). If there is a dispute about whether this Arbitration Agreement can be enforced or applies to our Dispute, you and Airbnb agree that the arbitrator will decide that issue.**

Id. at 291 (emphasis in original). Plaintiff was not a party to any contract with Airbnb and did not agree to the TOS or its arbitration provision.

Soon after Plaintiff filed this action on April 28, 2021, Airbnb informed Plaintiff's counsel several times that it would be filing a motion to compel arbitration. Airbnb, however, did not file a motion to compel arbitration until over two years later. In the interim, Airbnb aggressively litigated this action in court—objecting to extensive discovery propounded by Plaintiff; participating in mediation; filing two motions to dismiss based on the merits; and engaging in numerous discovery disputes. Airbnb filed its Motion to Compel Arbitration after the Court denied its second motion to dismiss; granted multiple motions to compel, and ordered Airbnb to participate in a second Rule 30(b)(6) witness deposition because its designee was unprepared on the noticed topics during the first deposition.

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APPLICABLE LAW

"Because the core of the FAA is consent, arbitration may be compelled only when the parties have agreed to it." *Lampo v. Amedisys Holding, LLC*, 437 S.C. 236, 242, 877 S.E.2d 486, 489 (Ct. App. 2022) (citation omitted). As such, "courts are [not] to grant blindly all motions to compel arbitration." *Rowland v. Sandy Morris Fin. & Est. Plan. Servs., LLC*, No. 20-1187, 2021 WL 1287563, at *3 (4th Cir. Apr. 7, 2021). Moreover, it is always up to the court to determine if the parties have an agreement to arbitrate. *Id.* at 242, 877 S.E.2d at 489 (citing *Granite Rock Co. v. Int'l Bhd. of Teamsters*, 561 U.S. 287, 296 (2010)). *See also Rent–A–Ctr. West, Inc. v. Jackson*, 561 U.S. 63, 71 (2010) ("If a party challenges the validity under § 2 of the precise agreement to arbitrate at issue, the federal court must consider the challenge before ordering compliance with that agreement under § 4.").

Contracts for a transaction involving interstate commerce are governed by the Federal Arbitration Act ("FAA"). *See* 9 U.S.C. § 2. However, whether the parties have formed an agreement to arbitrate is determined by applying South Carolina contract law. *Wilson v. Willis*, 426 S.C. 326, 336, 827 S.E.2d 167, 173 (2019). "The presumption in favor of arbitration applies to the scope of an arbitration agreement; it does not apply to the existence of such an agreement or to the identity of the parties who may be bound to such an agreement." *Id.* (cleaned up). "[B]ecause arbitration, while favored, exists solely by agreement of the parties, a presumption against arbitration arises where the party resisting arbitration is a nonsignatory to the written agreement to arbitrate." *Id.* at 337-38, 827 S.E.2d at 173 (emphasis omitted).[1] While federal law governs the

[1]Our supreme court has recently returned the legal cliché that the law "favors" arbitration to its proper context, reminding that "statements that the law 'favors' arbitration mean simply that courts must respect and enforce a contractual provision to arbitrate as it respects and enforces all contractual provisions. There is, however, no public policy—federal or state—'favoring' arbitration.

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arbitrability of disputes, state law governs issues regarding contract formation. *Am. Gen. Life & Accident Ins. Co. v. Wood*, 429 F.3d 83, 87 (4th Cir. 2005).

ANALYSIS

As an initial matter, Airbnb raises the question of who is to decide the issue of whether the parties agreed to arbitrate—the Court or the arbitrator.[2] Because there is a delegation clause in its standard arbitration agreement contained in its TOS, Airbnb argues it a question for the arbitrator. Plaintiff, however, contends that is a question for the Court. The Court finds it is to determine whether a valid arbitration agreement was formed.

"[P]arties may agree to have an arbitrator decide not only the merits of a particular dispute but also 'gateway' questions of 'arbitrability,' such as whether the parties have agreed to arbitrate or whether their agreement covers a particular controversy." *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 529 (2019) (cleaned up) (quoting *Rent-A-Ctr.*, 561 U.S. at 68-69). However, "before referring a dispute to an arbitrator, the court determines whether a valid arbitration agreement exists." *Henry Schein*, 139 S. Ct. at 530 (citing 9 U.S.C. § 2); *see also Granite Rock*, 561 U.S. at 297 (holding that a "court must resolve," which "always include whether

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Simmons v. Benson Hyundai, LLC, 438 S.C.1, 4 , 881 S.E.2d 646, 647 (Ct. App. 2022) (quoting *Palmetto Constr. Grp., LLC v. Restoration Specialists, LLC*, 432 S.C. 633, 639, 856 S.E.2d 150, 153 (2021)).

[2] "A party may oppose a motion to compel arbitration by challenging the validity of the arbitration provision, including whether it delegates in 'clear and unmistakable' terms the power to an arbitrator to decide issues of arbitrability." *Novic v. Credit One Bank, Nat'l Asss'n.*, 757 Fed. App'x 263 (4th Cir. 2019) (citing *Rent-A-Ctr.*, 561 U.S. at 70-71 & n.1 "[A]bsent a parties (sic) challenge to the validity of such delegation, courts will not intervene in interpreting the parties' agreement." *Id.* Thus, a challenge to a different contract provision, or to the contract as a whole, will not prevent a court from submitting to the arbitrator the question of arbitrability. *Rent-A Ctr.*, 561 U.S. at 71. Plaintiff is challenging both the formation and validity of the arbitration agreement and the delegation clause, not simply whether some issues are subject to arbitration.

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the clause was agreed to, and may include when that agreement was formed"). As the Supreme Court held in *Schein* "[t]o be sure, before referring a dispute to an arbitrator, the court determines whether a valid arbitration agreement exists." *Henry Schein*, 139 S. Ct. at 530 (emphasis added) (citing 9 U.S.C. § 2); *see also York v. Dodgeland of Columbia, Inc.*, 406 S.C. 67, 749 S.E.2d 139, 144 (Ct. App. 2013). Accordingly, it is the Court which must first determine whether Plaintiff agreed to arbitrate her claims.

As discussed below, the Court denies Airbnb's Motion to Compel Arbitration because: (1) direct benefits estoppel cannot be used to bind the non-signatory Plaintiff into arbitration, as she received no direct contractual benefits and suffered harm while staying at the residence that was the subject of the contract; (2) South Carolina courts have declined to enforce arbitration provisions in cases of outrageous acts that are unforeseeable to reasonable consumers; and (3) Airbnb waived its right to enforce arbitration by participating in extensive litigation for over two years.

1) Estoppel

It is undisputed that Plaintiff is a nonsignatory to any agreement with Airbnb, including the TOS.[3] In its motion, Airbnb argues that Plaintiff is bound to the TOS, including the arbitration provision under a direct benefits estoppel theory. Airbnb, however, cannot overcome the presumption against arbitration which arises when the party resisting arbitration is a nonsignatory

[3] To apply estoppel, Airbnb needs to establish that it had a valid arbitration agreement with Ms. Jain. Whether Ms. Jain entered into a binding arbitration agreement is in dispute. However, the Court need not address this issue because, even if she did, the evidence does not support the application of estoppel against Plaintiff in this case. *See Hagood v. Sommerville*, 362 S.C. 191, 199, 607 S.E.2d 707, 711 (2005) (declining to address an issue when the resolution of a prior issue is dispositive).

to the written agreement to arbitrate like Plaintiff. Moreover, Airbnb cannot establish that Plaintiff as a nonsignatory received any direct benefits from the TOS.

"Whether an arbitration agreement may be enforced against nonsignatories, and under what circumstances, is an issue controlled by state law." *Wilson*, 426 S.C. at 338, 426 S.E.2d at 173 (citing *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 630–31, 630 n.5 (2009)). In South Carolina, "[a] nonsignatory is estopped from refusing to comply with an arbitration clause when it receives a direct benefit from a contract containing an arbitration clause." *Pearson v. Hilton Head Hosp.*, 400 S.C. 281, 290, 733 S.E.2d 597, 601 (Ct. App. 2012) (internal quotation marks and citation omitted). "In the arbitration context, the doctrine recognizes that a party may be estopped from asserting that the lack of his signature on a written contract precludes enforcement of the contract's arbitration clause when he has consistently maintained that other provisions of the same contract should be enforced to benefit him." *Id.* (emphasis omitted).

"This legal principle rests on a simple proposition: it is unfair for a party to 'rely on [a] contract when it works to its advantage, and repudiate it when it works to its disadvantage.' " *Wachovia Bank, N.A. v. Schmidt*, 445 F.3d 762, 769 (4th Cir. 2006) (citation omitted). However, "direct benefits estoppel is not implicated simply because a claim relates to or would not have arisen 'but for' a contract's existence." *Wilson*, 426 at 176, 426 S.E.2d at 343. "[W]hen the substance of the claim arises from general obligations imposed by state law, including statutes, torts and other common law duties, or federal law," direct-benefits estoppel is not implicated even if the claim refers to or relates to the contract or would not have arisen 'but for' the contract's existence." *Id.* (citation omitted); *see also Int'l Underwriters v. Triple I: Int'l Inv. Inc.*, 533 F.3d 1342, 1347 (11th Cir. 2008) (holding that a dispute does not arise out of or in connection with a contract for the purposes of arbitration "just because the dispute would not have arisen if the

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contract had never existed.").“Equitable estoppel is, ultimately, a theory designed to prevent injustice, and it should be used sparingly.” *Wilson*, 426 S.C. at 345, 827 S.E.2d at 177 (citing *Hirsch v. Amper Fin. Servs., LLC*, 215 N.J. 174, 71 A.3d 849, 852 (2013) (observing equitable estoppel should be used sparingly to compel arbitration and noting it “is more properly viewed as a shield to prevent injustice rather than a sword to compel arbitration”)). Finally, a presumption against arbitration arises where the party resisting arbitration is a nonsignatory to the written agreement to arbitrate. *Wilson*, 426 S.C. at 337, 827 S.E.2d at 173 (citation omitted).

Here, Airbnb cannot overcome this presumption. Plaintiff has not sued Airbnb under any provision of the TOS, and she has not exploited any agreement to any degree, let alone to the degree which would warrant the application of estoppel. Rather, Plaintiff is bringing claims imposed by statute or common law. “ ‘[W]hen the substance of the claim arises from general obligations imposed by state law, including statutes, torts and other common law duties, or federal law,” direct-benefits estoppel is not implicated even if the claim refers to or relates to the contract or would not have arisen “but for” the contract’s existence.’” *Wilson*, 426 S.C. at 343, 827 S.E.2d at 176 (citation omitted); *see also Alston v. Conway Manor, LLC*, No. 2021-UP-105, 2021 WL 1227786 (S.C. Ct. App. Mar. 31, 2021) (declining to apply estoppel when the causes of action set forth in the complaint relied on alleged breaches of common law, regulatory, and statutory duties). Thus, the Court finds that the direct benefits estoppel does not apply because Plaintiff is not seeking to enforce the contract.

Moreover, estoppel does not apply because Plaintiff has not received any benefit from any agreement with Airbnb. In *Hodge v. UniHealth Post-Acute Care of Bamberg, LLC*, the Court declined to apply equitable estoppel against nonsignatories to an arbitration agreement between a nursing home and a decedent because

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> [t]he only agreement from which Respondents even arguably received a benefit was the Admission Agreement because [plaintiff] was admitted to the Facility as a result of it. However, because the Facility allegedly caused [plaintiff's] injuries that later led to her death, we find it difficult to find she benefited even from being admitted.

422 S.C. 544, 563, 813 S.E.2d 292, 302 (Ct. App. 2018). Likewise, here, it would be difficult to find Plaintiff received a benefit from staying at the Airbnb rental when Airbnb caused her injuries and her privacy rights to be violated. Further, as discussed above, Plaintiff is not trying to enforce an agreement while attempting to avoid an arbitration provision. *Id.; see also Weaver v. Brookdale Sr. Living*, 431 S.C. 223, 233, 847 S.E.2d 268, 273 (Ct. Ap.. 2020) (opining that the plaintiff had not exploited or sought to enforce or benefit from the residency agreement "any more than a pedestrian run over by a truck has benefited from the contract for the purchase of the truck."). Therefore, the Court finds that estoppel is inapplicable in this case.

2) Outrageous Acts

South Carolina courts have declined to enforce arbitration provisions in cases of outrageous acts that are unforeseeable to reasonable consumers. "Because even the most broadly-worded arbitration agreements still have limits founded in general principles of contract law, this [c]ourt will refuse to interpret any arbitration agreement as applying to outrageous torts that are unforeseeable to a reasonable consumer in the context of normal business dealings." *Aiken* v. *World Finance Corp. of South Carolina*, 373 S.C. 144, 151, 644 S.E.2d 705, 709 (2007).[4] The surreptitious recording of Plaintiff while she was undressing in a private area of the Airbnb rental was an unexpected invasion of her privacy and unforeseeable to a reasonable consumer in a normal business dealing. Such unexpected and outrageous conduct could not possibly have been foreseen,

[4] The Court in *Aiken* also emphasized that a determination of foreseeability is to be made from the standpoint of the injured party. 373 S.C. at 151 n.6, 644 S.E.2d at 709 n.6. *See also Timmons v. Starkey*, 380 S.C. 590, 671 S.E.2d 101, (Ct. App. 2008). On the other hand, Airbnb's expectations and knowledge regarding hidden cameras is a disputed question of fact in this case.

and thus are outside of any arbitration agreement. Accordingly, the Court declines to enforce arbitration provisions in this case.

3) Waiver

Airbnb has waived any right to compel arbitration by acting inconsistently to arbitration and extensively litigating this case for almost two years before raising the issue of arbitration to the Court.

Waiver "is the intentional relinquishment or abandonment of a known right" a party "knowingly relinquish[es] the right to arbitrate by acting inconsistently with that right." *Morgan v. Sundance, Inc.*, 142 S. Ct. 1708, 1713-14, U.S. (2022) (internal quotation marks omitted); *see also Eason v. Eason*, 384 S.C. 473, 480, 682 S.E.2d 804, 807 (2009) ("Waiver is a voluntary and intentional abandonment or relinquishment of a known right.") (quoting *Parker v. Parker*, 313 S.C. 482, 487, 443 S.E.2d 388, 391 (1994)). A party may waive its contractual right to arbitration if it knew of the right and acted inconsistently with that right. *In re Mercury Const. Corp.*, 656 F.2d 933, 939 (4th Cir. 1981), aff'd sub nom. *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1 (1983)). "There is no set rule as to what constitutes a waiver of the right to arbitrate; the question depends on the facts of each case." *Liberty Builders, Inc. v. Horton*, 336 S.C. 658, 665, 521 S.E.2d 749, 753 (Ct. App. 1999) (quoting *Hyload, Inc. v. Pre–Engineered Prods., Inc.*, 308 S.C. 277, 280, 417 S.E.2d 622, 624 (Ct. App. 1992)).

Generally, the factors our courts consider to determine if a party waived its right to compel arbitration are: (1) whether a substantial length of time transpired between the commencement of the action and the commencement of the motion to compel arbitration; (2) whether the party requesting arbitration engaged in extensive discovery before moving to compel arbitration; and (3)

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whether the non- moving party was prejudiced by the delay in seeking arbitration.[5] These factors, of course, are not mutually exclusive, as one factor may be inextricably connected to, and influenced by, the others. *Rhodes v. Benson Chrysler–Plymouth, Inc.*, 374 S.C. 122, 126, 647 S.E.2d 249, 251 (Ct. App. 2007).

"[A] party's extended silence and delay in moving for arbitration may indicate a conscious decision to continue to seek judicial judgment on the merits of the arbitrable claims, which would be inconsistent with a right to arbitrate." *Martin*, 829 F.3d at 1125 (internal quotation marks omitted). In *Liberty Builders*, the court found the defendant had waived its right to arbitration where the parties sought the court's assistance numerous times on matters such as motions to amend, compel, dismiss, add parties, and restore under Rule 40(j), SCRCP. 336 S.C. at 666, 521 S.E.2d at 753; *see also Morgan Stanley & Co., LLC v. Couch*, 134 F. Supp. 3d 1215, 1230 (E.D. Cal. 2015), aff'd, 659 F. App'x 402 (9th Cir. 2016) (finding waiver where the parties "engaged in extensive discovery for almost a year" and participated in a private mediation before the defendant pursued arbitration under an arbitration agreement); *Soriano v. Experian Info. Sols., Inc.*, No. 2:22-cv-197-SPC-KCD, 2022 WL 6734860, at *3 (M.D. Fla. Oct. 11, 2022) (finding waiver where the defendant litigated for nearly six months, including filing answers, exchanging written discovery, and attending mediation).

[5] The Supreme Court recently resolved a circuit split and held the party opposing arbitration does not need to show any prejudice to establish waiver of arbitration. *Morgan v. Sundance, Inc.*, 142 S. Ct. 1708, 1714 (2022). In any event, Plaintiff has been prejudiced by Airbnb's delay in raising arbitration. The extensive litigation over the past two years has forced Plaintiff to incur discovery costs that would not have been expended in arbitration. *Evans*, 352 S.C. at 551, 575 S.E.2d at 77 (holding defendant's continuation of discovery, rather than seeking arbitration in a timely manner, prejudiced plaintiff by forcing her to incur discovery costs that would not have been expended in arbitration).

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Here, Airbnb was obviously aware of its arbitration provision in its TOS—as evidenced at the beginning of this action when Airbnb stated its unequivocal intention to file a Motion to Compel Arbitration. (Exhibit A – Email chain with Airbnb's prior counsel, stating, inter alia, "I expect I may be filing a Motion to Compel Arbitration" (May 27, 2021); "my client intends to file a Motion to Compel Arbitration" (July 7, 2021); and finally, "we plan on filing a Motion to Compel Arbitration with our Answer" (July 14, 2021)). However, Airbnb did not file any such motion until after two years of active litigation—answering the Complaint and the Amended Complaint, deposing witnesses, participating in extensive discovery and mediation, and filing numerous motions, including two dispositive motions to dismiss, which the Court denied. Airbnb has engaged in extensive motions practice requiring the Court to devote its limited resources to resolving these motions.[6] Further, Airbnb filed a motion to be allowed to amend and bring cross-claims against Defendant Thomas and a third-party complaint against defendant Riviere. Put simply, for over two years, Airbnb has acted as if no arbitration agreement existed and actively litigated this case in court and thus waived any right it may have had to arbitration. *Liberty Builders*, 336 S.C. at 666, 521 S.E.2d at 753 (finding waiver when the parties sought the court's assistance approximately forty times prior to the filing of the motion to compel, on matters such as motions to amend, compel, dismiss, add parties, and restore under Rule 40(j), SCRCP); *Evans v. Accent Mfg'd Homes, Inc.*, 352 S.C. 544, 575 S.E.2d 74 (Ct. App. 2003) (finding waiver where arbitration was neither pleaded nor raised for first nineteenth months of litigation).

[6] For example, Airbnb opposed Plaintiff's deposing Airbnb's 30(b)(6) witness filing a motion for protection and when the Court denied this motion, Airbnb filed a six-page motion for reconsideration and subsequently a 28-page Supplemental Memorandum and then a separate 13-page Supplemental Reply.

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Airbnb argues that it reserved its rights to arbitration in its Answer; and there is an express non-waiver provision in the TOS. In the cases Airbnb cites, the defendants asserted arbitration as an affirmative defense. *Id.* Here, while Airbnb asserted nineteen affirmative defenses in its Answer to the initial complaint and twenty-five affirmative defenses in its Answer to the Amended Complaint, none included an arbitration demand. Instead, Airbnb asserted in its introductory paragraph that it was reserving and not waiving its rights to compel arbitration. However, "[a] statement by a party that it has a right to arbitration in pleadings or motions is not enough to defeat a claim of waiver." *Martin v. Yasuda*, 829 F.3d 1118, 1125 (9th Cir. 2016). *See also Hooper v. Advance Am., Cash Advance Ctrs. of Missouri, Inc.*, 589 F.3d 917, 923 (8th Cir. 2009) ("A reservation of rights is not an assertion of rights."). *Bombardier Trans. (Holdings) USA, Inc. v. HDR Engineering, Inc.*, No. CV-21-01460-PHX-SPL, 2022 WL 17811661, * 3 (D. Ariz. Dec. 19, 2022). Moreover, Airbnb cannot "reserve" its purported arbitration rights while taking inconsistent actions for almost two years. *In Re Mirant Corp. v. Castex Energy, Inc.*, 613 F.3d 584,591 (5th Cir. 2010) ("A party cannot keep its right to demand arbitration in reserve indefinitely while it pursues a decision on the merits before the district court."). Further, as the court held in *Liberty Builders* "the right to arbitrate can be waived even in the face of a no-waiver provision." 336 S.C. at 667, 521 S.E.2d at 754.

Finally, Airbnb contends that it is now moving for arbitration because of the Amended Complaint, and, in particular, its inclusion of a claim for a violation of South Carolina's Unfair Trade Practices Act ("SCUTPA"). However, this case has always been about Plaintiff and the harm caused to her during her stay at an Airbnb rental, and the Amended Complaint did not alter the scope in such a way as to revive Airbnb's alleged right to arbitration. *See Manasher v. NECC Telecom*, 310 F. App'x 804, 807 (6th Cir. 2009) ("[W]e hold that the additional claims contained

in the amended complaint did not substantially alter the scope or theory of this matter in such a way as to revive the defendant's right to compel arbitration . . . ."). Furthermore, even if the Amended Complaint revived Airbnb's right to assert arbitration, Airbnb continued to actively litigate and waived its purported right to arbitration once again. Airbnb was on notice of the additional claims when Plaintiff moved to file an Amended Complaint on September 2, 2022. Airbnb, however, answered the Amended Complaint and continued extensively litigating this action in court—participating in extensive discovery and filing numerous motions—and did not move to compel arbitration for almost nine months. Airbnb's actions throughout this litigation evidence a waiver of any right it may have had to arbitration. Accordingly, the Court finds that Airbnb has waived any right it may have had to compel arbitration.

CONCLUSION

Airbnb has actively participated in this litigation for two years now, and thus has waived any right it may have had to arbitrate. Moreover, Plaintiff never agreed to arbitration, and she is not subject to the application of estoppel. Based on the foregoing, Airbnb's Motion to Compel Arbitration is **DENIED**. I have considered and rejected all of the arguments made by Airbnb in favor of its motion to compel arbitration by way of written submission and in the oral argument on the motion.

IT IS SO ORDERED.

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Aiken Common Pleas

Case Caption: Julianne Foster , plaintiff, et al VS Rhett Riviere , defendant, et al

Case Number: 2021CP0200889

Type: Order/Other

So Ordered

s/ J. Cordell Maddox Jr.

EXHIBIT D

ELECTRONICALLY FILED - 2023 Jul 26 1:41 PM - AIKEN - COMMON PLEAS - CASE#2021CP0200889

STATE OF SOUTH CAROLINA COUNTY OF AIKEN	)))	IN THE COURT OF COMMON PLEAS SECOND JUDICIAL CIRCUIT
Julianne Foster, Plaintiff, vs. Rhett Riviere, Katherine A. Thomas, Chase Enterprises, LLC of South Carolina, and Airbnb, Inc. Defendants.	)	Civil Action No. 2021-CP-02-00889 **Order Denying Motions to Compel Arbitration and Dismiss by Third-Party Defendant Rhett Riviere**

This matter comes before the Court on Rhett Riviere's (previously a Defendant, now a Third-Party Defendant) Motion to Compel Arbitration filed May 23, 2023, and his Motion to Dismiss or, in the Alternative, Stay filed on May 26, 2023. The Court held a hearing on June 13, 2023. All parties were represented by counsel. After consideration of the parties' arguments based on the pleadings, exhibits, written submissions to date, oral argument, and applicable authorities, the Court **DENIES** Riviere's motions to compel arbitration and dismiss or stay.

Factual Background

This action arose from an incident that occurred from May 17–18, 2019. (Am. Compl. ¶ 89.) Plaintiff alleges that she and her friend stayed at a rental property in Aiken, South Carolina. (*Id.* ¶ 93.) This property was owned by Defendant Chase Enterprises, which was managed by Riviere. (*Id.* ¶¶ 89–91.) Defendant Katherine Thomas held herself out to be the "host" or property manager for the property on Airbnb, Inc. ("Airbnb"). (*Id.* ¶ 95.) Plaintiff alleges that when she was staying at the property, Riviere had a hidden camera placed in a bedroom which captured recordings of her. (*Id.* ¶ 100.) Plaintiff dismissed her claims against Riviere pursuant to a confidential settlement agreement. Airbnb thereafter filed a third-party complaint against Riviere

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seeking contractual and equitable indemnification. In response, Riviere filed a motion to compel Airbnb to arbitrate the indemnification claims.

Plaintiff's friend booked the property through Airbnb and the group "paid the Defendants to rent the Airbnb property." (*Id.* ¶ 100.) Riviere argues that Airbnb's Terms of Service attached as an exhibit to its Motion to Compel Arbitration govern the transaction. He argues that Plaintiff, Airbnb, and Thomas directly benefited from the transaction and the contractual provisions, including the incorporated policies, making them subject to those Terms. Riviere further contends that Plaintiff, Airbnb, and Thomas all agreed to the Terms as a condition of their being allowed to list and stay at his properties on Airbnb's online platform. Those Terms include an arbitration provision in Section 19 entitled "Dispute Resolution and Arbitration Agreement." (Terms of Service at 290–93.) Section 19.4 then states in bold:

> Agreement to Arbitrate. You and Airbnb mutually agree that any dispute, claim or controversy arising out of or relating to these Terms or the applicability, breach, termination, validity, enforcement or interpretation thereof, or to the use of the Airbnb Platform, the Host Services, the Group Payment Service, or the Collective Content (collectively, "Disputes") will be settled by binding individual arbitration (the "Arbitration Agreement"). If there is a dispute about whether this Arbitration Agreement can be enforced or applies to our Dispute, you and Airbnb agree that the arbitrator will decide that issue.

(*Id.* at 291.) Section 19.6 then provides that the Arbitration Agreement "evidences a transaction in interstate commerce and thus the Federal Arbitration Act governs the interpretation and enforcement of this provision." (*Id.*) The Court disagrees with Defendants' arguments that an arbitrator, not the Court, should decide whether this case is arbitrable.

Legal Standard

Under the applicable Federal Arbitration Act ("FAA") "there is a potent public policy favoring arbitration, but this policy is deployed only as an aid in interpreting the scope and

enforcement of validly entered arbitration agreements." *Weaver v. Brookdale Senior Living, Inc.*, 431 S.C. 223, 229-30, 847 S.E.2d 268, 271–72 (Ct. App. 2020). The "presumption in favor of arbitration applies to the scope of an arbitration agreement; it does not apply to the existence of such an agreement or to the identity of the parties who may be bound to such an agreement." *Wilson v. Willis*, 426 S.C. 326, 337, 827 S.E.2d 167, 173 (2019) (internal quotation omitted).

Analysis

The Court **DENIES** Riviere's Motion to Compel Arbitration and the Motion to Dismiss for three reasons: (1) The theory of direct benefits estoppel cannot be used to bind the Plaintiff non-signatory into arbitration, as she received no direct contractual benefit because she suffered harm while staying at the residence that was the subject of the contract; (2) South Carolina courts have declined to enforce arbitration provisions in cases of outrageous acts that are unforeseeable to reasonable consumers; and (3) Riviere waived the right to enforce arbitration by participating in the litigation before his dismissal and the third-party claims against him. The Court has considered and rejected all of the arguments raised by Riviere (whether directly or by way of joinder with Airbnb's motion) in submissions filed and made to date in reaching its rulings on the pending motions.

I. Direct benefits estoppel does not apply here.

Riviere argues that direct benefits estoppel applies to require Plaintiff's claims to be brought in arbitration. *See Wilson*, 426 S.C. at 340–41, 827 S.E.2d at 175 (quoting *Pearson v. Hilton Head Hosp.*, 400 S.C. 281, 290, 733 S.E.2d 597, 601 (Ct. App. 2012)). The Court disagrees. Instead, the Court relies on *Hodge v. UniHealth Post-Acute Care of Bamberg, LLC*, 422 S.C. 544, 556, 813 S.E.2d 292, 299 (Ct. App. 2018), a case cited by Plaintiff, to conclude that Plaintiff

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received no direct contractual benefit because she suffered harm while staying at the residence that was the subject of the contract. Thus, the Court declines to compel the matter to arbitration.

II. The Court will not compel arbitration of outrageous acts that are unforeseeable.

In South Carolina, the outrageous torts exception has permitted "parties whose claims arose out of an opponent's 'outrageous' tortious conduct to avoid arbitration." *Parsons v. John Wieland Homes & Neighborhoods of the Carolinas, Inc.*, 418 S.C. 1, 9, 791 S.E.2d 128, 132 (2016). South Carolina first recognized the exception to arbitration enforcement in 2007. *See Aiken v. World Fin. Corp. of South Carolina*, 373 S.C. 144, 644 S.E.2d 705 (2007). The Supreme Court excepted from arbitration outrageous torts that are "unforeseeable to the reasonable consumer and legally distinct from the contractual relationship between the parties." *Id.*

Although Airbnb's third-party complaint against Riviere seeks equitable and contractual indemnification, the Court nevertheless invokes that exception here, which Plaintiff first raised in her June 16 and 29, 2023 letters to this Court. On the facts alleged in the Amended Complaint, the Court concludes the exception applies outside of the contractual relationship between the parties and declines to compel the action to arbitration. The Court disagrees that United States Supreme Court precedent disallows this result.

III. Riviere has waived the right to seek arbitration.

South Carolina traditionally followed a three-part test in assessing whether a party has waived its right to compel arbitration: "(1) whether a substantial length of time transpired between the commencement of the action and the commencement of the motion to compel arbitration; (2) whether the party requesting arbitration engaged in extensive discovery before moving to compel arbitration; and (3) whether the non-moving party was prejudiced by the delay in seeking arbitration." *Rhodes v. Benson Chrysler-Plymouth, Inc.*, 374 S.C. 122, 125, 647 S.E.2d 249, 250

(Ct. App. 2007). However, the Supreme Court of the United States recently clarified that courts could not develop an arbitration-specific variant of procedural rules such as requiring, for example, a showing of prejudice. *Morgan v. Sundance, Inc.*, 142 S. Ct. 1708, 1714 (2022). *Morgan* emphasized the general waiver rule of "voluntary relinquishment of a known right" and noted that the analysis should focus on the actions of the party who held the right. *Id.*

Regardless of the applicability of the arbitration agreement in the Airbnb's Terms of Service to the claims asserted in this matter, Riviere has waived his right to enforce arbitration by participating in the litigation and settling Plaintiff's claims against him. *See Rhodes v. Benson Chrysler-Plymouth, Inc.*, 374 S.C. 122, 125, 647 S.E.2d 249, 250 (Ct. App. 2007). Plaintiff filed her Complaint on April 28, 2021. Riviere filed an answer on June 28, 2021, and an Amended Answer on July 23, 2021. Riviere also filed a Motion to Stay on July 23, 2021, while the criminal action against him proceeded, which was denied. The parties then proceeded with discovery and have exchanged written discovery, taken depositions, and litigated discovery-related motions. Plaintiff then amended her complaint on November 30, 2022, and then unilaterally dismissed Riviere on December 20, 2022, after reaching a settlement with him. Riviere was then brought into the case in response to third-party claims the Court required Airbnb to assert in lieu of crossclaims. It was not until May 23, 2023, that Riviere moved to compel arbitration. The Court finds that the nonwaiver provision in the Terms of Service is not dispositive on the issue of whether Riviere or Airbnb waived the right to arbitrate. *Nat'l Union Fire Ins. Co. of Pittsburgh, P.A. v. NCR Corp.*, 376 F. App'x 70, 73 (2d Cir. 2010).

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Conclusion

IT IS THEREFORE ORDERED that Riviere's motions to compel arbitration is **DENIED**.

IT IS SO ORDERED.

[Electronic signature page of the Honorable J. Cordell Maddox, Jr. to follow.]

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Aiken Common Pleas

Case Caption: Julianne Foster , plaintiff, et al VS Rhett Riviere , defendant, et al

Case Number: 2021CP0200889

Type: Order/Other

So Ordered

s/ J. Cordell Maddox Jr.

EXHIBIT E

ELECTRONICALLY FILED - 2023 Aug 24 11:32 AM - AIKEN - COMMON PLEAS - CASE#2021CP020889

STATE OF SOUTH CAROLINA COUNTY OF AIKEN	)))	IN THE COURT OF COMMON PLEAS SECOND JUDICIAL CIRCUIT
Julianne Foster, Plaintiff, vs. Rhett Riviere, Katherine A. Thomas, Chase Enterprises, LLC of South Carolina, and Airbnb, Inc., Defendants.	)	Civil Action No. 2021-CP-02-00889 **ORDER**
Airbnb, Inc. Third-Party Plaintiff, vs. Rhett Riviere, Third-Party Defendant.	)	

Before the Court is Third-Party Plaintiff Airbnb, Inc. ("Airbnb") and Third-Party Defendant Rhett Riviere's ("Riviere") joint motion for an Order acknowledging that the automatic stay is in effect, staying all further judicial proceedings, or, in the alternative, granting supersedeas/stay regarding further judicial proceedings in this case. For the reasons stated below, the Court grants Airbnb and Riviere's joint motion.

PROCEDURAL HISTORY

On May 26, 2023, Riviere moved to compel arbitration ("Riviere's Motion"). On June 13, 2023, the Court held a hearing on Riviere's motion, among others. On July 26, 2023, the Court denied Riviere's Motion. On July 26, 2023, Riviere timely filed a notice of appeal of the Order.

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Airbnb and Riviere submitted their joint motion to stay on July 28, 2023. That motion has been fully briefed and is ripe for adjudication.

ANALYSIS

As Airbnb and Riviere correctly noted, Riviere's appeal from the Order is proper and, under applicable law, requires a stay of all proceedings in this case. Under Section 16 of the governing Federal Arbitration Act ("FAA"), an appeal may be taken from an order denying arbitration. *Towles v. United HealthCare Corp.*, 338 S.C. 29, 34–35, 524 S.E.2d 839, 842 (Ct. App. 1999) (finding that the circuit court's order refusing to compel arbitration was immediately appealable, citing section 16 of the FAA). Riviere has timely instituted such an appeal.

The Court agrees with Airbnb and Riviere that under the Supreme Court of the United State's June 23, 2023 precedent in *Coinbase,* this Court "must stay its proceedings." *Coinbase, Inc. v. Bielski*, 143 S. Ct. 1915, 1918 (2023) (citing *Griggs v. Provident Consumer Disc. Co*., 459 U.S. 56, 58. *Coinbase* formally recognized the mandatory stay of further proceedings required during the pendency of an interlocutory appeal on the question of arbitrability. *Coinbase*, 143 S.Ct. at 1919. This ruling is consistent with long-standing Supreme Court precedent holding that a trial court lacks jurisdiction over issues pending before the governing appellate court. *See Griggs v. Provident Consumer Disc. Co.*, 459 U.S. 56, 58 (1982).

As the Supreme Court explained in *Coinbase*, because the question on appeal is "whether the case belongs in arbitration or instead in the [trial] court," "the entire case is essentially 'involved in the appeal'" such that trial court proceedings must be stayed. *Coinbase*, 143 S.Ct. at 1919 (quoting *Griggs*, 459 U.S. at 58). The appellate court must decide "whether 'the litigation may go forward in the [trial] court.'" *Coinbase*, 143 S.Ct. at 1919 (quoting *Bradford-Scott Data Corp. v. Physician Comput. Network, Inc.*, 128 F.3d 504, 506 (7th Cir. 1997) (Easterbrook, J)).

Thus, it "makes no sense for trial to go forward while the court of appeals cogitates on whether there should be one." *Id.* (quoting *Apostol v. Gallion*, 870 F.2d 1335, 1338 (7th Cir. 1989)).

Absent an automatic stay, Congress's decision to afford a right in the FAA to an interlocutory appeal "would be largely nullified." *Coinbase*, 143 S.Ct. at 1921. Parties would be forced to proceed with trial court proceedings they had contracted to avoid via arbitration, and "many of the asserted benefits of arbitration (efficiency, less expense, less intrusive discovery, and the like) would be irretrievably lost—even if the court of appeals later concluded that the case actually had belonged in arbitration all along." *Id.* Such an outcome "could potentially force parties to settle to avoid [trial] court proceedings (including discovery and trial) that they contracted to avoid through arbitration." *Id.* Moreover, allowing the trial court to proceed would "create[] the possibility that the [trial] court will waste scarce judicial resources—which could be devoted to other pressing criminal or civil matters—on a dispute that will ultimately head to arbitration in any event." *Id.*

Stated succinctly, continuing trial court proceedings while arbitrability is pending on appeal "largely defeats the point of the appeal." *Coinbase*, 143 S.Ct. at 1921 (quoting *Bradford-Scott*, 128 F.3d at 505). Accordingly, this Court "must stay its proceedings." *Id.* at 1918.

The Court also agrees with Airbnb and Riviere that Rule 241, SCACR mandates a stay. Rule 205 of the South Carolina Appellate Court Rules provides that, upon service of the notice of appeal, "the appellate court shall have exclusive jurisdiction over the appeal" and all matters "affected by the appeal." Rule 205, SCACR. Correspondingly, Rule 241 provides that, "[a]s a general rule, the service of a notice of appeal in a civil matter acts to automatically stay matters decided in the order, judgment, decree or decision on appeal, and to automatically stay the relief ordered in the appealed order, judgment, or decree or decision," and that "[t]his automatic stay

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continues in effect for the duration of the appeal unless lifted by order of the lower court, the administrative tribunal, appellate court, or judge or justice of the appellate court." Rule 241, SCACR. None of the exceptions to this general rule enumerated in subsection (b) to Rule 241 apply here.

Finally, the Court also has discretion to issue a supersedeas under Rule 241. A supersedeas should be used to "stay proceedings in the [circuit] court, to preserve the status quo pending the determination of the appeal . . . and to preserve to appellant the fruits of a meritorious appeal where they might otherwise be lost to him." *Graham v. Graham*, 301 S.C. 128, 130, 390 S.E.2d 469, 470 (1990) (quoting 4A C.J.S. *Appeal & Error* § 662 at 494–95 (1957)) (alteration in original). In ruling on a motion for supersedeas, the "court should consider whether such an order is necessary to preserve jurisdiction of the appeal or to prevent a contested issue from becoming moot." Rule 241(c)(2), SCACR. For each of the reasons the Supreme Court discussed in *Coinbase*, proceeding with discovery and litigating the merits of the case would moot the contested issues on appeal entirely. Therefore, a discretionary stay is also appropriate.

CONCLUSION

For the foregoing reasons, the Court **GRANTS** Airbnb and Riviere's motion and **ORDERS** that all further proceedings are **STAYED** pending a final decision of the appellate courts and this Court's receipt of the remittitur confirming the same.

[Electronic signature page of the Honorable J. Cordell Maddox, Jr. to follow.]

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Aiken Common Pleas

Case Caption: Julianne Foster , plaintiff, et al VS Rhett Riviere , defendant, et al

Case Number: 2021CP0200889

Type: Order/Stay

So Ordered

s/ J. Cordell Maddox Jr.

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM AIKEN COUNTY
Court of Common Pleas

J. Cordell Maddox, Jr., Circuit Court Judge

Appellate Case No. 2023-001211
Case No. 2021-CP-02-00889

Julianne Foster, ... Plaintiff,

v.

Rhett Riviere, Katherine A. Thomas, Chase Enterprises, LLC of South Carolina, and Airbnb, Inc., ... Defendants,

Of which

Rhett Riviere, is the ..... Appellant,

AND

Airbnb, Inc., ... Respondent,

v.

Rhett Riviere, ... Appellant.

/s/ Deborah B. Barbier
Deborah B. Barbier, S.C. Bar No. 6920
DEBORAH B. BARBIER, LLC
1811 Pickens Street
Columbia, South Carolina 29201
Phone: (803) 445-1032
Email: dbb@deborahbarbier.com

PROOF OF SERVICE

The undersigned hereby certifies that on October 4, 2023, **Julianne Foster's Motions to Dismiss and Expedite Appeal** were served on all counsel of record and the Court of Appeals Clerk of Court via Email as follows:

The Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals, Clerk of Court
Post Office Box 11629
Columbia, South Carolina 29211
ctappfilings@sccourts.org

-and-

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/s/Cassy Young
Cassy Young

October 4, 2023
Columbia, South Carolina

WESLEY D. FEW, LLC
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Oct 04 2023
SC Court of Appeals

October 4, 2023

Via Email-Filing:

The Hon. Jenny Abbott Kitchings, Clerk of Court
South Carolina Court of Appeals
P.O. Box 11629
Columbia, South Carolina 29211
ctappfilings@sccourts.org

RE: Rhett Riviere v. Airbnb Inc.
Appellate Case No.: 2023-001211
Case No. 2021-CP-02-00889
Our File No.: 00305-001

Dear Ms. Kitchings:

Enclosed for filing are Julianne Foster's Motions to Dismiss and Expedite Appeal and Proof of Service for same.

Sincerely Yours,

Wesley D. Few

Enclosures

WDF/cgy

CC: All Counsel of Record (*Via Email)*
Client (*Via Email)*