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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
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MOTION TO EXPEDITE APPEAL

Pursuant to Rule 240 of the South Carolina Rules of Appellate Procedure, Plaintiff respectfully requests this Court expedite consideration of this appeal.

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 Rhett Riviere and Defendant Katherine 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 Riviere 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 opposition to Riviere's motions. Further, at the hearing on the motion, Airbnb did not voice any opposition to Riviere'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**. In other filings in the Circuit Court, Airbnb expressly stated that its Third-Party indemnification claims against Riviere are subject to arbitration. *See* Airbnb's Mot. *See* Airbnb's Reply in Support of its Motion to Compel Arbitration at 8, attached as **Exhibit D** (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.");

Airbnb's Supp. Mem. in Support of its Motion to Compel Arbitration at 8, attached as **Exhibit E** (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.").

Despite there being no opposition and both Riviere and Airbnb wanting to arbitrate Airbnb's third party claims against Riviere, on July 26, 2023, the circuit court denied Riviere's Motion to Compel Arbitration. *See* Order Denying Motion to Compel Arbitration, attached hereto as **Exhibit F**.¹ Riviere immediately filed this interlocutory appeal of that Order. On August 24, 2023, the circuit court granted Riviere and Airbnb's Joint Motion and stayed the entire action pending the resolution of this appeal. *See* Order Granting Joint Mot. to Stay, attached as **Exhibit G**.

The arbitrability of Airbnb's third-party indemnification claims against Riviere is uncontested; however, the appeal and the stay pending resolution of the appeal are adversely affecting Plaintiff and the resolution of her claims. Despite having been filed over two years ago, Plaintiff's litigation against Airbnb is still early in the discovery process. Only recently, after numerous discovery disputes and motions, and pursuant to the circuit court's orders, Airbnb produced a partial response to Plaintiff's discovery requests that were originally served a year ago. The circuit court granted Plaintiff's Motion for a Rule to Show Cause based upon Airbnb's failure to comply with discovery finding that Airbnb's actions show continuing "contemptuous conduct." *See* Order granting Plaintiff's Motion for a Rule to Show Cause at 3, attached as **Exhibit H**. The current stay pending this appeal further prolongs the time which Plaintiff has to wait to receive all the discovery that was due a year ago. Each day that this litigation is stayed is an additional day

¹ Plaintiff has simultaneously filed a Motion to Dismiss based on the lack of a justiciable controversy.

that Plaintiff will spend without a resolution of her claims. “Arbitration laws are passed in order to expedite the settlement of disputes and should not be used as a means of furthering and extending delays.” *Evans v. Accent Manufactured Homes, Inc.*, 352 S.C. 544, 550, 575 S.E.2d 74, 76 (Ct. App. 2003).

Conclusion

Accordingly, Plaintiff respectfully request the Court grant this Motion and expedite consideration of this appeal.

Respectfully submitted,

/s/ Deborah B. Barbier

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Attorneys for Plaintiff Julianne Foster

October 4, 2023
Columbia, South Carolina

EXHIBIT A

STATE OF SOUTH CAROLINA
COUNTY OF AIKEN

IN THE COURT OF COMMON PLEAS
SECOND JUDICIAL CIRCUIT

JULIANNE FOSTER,

Civil Case No. 2021-CP-02-00889

Plaintiff,

v.

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

**THIRD PARTY DEFENDANT
RHETT RIVIERE'S MOTION TO
COMPEL ARBITRATION**

Defendants.

AIRBNB, INC.,

Third-Party Plaintiff,

v.

RHETT RIVIERE,

Third-Party Defendant.

Pursuant to 9 U.S.C. §§ 3 and 4 of the Federal Arbitration Act (“FAA”), Defendant Rhett Riviere (Riviere) moves to compel arbitration of the third-party claims asserted by Airbnb, Inc. (“Airbnb”) in the above-captioned action. All of Airbnb’s claims against Riviere arise out of a transaction involving interstate commerce and are subject to a binding arbitration agreement that is governed by the FAA. Accordingly, the Court should compel arbitration.

“The policy of the United States and of South Carolina is to favor arbitration of disputes.” *Parsons v. John Wieland Homes & Neighborhoods of the Carolinas, Inc.*, 418 S.C. 1, 6-7, 791 S.E.2d 128, 131 (2016) (citing *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 590, 553 S.E.2d 110, 115 (2001)). As such, there is a strong presumption in favor of the validity of arbitration

agreements. *See Towles v. United Healthcare Corp.*, 338 S.C. 29, 37, 524 S.E.2d 839, 844 (Ct. App. 1999). Absent evidence that parties to an agreement delegated issues of arbitrability to an arbitrator, such determination is rightly made by the court. *See Palmetto Wildlife Extractors, LLC v. Ludy*, 435 S.C. 690, 700-701, 869 S.E.2d 859, 864-65 (Ct. App. 2022), *reh'g denied* (Feb. 25, 2022)). Where there is “clear and unmistakable” evidence of such delegation, the arbitrator properly determines gateway issues of arbitrability. *Id.* (citing *Doe v. TCSC, LLC*, 420 S.C. 602, 608, 846 S.E.2d 874, 877 (Ct. App. 2020)).

In the present matter, both Plaintiff Foster and Defendant Airbnb agreed to the Airbnb Terms and Conditions which contained the Arbitration Agreement. Similarly, Defendant Thomas, was required to agree to the Terms and Conditions prior to listing the property on the Airbnb platform. Defendant Airbnb has alleged a claim for indemnification against Riviere pursuant to the Airbnb Terms and Conditions. The Terms and Conditions contained the following agreement:

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.

See Terms of Service § 19.4, attached hereto as Exhibit A. Furthermore, the Terms of Service also provided that the Arbitration Agreement “evidences a transaction in interstate commerce and thus the [FAA] *governs the interpretation and enforcement of this provision.*” *Id.* § 19.6 (emphasis added). Accordingly, the clear language of the agreement dictates that the gateway issue of arbitrability be determined by the arbitrator and requires the court compel the third-party claims to arbitration conducted in accordance with the FAA.

Moreover, even if the Court were inclined to make this gateway determination itself – which it should not given section 19.6 - the plain language of the Arbitration Agreement necessitates the claims against Riviere be sent to arbitration. The Arbitration Agreement is clear that it is applicable to “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.” Terms of Service § 19.4. As an initial matter, Airbnb relies on section 18 of the Terms of Service in its contractual indemnification claim against Riviere, and therefore, it is a “claim...arising out of...these Terms” subject to arbitration. Additionally, all of Airbnb’s third-party claims against Riviere stem from and are related to Plaintiff’s allegations that she was damaged by conduct that occurred after agreeing to the Terms of Service. Thus, it is clear, the third-party claims are encompassed by the Arbitration Agreement, and to the extent there is any uncertainty, “when the scope of the arbitration clause is open to question, a court must decide the question in favor of arbitration.” *Parsons*, 418 S.C. at 7, 791 S.E.2d at 131 (citing *Landers v. Fed. Deposit Ins. Corp.*, 402 S.C. 100, 109, 739 S.E.2d 209, 213 (2013)).

Based on the foregoing, the Court should grant the motion to compel arbitration of the third-party claims because all of Airbnb’s claims fall within the scope of the Airbnb Arbitration Agreement which is governed by the FAA.

[SIGNATURE BLOCK ON FOLLOWING PAGE]

s/ James M Griffin

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Columbia, SC
May 23, 2023

EXHIBIT B

STATE OF SOUTH CAROLINA
COUNTY OF AIKEN

IN THE COURT OF COMMON PLEAS
SECOND JUDICIAL CIRCUIT

JULIANNE FOSTER,

Civil Case No. 2021-CP-02-00889

Plaintiff,

v.

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

**THIRD PARTY DEFENDANT
RHETT RIVIERE'S MOTION TO
DISMISS, OR, IN THE
ALTERNATIVE, TO STAY**

Defendants.

AIRBNB,

Third-Party Plaintiff,

v.

RHETT RIVIERE,

Third-Party Defendant.

Pursuant to Rules 12(b)(1), (3), and (6) of the South Carolina Rules of Civil Procedure, Third-Party Defendant Rhett Riviere (“Riviere”) moves to dismiss Third-Party Plaintiff Airbnb’s (“Airbnb”) claims asserted against him in the third-party complaint. The Court should grant this motion because all of Airbnb’s claims against Riviere arise out of a transaction involving interstate commerce and are subject to a binding arbitration agreement that is governed by the Federal Arbitration Act (“FAA”). Accordingly, the Court should dismiss the claims with prejudice. In the alternative, the Court should stay the claims pending the completion of arbitration.

In its third-party complaint, Airbnb alleges four causes of action against Riviere that stem from the agreement entitled Airbnb Terms of Use: (1) breach of contract; (2) contractual

indemnification; (3) interference with contractual relationship; and (4) equitable indemnification. Additionally, this same agreement – the Airbnb Terms of Use - is central to the underlying case brought by Plaintiff against Airbnb. As set forth in Riviere’s Motion to Compel Arbitration – the Airbnb Terms of Use contained a valid arbitration clause that is governed by the FAA. The scope of the arbitration clause clearly covers each of the third-party claims against Riviere. Therefore, the third-party claims are appropriately resolved in arbitration.¹

Because all of Airbnb’s third-party claims are subject to arbitration, the Court lacks subject matter jurisdiction and, additionally, is not a proper venue for the adjudication of those claims. *See Cox v. Assisted Living Concepts, Inc.*, CA No. 6:13-00747, 2014 WL 1094394, at *7 (D.S.C. Mar. 18, 2014) (“Where all claims pled by a plaintiff are subject to an [FAA] 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.”))). Moreover, the third-party complaint fails to set forth a claim constituting a cause of action for which this Court can provide Airbnb relief given all of the present third-party claims are subject to arbitration. Accordingly, the third-party claims should be dismissed, with prejudice, or, in the alternative, the Court should stay the action until such time as arbitration has concluded.

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¹ Riviere refers the Court to his Motion to Compel Arbitration (filed May 23, 2023) and the arguments contained therein.

s/ James M Griffin

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ATTORNEYS FOR DEFENDANT RIVIERE

Columbia, SC
May 26, 2023

EXHIBIT C

1 State of South Carolina) Court of Common Pleas
 2 County of Aiken) Second Judicial Circuit
 3
 4 Julianne Foster,) Transcript of Record
)
 5 Plaintiff,)
)
 6 vs.) 2021-CP-02-00889
)
 7 Rhett Riviere, et al.,)
)
 8 _____ Defendants.)

9 June 13, 2023
 10 Via WebEx Videoconferencing

11 B E F O R E:

12 The Honorable J. Cordell Maddox, Jr., Judge

13 A P P E A R A N C E S:

14 Deborah B. Barbier, Esquire
 15 Ryan L. Beasley, Esquire
 16 Wesley D. Few, Esquire
 On behalf of the Plaintiff

17 Matthew A. Abee, Esquire
 18 Beattie B. Ashmore, Esquire
 19 C. Mitchell Brown, Esquire
 Richard A. Harpootlian, Esquire
 On behalf of Airbnb, Inc.

20 Damon C. Wlodarczyk, Esquire
 On behalf of Katherine A. Thomas

21 James M. Griffin, Esquire
 22 Joseph M. McCulloch, Jr., Esquire
 On behalf of Chase Enterprises of South Carolina, LLC,
 23 and Rhett Riviere

24 Stacy S. Johnson, RPR
 25 Circuit Court Reporter

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45

E X H I B I T S

NO EXHIBITS WERE INTRODUCED

1 (The following proceedings were held June 13, 2023,
2 beginning at 10:08 AM.)

3 THE COURT: Okay. Well, let's get -- I know some
4 of you-all probably have other things to do rather than
5 argue a Zoom motion in Aiken. I've looked through all of
6 this and read everything. It seems to me the -- unless
7 you have some real different opinion that the arbitration
8 issue needs to be addressed first. That might take care
9 of a lot of things.

10 So you-all agree with that?

11 MR. McCULLOCH: Yes, sir.

12 THE COURT: Okay. All right. Good to see all of
13 you.

14 MR. HARPOOTLIAN: Good to see you.

15 Your Honor, Dick Harpootlian for the defendant
16 Airbnb. I'm just going to make some introductory
17 remarks and then Mitch Brown and/or Beattie will take
18 over.

19 This case began as a lawsuit by a woman who's
20 videotaped by Mr. Griffin's client in her room at a -- a
21 house or cabin where Mr. Griffin's client had apparently
22 videotaped a bunch of different folks over the years in
23 various states of undress or other poses. The --
24 Mr. Griffin's client has been charged criminally. He
25 also has apparently settled this case with the -- the

1 plaintiff we hear for a substantial amount of money,
2 seven figures, so that piece is over.

3 What's left is a lawsuit by the plaintiff --

4 UNIDENTIFIED MALE: What's his name?

5 UNIDENTIFIED FEMALE: Cordell.

6 UNIDENTIFIED MALE: What's his first name?

7 UNIDENTIFIED FEMALE: Cordell Maddox.

8 THE COURT: Yeah. Who's saying that?

9 MR. HARPOOTLIAN: I don't hear anybody. I don't
10 see anybody, but --

11 THE COURT: When you hear someone say Cordell
12 Maddox, it -- I mean, it's my birthday tomorrow and my
13 mother used to call me at 8:30 tomorrow morning and tell
14 me that I was killing her every year for 53 years, but is
15 anybody trying to get me personally or is this something
16 weirder?

17 Look, I ain't holding no -- no video ghost I'm
18 telling you right now. I'm not doing that. I mean, I
19 notice how slick this defendant has become Mr. Griffin's
20 client all of a sudden. I mean, that just seems to be a
21 little bit of a smear job, but go ahead.

22 All right. I assume somebody was just confirming
23 that my name was Cordell Maddox. It is.

24 Okay. Go ahead.

25 MR. HARPOOTLIAN: Well, Your Honor, we all

1 stipulate that you are, in fact, Cordell Maddox, but
2 the disagreement here is whether or not an arbitration
3 provision in the contract is applicable to the -- the
4 plaintiff and, of course, you can hear Mr. Brown in much
5 more detail on this, but we believe since they've filed
6 an amended complaint with twelve new causes of action,
7 dozens and dozens of new paragraphs, many of which refer
8 back to, which they did not do in their first complaint,
9 to the online contract that folks enter into when they
10 either book a -- book a place or offer a place to be
11 booked.

12 So we think this is relatively, you know, a new
13 suit in effect and so we can assert arbitration and,
14 again, there's all kinds of great caselaw that says we
15 can do this, and I think that -- that -- that once you
16 hear Mr. Brown and -- and Beattie walk through some of
17 this stuff you're gonna determine that this case should
18 not be consuming the resources of -- of common pleas,
19 but, in fact, should go to an arbitrator and get it
20 resolved in relatively short order.

21 I will say this; that -- that this case has now been
22 turned into a national case based on the way they've pled
23 it and the discovery they're seeking. That was not the
24 initial case and -- and so with having said that, let me
25 turn this over to Mitch Brown.

1 THE COURT: Okay.

2 Okay, Mitch. Go ahead.

3 MR. BROWN: May it please the Court, Judge? So we
4 are -- we are, as Mr. Harpootlian said, we're moving to
5 compel arbitration. He and I got involved in this case
6 at a stage not long after the amended complaint was
7 filed. A motion to dismiss had been made, had been
8 orally but not -- not formally ruled upon by Judge
9 Newman. We got involved in it and we looked and said
10 to Judge Newman, number one, you're -- you're ordering
11 some discovery here with all due respect that our State
12 Supreme Court has said is out of bounds because of
13 nonparty privacy interest. And, number two, we told her
14 we're gonna -- we're moving for arbitration -- to compel
15 arbitration right now and in the previously filed answer
16 the -- Airbnb specifically reserved its rights to compel
17 arbitration.

18 Now the question is going to be the other side has
19 -- has principally talked about waiver, they've talked
20 about some other things that I can address, but they've
21 -- but to start with I do think it's important to know
22 that the U.S. Supreme Court came out with a case called
23 Sundance in which they said that the prejudice component
24 that is out there in Federal caselaw and in -- it happens
25 to be also in South Carolina caselaw when you're looking

1 at waiver questions is not to be considered. You're
2 supposed to just use the old-timey did you knowingly
3 relinquish a known right waiver test. That's what they
4 said, okay? We still have the arbitration scope should
5 be favorable in terms of arbitration and we still have
6 -- so we still have that in terms of scope and what the
7 arbitration provision covers versus what it doesn't.
8 It's supposed to be favorable in -- in support of
9 arbitration in that regard.

10 So when you look at waiver, there -- there are few
11 facts here that are important, and I won't belabor them,
12 but, number one, in the terms and conditions, Judge,
13 there is a specific nonwaiver provision in there, okay,
14 that says if we're not enforcing this on a particular
15 occasion that doesn't mean we're not -- that we're
16 waiving anything. So they're specifically saying we're
17 not waiving things by nonenforcement.

18 Number 2, there's a -- as I mentioned in the
19 pleading, the -- Airbnb in their original pleading and
20 in their second pleading to the amended complaint
21 specifically raised arbitration and stated they were
22 not waiving arbitration.

23 So in -- and then Number 3, as Mr. Harpootlian
24 mentioned, we now have a new lawsuit that's kind of
25 restarted everything with a massive number of -- I think

1 there's five actually new causes of action, not twelve,
2 but -- but there are a lot, and there's tons of other
3 paragraphs in there many of which quote from policies or
4 standards of Airbnb that are incorporated into the terms
5 and service agreement and the plaintiff is specifically
6 and expressly relying upon those terms and pointing at
7 those terms in bringing these new claims, including
8 unfair trade practices, okay?

9 The -- the reason all of that is important is
10 because there are some cases cited in our -- in our
11 papers. One is called Haarslev versus Nissen from 2023,
12 not a South Carolina case, Your Honor, but -- but it's
13 in our papers -- in our reply papers.

14 THE COURT: Right.

15 MR. BROWN: There's another one called Solis that's
16 from 2022, also not South Carolina, but it's -- those are
17 two district court cases, Your Honor, where the courts
18 are saying look, when you bring a new complaint, that
19 restarts -- that basically restarts the case and if you
20 haven't waived arbitration, then, you know, go forward
21 with it. That's what we're doing.

22 And as I mentioned, in there first complaint they
23 didn't have all these quotes of Airbnb's policies, terms
24 and standards, all of which are incorporated in the terms
25 of service, they didn't have that in there, now they do,

1 and we've specifically not waived -- and I'd like to draw
2 the Court's attention to a quick analogy. I was talking
3 this with Dick the other day. You know, every day in
4 America millions of times there are lenders, there are
5 landlords that say, you know, payment is -- is late and
6 I've got a right to foreclose on you or a right to do
7 this or that to you, but, you know what, I'm not waiving
8 my rights, but I'm gonna take your payment, okay? The
9 Supreme Court has said now -- the U.S. Supreme Court
10 has said we're supposed to treat waiver of arbitration
11 exactly like we treat waiver of everything else and here
12 Airbnb specifically stated we are not waiving arbitration
13 repeatedly. They made their amended complaint, we moved
14 to compel the arbitration, which we specifically did not
15 waive, and I would argue it's analogous to those, you
16 know, very common situations that people find themselves
17 in all the time where there's no waiver of a contract
18 right just by virtue of -- of something that's happened.

19 The -- the arguments that they make, Your Honor,
20 against us are on this, first, they say that we didn't
21 prove that Mrs. Jain, who is the friend of -- of the
22 plaintiff, J-A-I-N, that she agreed to the particular
23 terms of service, okay? That's one of their arguments
24 that they make. We didn't think, number one, that that
25 was even a contested fact because in their amended

1 complaint they reference Mrs. Jain's lawsuit in which
2 Mrs. Jain in Paragraph 13 of her lawsuit says that
3 she booked through Airbnb and Airbnb hosted the house
4 and when you do that you are accepting the terms and
5 conditions of the Airbnb platform and online services.

6 Number 2, for months and months plaintiff has had
7 evidence that was produced regarding the fact that
8 everybody knew this was an Airbnb case, everybody knew
9 this was an Airbnb house and Mrs. Jain signed up and
10 clicked on the online documentation to become a -- a
11 guest and, therefore, the terms of service apply.

12 Their second argument is that well, plaintiff is a
13 non-signatory and our argument there as you might guess,
14 is direct benefits estoppel. Plaintiff is repeatedly,
15 and I'm trying to -- I wish I had it handy with me, but
16 I counted -- I mean, I'll give you a quick rundown,
17 these are paragraphs in their complaint that -- that
18 quote parts of standards or terms or policies in the
19 Airbnb. Number 4, 12, 32, 59, 60, 61, 70, 71, 72, 73,
20 and then it keeps on going. They're quoting the very
21 terms in their lawsuit that they're now saying we don't
22 want to be bound by the arbitration part of those terms,
23 we just want to benefit and bring a lawsuit based on
24 these terms. That is exactly what direct benefits
25 estoppel is all about and you -- and you can't do.

1 There's a case that I handled part of called --
2 Wilson versus Willis I think is the -- I think is the
3 State Supreme Court's latest and greatest on this direct
4 benefits estoppel and in that case the Court said look,
5 it's not a but for test. You can't just simply say but
6 for a contract I wouldn't be sued. That's not good
7 enough. You have to -- the plaintiff has to be pointing
8 at parts of the contract and relying on that. Well,
9 that's what they're doing here numerous, numerous times
10 and, therefore, the Willis -- the Wilson versus Willis
11 case is completely distinguishable and this is right on
12 point as a direct benefits estoppel case.

13 And I think, Your Honor, that might be the sum total
14 of the -- ostensibly what we're talking about here. We
15 have made a motion, Your Honor, that is linked to this
16 motion, which is just a common sense type thing, where
17 we say, Judge Maddox, while you're -- while you're
18 considering whether to compel arbitration, please, you
19 know, don't allow other judicial proceedings to go on,
20 so we're asking for a limited stay there while you're
21 considering this because you're kind of putting the
22 cart before the horse if you just allow all this other
23 judicial stuff to go on while you're considering whether
24 any of it should be going on, so we have made that motion
25 too and I just mention that one briefly. That's kind

1 of --

2 THE COURT: Well, just for practical matters, the
3 fact that there may be a -- multistate additional cases
4 involved, I mean, are you eventually moving toward a
5 class or are these separate actions?

6 And that's not -- not anything that really -- I'm
7 just kind of curious.

8 Does anybody know?

9 MR. BROWN: Your Honor, I don't know what their
10 intentions are, but I think -- and I don't believe that's
11 been brought up yet, but I believe that that would be
12 blocked by the terms of service also, but --

13 THE COURT: Okay.

14 MR. BROWN: -- but I'm not -- I'm not saying that
15 definitively because I haven't looked at that issue
16 closely enough.

17 THE COURT: But you might have -- you might have
18 some cases moving forward because I don't know which
19 states you're -- but I do know that arbitration laws in
20 each state are different, so you may have some moving
21 forward.

22 MR. BROWN: You're right, Your Honor, they are
23 different, but what we have here is, as Mr. Harpootlian
24 was going through there, we have a single incident
25 involving this -- this lady who is trying to essentially

1 create an unfair trade practices case and a punitive
2 damages case or -- you know, it's got to be one or the
3 other, treble damages or punitive damages, and pointing
4 to all kinds of other events and other places as evidence,
5 so she's wanting to expand the scope of her case to make
6 it not just about her, but about lots of other conduct
7 involving Airbnb. That's what she's really trying to do
8 here. She hasn't tried to make a motion for class
9 certification that I'm aware of or anything like that.

10 THE COURT: Okay. Yeah, I'm just curious. Okay.

11 MR. HARPOOTLIAN: Your Honor, also if Mitch is
12 done, Mr. Griffin made a motion to compel arbitration.

13 MR. BROWN: That's right. And I did -- I did leave
14 that out, Your Honor, and I apologize.

15 Good -- good call, Dick, on that.

16 I'll let Mr. Griffin. He's more than capable of
17 speaking for himself, but the point there we would simply
18 make is a third-party claim was brought against him and
19 he's moving to compel arbitration as well, so, you have
20 multiple parties asking to compel arbitration.

21 THE COURT: I think he -- he left in shame. Oh,
22 there is he. Okay. Sorry. You know, they were -- they
23 were painting you with this awful action.

24 MR. GRIFFIN: Judge, you know, these -- these video
25 cameras make me very nervous. Very nervous.

1 THE COURT: Well, look -- look, I just assume in
2 every Airbnb. I just wave in the room. But, yeah,
3 anything you want to say to that?

4 MR. GRIFFIN: To -- to me, Your Honor?

5 THE COURT: Yeah.

6 MR. GRIFFIN: We -- we do have a separate motion.
7 We did settle with the plaintiff, it's a confidential
8 settlement, and we thought we were out of the case.
9 Airbnb then filed a third-party action to bring us back
10 in the case. They've alleged claims for indemnification
11 contractually and equitable indemnification and -- and
12 we dispute, frankly, Judge, and we're not admitting that
13 -- that our client, Mr. Riviere, had an agreement with
14 Airbnb, but nevertheless they're suing under the terms
15 of that agreement and so we have moved to compel
16 arbitration on Airbnb's third-party claim against us. I
17 don't think Airbnb opposes that motion, but -- so -- but
18 I can't speak for them, but that -- that is pending and
19 we do request that -- that the case either be stayed or
20 dismissed on the third-party claim and that -- and that
21 any claim by Airbnb be pursued under the terms of the
22 arbitration provision.

23 THE COURT: Okay.

24 All right. So that's just basically piling on.
25 You've got another claim. Okay.

1 All right. I mean, I -- I do want to hear from
2 the people who don't want to have the arbitration. I
3 mean, look, I've always been personally disappointed
4 that you can have a contract that would require
5 arbitration in contractual terms and then a tort occur
6 during the performance of that contract and it be held
7 in arbitration. I mean, that's -- I've been against --
8 I've been ruled against a lot on that, so I'm -- I have
9 been beat into submission on it, but I sure want to hear
10 from the other side.

11 MS. BARBIER: Good morning, Your Honor.

12 THE COURT: Good morning.

13 MS. BARBIER: Debbie Barbier for the plaintiff.

14 THE COURT: Good morning.

15 MS. BARBIER: Along with Mr. Beasley and Mr. Few
16 we represent Ms. Julianne Foster, and -- and like
17 Mr. Harpootlian, I'd like to give you just a brief
18 overview of the case because we have been in front of
19 a lot of the circuit court judges in this case, but we
20 have yet to have the pleasure of being in front of you
21 on it, so I just wanted to give you a little bit of some
22 background.

23 Ms. Foster, our client, is a working mom, mother of
24 two, single. She's the victim in one of three criminal
25 charges pending against Mr. Riviere, and that's

1 Mr. Griffin's client, in Aiken County. She got informed
2 in 2018 by SLED that she had been repeatedly videotaped
3 while she was undressing in Mr. Riviere's Airbnb. She
4 was staying in a -- in a house of his that's in Aiken
5 because she attended a tennis tournament with some of
6 her girlfriends.

7 And so in SLED's investigation, they searched
8 Mr. Riviere's properties and they found 42 electronic
9 devices and on those devices are thousands of videos of
10 young girls and women who are undressing, who are getting
11 in the shower, and many of them were in town for horse
12 competitions and things like that, but let me -- let me
13 go to why we're here today --

14 THE COURT: Sure.

15 MS. BARBIER: -- because I think the timing of the
16 motion of Airbnb is very important. On -- we have had a
17 number of discovery battles in this case over two years
18 and they haven't gone so well for Airbnb, but on April 5th
19 Judge Jocelyn Newman heard a number of motions related
20 to discovery in this case and she granted both of our
21 motions to compel discovery and she ordered Airbnb to
22 produce, you know, hundreds of thousands of documents
23 and they were ordered to retake their Rule 30(b)(6)
24 deposition and appoint multiple representatives for each
25 and every one of the topics, the twenty-four topics, that

1 they did not comply with the Court's previous rulings on,
2 and that took us nine months to get to the Rule 30(b)(6)
3 deposition because they -- they moved for protective
4 order, they lost that, they moved to reconsider, and it
5 was a long drawn out battle to get there and then once
6 they got there they sent one representative who basically
7 refused to answer a number of questions and so Judge
8 Newman ordered them to retake it.

9 Then they lost a motion that they filed to quash
10 a deposition notice for their head of their global
11 operations and so as we have stated in our rule to show
12 cause, which is also before you today, they're just
13 refusing to produce documents that Judge Newman ordered
14 them to produce. And we did receive some documents on
15 June 5th and basically what those documents reveal is
16 that there are about 35,000 Airbnb guests that have
17 complained about being secretly videotaped, and a lot
18 of those guests are women, they're children. They have
19 been filmed while they were in the shower with hidden
20 cameras in the vents, hidden cameras in light bulbs,
21 hidden cameras in the walls. They -- women and children
22 have been filmed in the bedrooms of Airbnb with hidden
23 cameras in night lights, in alarm clocks, in speakers.
24 They've been filmed going to the toilet, they've been
25 filmed -- people have filmed having sex, children have

1 been filmed while they've been undressing, bathing and
2 just being naked, and private conversations have been
3 recorded in violation of Federal law. And these are
4 hidden cameras with wi-fi capability so that host can
5 listen and watch unsuspecting people in realtime --

6 THE COURT: Right.

7 MS. BARBIER: -- and predators can post videos to
8 the dark web, so -- so that's what we're dealing with.
9 This is what they have had to produce and basically what
10 the documents show is that Airbnb does nothing about
11 these complaints. The reason we want discovery on them
12 is -- is because we can prove and just with the little
13 bit of discovery we've gotten that they have -- they
14 don't call law enforcement, they don't confiscate video
15 cameras, they warn hosts when a complaint is filed and
16 they give hosts time to destroy or hide evidence, they
17 don't notify other guests who stay there that they've
18 been filmed, they don't collect evidence to provide to
19 law enforcement. In many cases they never even kick
20 the perverts and the predators that are, you know, being
21 hosts on Airbnb off the platform. Instead they continue
22 to allow people to -- to host Airbnb's that have done
23 this. They allow felons and people with criminal
24 histories to be Airbnb hosts.

25 So in this case, Your Honor, what we have is the

1 perfect storm. We have a -- a predator like Mr. Riviere
2 who's allowed to be an Airbnb host combined with a company
3 that touts itself as providing safety as its number one
4 priority in a trusted community and we have a lot of
5 unsuspecting people in South Carolina who have been
6 videotaped by them. It's a public safety issue, Your
7 Honor, and every time we get -- or Airbnb gets a bad
8 ruling, they hire new lawyers.

9 And so immediately after Judge Newman's hearing in
10 which they lost all these motions, and -- and I have to
11 tell you in the hearing with Judge Newman I said Judge,
12 when Airbnb gets a bad ruling they go onto new lawyers.
13 This is their fourth set of lawyers. Fourth set. And,
14 you know, we have been in front of Judge New -- Benjamin
15 on this case, Judge Keesley, Judge Pope, Judge Dennis,
16 Judge McLeod and Judge Newman, and Airbnb has -- they've
17 repeatedly thumbed their noses at the orders of these
18 judges. When motions are granted, they simply refuse to
19 comply. They don't produce documents. They haven't
20 produced -- they still haven't produced one e-mail, one
21 internal e-mail.

22 And so what we have now is that they've decided
23 things are going so badly they want to try to get to
24 arbitration and this is not the first time that they
25 have mentioned arbitration. In fact, when this case

1 was first filed their lawyer said we're gonna be
2 transparent. He asked for a number of extensions to
3 answer, but he said I want to let you know we're gonna
4 move for arbitration and I said well, can you show me an
5 agreement where my client agreed to arbitrate and what
6 came out was that there was no agreement. In fact, they
7 couldn't even show that Ms. Jain, the person who rented
8 the property, had agreed to the terms of service. There
9 is no document that Ms. Jain has signed that they have
10 produced and no document that Ms. -- they admit and it's
11 undisputed that -- that Ms. Foster, our client, didn't
12 sign anything. There's simply no agreement.

13 And so, Your Honor, you know, that -- that's how we
14 got to this posture. We got to this posture because they
15 don't like where this case is headed and they don't like
16 what evidence is coming out and they've been hiding behind
17 arbitration in sexual assault cases and sexual, you know,
18 voyeurism cases for years. They have stated in their
19 brief that this isn't a sexual assault case. Well,
20 voyeurism in South Carolina, if you look at the statute,
21 is a sexual offense. One of the elements of voyeurism
22 is that it was done for sexual gratification and so it
23 is a sexual offense and they have -- they tout to the
24 public that they were no longer after 2021 going to move
25 sexual offense cases to arbitration, but that's exactly

1 what they've done here because it just hasn't gone well
2 for them.

3 But getting to the --

4 THE COURT: Well, let me -- let me -- and I don't
5 mean to -- I want to interrupt you, but it seems to me,
6 the Court, the decision about arbitration is that there's
7 an agreement and I assume there was some agreement to
8 the terms of use and to arbitration. Is that -- does
9 that exist?

10 MS. BARBIER: That -- that does not exist, Your
11 Honor. My client was a -- stayed in the Airbnb and she
12 did not sign up for the Airbnb, she did not sign any
13 terms of service. There's no document, and they don't
14 dispute that, that she signed --

15 THE COURT: Now you're taking -- you're not taking
16 the position that she was a non-signatory, therefore,
17 you're saying there is no document for whoever rented
18 that Airbnb to require arbitration or a contract?

19 MS. BARBIER: Right, Your Honor. So Ms. Jain,
20 Michele Jain, is the one who actually rented the Airbnb
21 through Airbnb, okay? They have not produced a document
22 that she signed --

23 THE COURT: Okay.

24 MS. BARBIER: -- indi -- indicating that -- that she
25 agreed to those terms of service. They have produced a

1 computer printout. Like it's -- it's one line basically
2 with the date saying that she agreed to the TOS, which
3 I'm assuming is terms of service, but they have not
4 produced an affidavit from Ms. Jain or any employee of
5 Airbnb indicating Airbnb that they have a signed document
6 that she did sign agreeing to arbitrate and our client
7 didn't agree to any of that and is not suing in contract,
8 she's not suing over a breach of the terms of service,
9 she's suing in tort and she's suing under unfair trade
10 practices, and the -- the operative facts, Your Honor,
11 that she's suing under in the amended complaint, the
12 amended complaint was filed in September of last year,
13 a motion to amend, so Airbnb has known about an amended
14 complaint for a very long time and they never have once
15 raised arbitration until they got ruled against on
16 April 5th and they did not mention to Ms. -- I'm sorry,
17 to Judge Newman that they were going to be moving for
18 arbitration.

19 There's a transcript of that hearing and I invite
20 you to read it because they do not say we're moving to
21 -- we're moving to arbitrate. In fact, Your Honor, that
22 -- that was afterthought after they hired their fourth
23 set of lawyers, so -- but in basic contract law, Your
24 Honor, and arbitration law in South Carolina there's no
25 support for Ms. Foster being forced to arbitrate. She

1 didn't consent to anything related to their terms of
2 service or anything related to arbitration. If Airbnb
3 wanted to make every guest -- every person that stays in
4 their property sign a terms of service or an arbitration
5 agreement, they could easily do that. They could require
6 the person that signs up for the Airbnb to make every
7 person staying in the Airbnb sign the terms of service
8 or sign an arbitration agreement. They don't do that.
9 It would be very simple, but they don't do that, and so
10 there is no --

11 THE COURT: What about -- go -- no, go ahead.
12 Finish your thought, then I want to ask you about the
13 direct benefits.

14 MS. BARBIER: No, I'm sorry, Your Honor. I was just
15 gonna say that it would be very easy for them to require
16 that, but they don't require that and the law is not that
17 -- I mean, the law is not that any person who stays in an
18 Airbnb is subject to arbitration. I mean, that -- the --
19 the heart of arbitration law is consent and you can't
20 consent to something that you don't know exists, so --

21 THE COURT: Well, and I think, Mr. Brown, you're
22 saying that, in fact, under direct benefits estoppel if
23 you stay in an Airbnb, you are subject to arbitration,
24 right? I just want to make sure I've got the arguments
25 right.

1 MR. BROWN: Your Honor, I don't think there's a
2 dispute that the plaintiff herself didn't sign something.
3 I think to that extent we're in agreement.

4 THE COURT: Right.

5 MR. BROWN: However, I thought everybody agreed that
6 there was an agreement out there, a terms of service
7 agreement. You can't click and become -- you can't rent
8 the Airbnb house without clicking in the terms of service
9 and agreeing to that. It's all on the web. There's not,
10 you know, some deal where somebody shows up and hands you
11 a signature -- a document and says please sign this and
12 let me walk off and do that. I mean, that's not how any
13 of this works, of course.

14 THE COURT: So you're saying as a part of the rental
15 process online, you go through, you look for your place,
16 you find it, you click on your dates, et cetera, and
17 then the last thing you click is a TOS button and at that
18 point -- at that point you and everyone who uses that
19 property are subject to arbitration even for tortious
20 acts or criminal acts?

21 MR. BROWN: Well, we don't even have to go that far,
22 Judge, because the -- here what you have, and I'll just
23 give you a couple of quick examples, Paragraph 94 of
24 their amended complaint says plaintiff and her friends
25 relied upon -- this is plaintiff, not just Mrs. Jain who

1 -- who signed the agreement -- plaintiff and her friends
2 relied upon Airbnb's name, reputation and Airbnb's
3 claims that it will provide a safe and trustworthy rental
4 facility. Now where do these Airbnb, quote, claims
5 come from? They -- they reference and point to various
6 policies. All those policies that they're pointing to
7 are on the Internet and they're all incorporated in the
8 terms of service and they are specifically pointing at
9 those things. Then the -- then the plaintiff says that
10 she -- that Airbnb owed a duty as a result of the special
11 relationship, okay? Where does that come from? The --
12 the contract that they are pointing at. Then she also
13 says that Airbnb -- Paragraph 168 says Airbnb hosts must
14 register through Airbnb's platforms to offer properties
15 for rent, so that is the -- that's a statement by them
16 in their complaint, in their amended complaint.

17 THE COURT: But -- but what you said earlier was
18 that under the theory of direct benefits estoppel that
19 -- that I think our South Carolina Supreme Court has
20 espoused that -- and I'm just trying to get sure that
21 Ms. Barbier's client would be subject to arbi --
22 arbitration under that theory whether she signed or not.
23 That -- and, again, I'm not agreeing with it. I'm just
24 want to make sure I'm clear on what you're saying.

25 MR. BROWN: Understood, Judge, and -- and, yes, that

1 is correct. We are saying that because her claims -- she
2 is trying to directly benefit from the standards, terms,
3 policies and everything in the website, which are all
4 incorporated in the terms of service. That's what she's
5 basing her claims on. She's saying that these -- Airbnb
6 goes out there and puts these things on the web and make
7 -- represents under her theory that it is safe and all of
8 this and then she wants to bring that and say there's a
9 special relationship duty as a result of all of that.
10 They do allege as well, Judge, that -- that the plaintiff,
11 in fact, paid part of the -- you know, her share of the
12 rent on this and so --

13 THE COURT: Well, yeah. And Ms. -- and I didn't --
14 and I didn't -- and I didn't mean to interrupt you. I
15 knew that if I asked that question -- but I wanted to
16 make sure you-all were on the same page, so, and I want
17 to give you a chance to respond to Mr. Brown's theory
18 that because she's there that there's a South Carolina
19 Supreme Court case because, I mean, look, and I don't
20 mind saying, and it's probably not the best thing to
21 do, I don't like these arbitration agreements that hook
22 people in, and I'm not sure that any of us would in real
23 life, but every time I've -- I've ruled that way, you
24 know, it comes back at me like a ping pong ball, but --
25 with a little rock in the middle of it.

1 So go ahead. I just wanted to make sure that --
2 that we were on the same page and I interrupted your
3 argument, so I apologize.

4 MS. BARBIER: Oh, not at all, Your Honor.

5 Well, first of all, plaintiff is not citing to --
6 she's citing -- when Airbnb is touting its commitment to
7 safety, they're doing it on its website. She's not --
8 she's not citing to the terms of service because the
9 terms of service don't make any representations as far as
10 I can tell that help a plaintiff or that help a consumer.
11 It's a completely one-sided document in favor of Airbnb
12 and basically makes no promises or representations about
13 anything, so she's not citing that.

14 And the fact that Mr. -- that the defendants are
15 saying that it's incorporated into their terms of service
16 is -- frankly, it's ridiculous, Your Honor. You can say
17 that about anything. Ms. -- Ms. Foster is suing in tort.
18 She's not suing for a breach of contract or a breach of
19 the terms of service. She's suing in tort and she's
20 suing under the South Carolina unfair trade practices.
21 And, Your Honor, estoppel does not apply here. We have
22 -- we have cited a number of cases in our brief that
23 basically are very analogous because Ms. Foster received
24 no benefit from staying in the Airbnb. She was filmed
25 and violated and traumatized by staying in the Airbnb.

1 She didn't get re -- she didn't get any benefit from it
2 and there's a South Carolina case directly on point where
3 the Court said that, you know, a person who went on a
4 premises and was harmed didn't receive any benefit. In
5 fact, the -- any harm they received was far outweighed
6 by any benefit. She didn't know she was being lured to
7 that Airbnb by Mr. Riviere, who was a predator. If she'd
8 known that, she never would have agreed to stay there.

9 And, Your Honor, so what they're also saying too
10 with regard to estoppel doesn't apply to Ms. Foster
11 because under South Carolina law there has to be -- you
12 know, the arbitration provision would have to comply with
13 South Carolina law and here this is a provision that
14 Ms. Foster never saw. I mean, they deposed her for a
15 full day, Your Honor, and asked her and -- and, frankly,
16 grilled her about every traumatic experience that she's
17 ever incurred in her life to try to show that the fact
18 that she was videotaped is of no consequence, and so they
19 could have asked her, and I -- and I don't believe they
20 did, whether or not she agreed to arbitrate or whether or
21 not she agreed to the terms of service, but she -- but
22 the fact is she didn't. And Mr. Brown saying that, you
23 know, the terms of service are required for every person
24 who goes on Airbnb's website to -- to rent or to be a
25 host, that's not evidence, Your Honor. That is not

1 evidence. They haven't provided an affidavit from an
2 Airbnb employee, they haven't provided an affidavit from
3 Ms. Jain, they haven't provided any signed document by
4 anybody that this was agreed to.

5 So the threshold issue that Your Honor has to look
6 at is, is there an agreement? They haven't provided proof
7 of that. Just because their lawyers say in a pleading
8 that there is an agreement in the terms of service that
9 she must have clicked on, that's not proof. And -- and
10 in our brief, Your Honor, we have noted that in other
11 cases Airbnb has provided affidavits that say that. They
12 didn't do that here and there must be a reason for that
13 and that is because there's sometimes, Your Honor,
14 situations where people are allowed to -- to rent
15 properties or host properties and maybe that terms of
16 service didn't get clicked on, but there's no proof of
17 that, and even if there were proof --

18 THE COURT: That is a threshold -- I mean, look,
19 that -- that's sort of an end and beginning discussion
20 for me. I need to know that before I can -- and I -- I
21 trust all of you-all, I know most of you and I trust you,
22 but I do need to know whether or not there was an actual
23 memorialization of the fact that they were agreeing to
24 the terms of service, which I'm not gonna ask you to
25 produce right now. I'm just saying that seems to me to

1 be sort of the threshold. If that doesn't exist, then
2 this is an easy case. If that exists, then it's basically
3 the rule of contracts clashing horns with the rule of
4 torts and arbitration agreements, but it --

5 MS. BARBIER: Well, Your Honor, I'm assuming that
6 if it existed we would know it by now. You know, they
7 talked about filing a motion for arbitration two years
8 ago and when I asked them to produce it, they never filed
9 the motion to compel arbitration, and so they haven't
10 done that now either, but I think discovery has gone so
11 badly they have decided to try it anyway.

12 I would like to address waiver, Your Honor, because
13 in --

14 THE COURT: Sure.

15 MS. BARBIER: -- because I think, you know, it's an
16 important issue in this case. Basically what Airbnb has
17 done over the last two years has acted as a condition of
18 an alleged right to arbitrate and, first of all, moved to
19 dismiss the original complaint and they moved to dismiss
20 the amended complaint. They vigorously opposed amending
21 our complaint. They have produced discovery, they have
22 par -- participated in depositions. A number of
23 depositions. They have filed an answer to the amended
24 complaint and asserted cross-claims against Katherine
25 Thomas. They have asserted cross-claims against Rhett

1 Riviere and brought him in -- back in. They have attended
2 every deposition that's been taken. They engaged in a
3 two-day 30(b)(6) deposition. They engaged in mediation
4 in this case, which obviously didn't resolve the case.

5 They, as I said, took the plaintiff's deposition
6 and have propounded extensive discovery to her. They
7 have sent out subpoenas to her ex-husband, to her yoga
8 instructor, to her best friend. They have -- they have
9 done a lot of discovery looking into Ms. Foster to try to,
10 frankly, smear her and -- and deter her from wanting to
11 bring this case.

12 They have objected to every discovery request and
13 engaged in endless objections, motions to quash, motions
14 to reconsider, motions for protective orders and so, you
15 know, they can't just say that filing an amended complaint
16 revived their rights. There's no law to support that.
17 There's no law of revival in South Carolina that they
18 have just made up in their -- in their motion. The law
19 is that if you act inconsistently with a -- for an
20 extensive period of time that you waive your right to
21 assert arbitration. You can't -- I mean, under their
22 theory when would there -- when would waiver not apply?
23 I mean, would it be five years into the case? They could
24 -- and getting ready for trial and they could decide that
25 they want to assert their right to arbitrate?

1 That just simply doesn't make any sense, Your
2 Honor. We have not -- the only thing that we did in
3 our complaint is that we added more detail about the
4 misconduct of Airbnb and the notice that they have had
5 for over a decade that this problem has been occurring
6 and the public safety issue that it presents to not just
7 South Carolinians, but people all over the world who are
8 being injured and who are being victimized by people that
9 host Airbnb.

10 So, Your Honor, I think waiver's an important, you
11 know, consideration for this Court. I don't think it's
12 fair that the plaintiff has been expending the amount
13 of resources that we've been expending for two years in
14 fighting discovery battles with a -- a company that
15 because they make billions of dollars have decided that
16 the rules of this Court don't apply to them and have
17 decided unilaterally that they're not going to follow the
18 judges' orders because it doesn't suit them and because
19 it will open them up to public scrutiny for what they do
20 and don't do when people rent Airbnb's and the dangers
21 that exist within Airbnb. This is a -- this is a very
22 important public safety issue, Your Honor. You know,
23 there -- there are a lot of unsuspecting consumers in
24 South Carolina and South Carolina is a huge state for
25 Airbnb.

1 THE COURT: Yeah, I know.

2 MS. BARBIER: We have big tourism industry as you
3 know and -- and there are lot of people that are being
4 endangered by the -- the conduct of the people that host
5 Airbnb's and whose rights are being violated. So it's
6 a very important public safety issue. It's not an issue
7 that should be litigated in secret in arbitration in
8 Chicago or some -- somewhere else. It's an important --
9 it's an issue that's very important to South Carolinians
10 and that they deserve to know about. That's why we
11 brought an Unfair Trade Practices Act claim because when
12 we delved into this case and learned what Airbnb was
13 doing and -- it is a consumer fraud. They represent that
14 they are committed -- their number one priority is safety,
15 and that's simply not true. Their number one priority is
16 making billions of dollars at the expense of millions of
17 people who are being victimized. So, Your Honor, we --
18 we hope that you'll take that into consideration.

19 As far as the motion to stay goes, Your Honor,
20 they have effectively stayed this case for two years by
21 not providing discovery. I mean, the only meaningful
22 discovery production we got was about eight days ago on
23 June 5th where they produced four hundred and some twenty
24 thousand documents after two years of -- of going to
25 court over it and now that they've done that they don't

1 want the substance of these documents revealed so they
2 want us to go to arbitration. And, Your Honor, I fear
3 that, you know, if -- they're just gonna keep hiring new
4 lawyers, keep going to new judges and keep disobeying
5 orders of this Court until somebody puts their foot down
6 and says, you know, you have to produce discovery that
7 judges have ordered you to produce.

8 Judge -- Judge Newman, Judge Jocelyn Newman, took I
9 think it was a four-hour hearing. She read the entire
10 transcript of the 30(b)(6) deposition and she looked at
11 every request to produce that we moved to compel and gave
12 a lot of consideration to this case. And un -- unlike
13 Mr. -- what Mr. Brown says she wasn't told during that
14 hearing that we're gonna seek arbitration. That just
15 didn't happen. Basically what they said is we don't think
16 we should have to produce these documents and now that
17 they're being forced to they've come up with this --
18 frankly, Your Honor, this is a frivolous motion. This
19 is a frivolous motion that you should strike because it
20 is being done in an effort to thwart the orders of this
21 -- of South Carolina judges.

22 MR. ASHMORE: Judge --

23 THE COURT: Okay. Well, look, and I want to give
24 everybody time to talk, but I am -- you know, this is
25 one of those days with Zoom that I think I have twenty

1 motions today and I've got enough to chew on. I do need
2 -- I would --

3 MR. FEW: Your Honor --

4 THE COURT: Yeah.

5 MR. FEW: -- if I may, this is Wes Few. I know
6 the other side's had a couple of people argue. A quick
7 point. Rule 6(d) requires an affidavit to be filed
8 with a motion. In order for the Court to make a
9 determination as a factual matter that there is an
10 arbitration agreement, Airbnb needs a witness that can
11 testify to that. They have not done that. We're two
12 years into it. They have not even complied with
13 Rule 6(d).

14 For perspective, we were in front of Judge Markley
15 Dennis on June the 6th of 2022 when he ordered them for
16 the first time to comply with our discovery and at --
17 in that hearing their first set of lawyers I argued
18 to Judge Dennis they have yet to identify one single
19 witness. The young lawyer from Charlotte stood up and
20 he said yes, we have and I said, okay, well, let's look
21 at your discovery responses, and he was right, they had
22 identified witnesses, the parties to the lawsuit. They
23 had not identified one single witness from Airbnb that
24 could testify to any fact regarding to this case on
25 June the 6th of 2022 and then when they filed these

1 motions a year later every one of these lawyers knowing
2 that the motion had to be supported by an affidavit that
3 could establish that there was an arbitration agreement
4 they didn't do it and it's similar to these trade secret
5 cases where lawyers try to say someone has a trade secret,
6 trust me on it. We don't have to trust them on it. They
7 have to establish it as a factual matter.

8 They didn't get an affidavit from Michele Jain.
9 They still don't have an affidavit from anybody that can
10 say Michele Jain did this and they didn't do it with the
11 motion. So that answers the question of whether or not
12 there is an agreement and then the waiver's a whole other
13 issue that Debbie's already addressed.

14 THE COURT: Well, and that -- and that was what
15 I was alluding to before. It seems to me that the
16 threshold question for me is whether or not there's a
17 memorialization of this person agreeing to be bound by
18 the terms of service and -- and I do realize that it's
19 just a click. I've been warned by my oldest son, who
20 is -- at one point worked for Google to never click on
21 terms of service without reading it, but I do it all the
22 time and God knows what Bangladeshi people have my bank
23 account or, your know, whatever, but, I mean, that seems
24 to me to be sort of a threshold question for me that I
25 need an answer for.

1 MR. ASHMORE: Your Honor, if I may, Beattie Ashmore.

2 THE COURT: How do we resolve that?

3 MR. ASHMORE: Your Honor, if I may, I'm being told
4 by one of the lawyers that we have provided the terms of
5 service signed by Michele Jain previously and, Judge,
6 you can't use Airbnb unless you click on the terms of
7 service. We can't use WebEx unless we click on the terms
8 of service. And so, Your Honor, I think that document's
9 out there, it exists. I'm told we've already produced it
10 and so to the extent we need to supplement the record or
11 reproduce it, you know, we would request permission to do
12 so, Your Honor.

13 THE COURT: Yeah, you-all just -- I mean, I -- look,
14 I don't mind stopping at this point and letting you see
15 if that exists, I mean, and if it's been furnished, if
16 you can find it, Beattie, and send it to Deborah, that
17 would be the right thing to do.

18 MR. ASHMORE: Of course.

19 THE COURT: I mean, you know, this is some -- this
20 is ser -- to me this is serious. Again, I -- I wanted to
21 be real honest that I've always disliked the fact that by
22 hitting that term of service that you in a contractual
23 case can be bound to arbitration and in a tort, but, you
24 know, I once got as a lawyer many years ago fighting a --
25 a broker rammed into arbitration in New York under their

1 arbitration agreement on the 23rd of December, so I've
2 been there. I've been where are you.

3 So why don't we do this? I've got -- I've read
4 through everything, but just to the extent to take
5 notes I don't have any problem with us just continuing
6 this hearing. I'll do it whenever you want to do it if
7 you're okay with me retaining jurisdiction and finding
8 that document. You two could connect up just so we know
9 where we are.

10 MR. HARPOOTLIAN: Judge, Dick Harpootlian. I think
11 we can get you that document in the next hour. I don't
12 think there's -- I mean, it was furnished. I don't know
13 that there's any need to have a continuation of the
14 hearing. Once you get that document, that should resolve
15 all your issues. If not, we'll be happy to come back
16 before you.

17 THE COURT: Well, I think Ms. Barbier may disagree
18 with you. So why don't you get it to her. I think
19 that's the problem. Now is it in that 423,000 pages of
20 documents she got five days ago?

21 MR. HARPOOTLIAN: No. She got it many, many, many,
22 many, many, months before that. And, again, we are new
23 as she points out to this case, but -- and we -- I want
24 you to understand we in no way agree with her hyperbole,
25 accusations, misstatements that she made, and we don't

1 need to get in a fight here today. We can do that on
2 another day, but I know you've got twenty other people
3 waiting to have a hearing.

4 THE COURT: Well, I mean, I just -- look, after
5 twenty-one years, I mean, I've said so many things that
6 could get me in trouble. I'm looking at this crowd. I
7 mean, I know at least one person on here is the bottom
8 of the barrel of lawyers in South Carolina, so, I mean,
9 they can't go too far and -- and Dick has basically
10 slammed Jim Griffin, just accused -- just called --

11 MR. GRIFFIN: Judge, I -- my silence does not
12 equate to acquiescence with what he said about my client.
13 We'll be filing a defamation action soon.

14 THE COURT: Well, you've got -- you've got a damages
15 issue there, but that's a whole other -- I don't want to
16 get into that.

17 All right. Why don't we do this? I will -- I will
18 take what I have under advisement, but I'm not gonna do
19 anything until you -- we may need to at least -- at least
20 Mitch maybe and Deborah may, whoever, I may need to have
21 another quick conversation after you furnish that document
22 to her and she's had a chance to look at it, and to me.

23 Do you understand what I'm saying? I mean, I just
24 -- that's the threshold issue. If it doesn't exist, this
25 is all real easy for me. If it does, then I -- I need to

1 look at the estoppel issue and -- and I've got enough to
2 decide most of the stuff. I'll take it under advisement.
3 Let's put it that way, but I --

4 MS. BARBIER: Judge, that -- that is fine and we
5 appreciate your consideration of it. Can you please
6 order that Airbnb continue with discovery until a ruling
7 is made?

8 THE COURT: Yeah, and -- and I know that -- I am
9 gonna do that only because there are other judges that
10 have ordered discovery and -- and I'm self-aware enough
11 to know that in the past it's taken me a while to, you
12 know, do things, only a couple of years, but I will
13 get to this pretty quick, especially that issue as to
14 whether or not it's gonna be the entire thing referred
15 to arbitration, but to the extent you can, I think --
16 I don't think it's my place at this point to step in
17 where a judge has already stepped and stayed orders for
18 discovery because, quite frankly, if you have arbitration
19 you're gonna have to do that anyway.

20 So with that, I make all of you hate me and I'll --
21 why don't we just -- why don't you get the information
22 to me, to the plaintiff, and then I'm almost positive
23 we're at least gonna have to have an informal conference
24 so you know by Zoom or whatever -- whatever you want to.
25 I'll make myself available to you.

1 So I'll take -- so officially all these are under
2 advisement. I'm waiting on the term of service agreement
3 to be sent to me and to the plaintiff and then if I have
4 any other questions about waiver or estoppel, I'll let
5 you know if I need you to -- I don't need any more memos,
6 but sometimes it helps me if you've got -- like
7 especially, Ms. Barbier, you -- this issue of estoppel
8 is something I'd like your opinion on in just like a
9 paragraph, but just a letter. Do you understand?

10 MS. BARBIER: Judge, we can --

11 THE COURT: Their position is that she had the
12 benefits, and I understand that being taped and violated
13 in such a vile way is not a benefit, but I think given
14 that -- what was the name of that case? Because I
15 remember reading it. And, again, I -- it goes against
16 my Baptist belief, but what was the name of the case
17 that --

18 MS. BARBIER: Well, Your Honor, the case on waiver
19 is Liberty Builders versus -- and that is at 336 South
20 Carolina 658.

21 THE COURT: Yeah, I'm talking about the one -- the
22 one on estoppel.

23 MS. BARBIER: Yes, if you'd just give me one moment,
24 Your Honor, I've got it in my brief.

25 MR. BROWN: Judge, it's Wilson versus Willis I think

1 is what you're talking about, but, Judge, the only other
2 thing I would like to give you is because especially my
3 friend on the other side said this argument was ridiculous
4 I would like to just send you the two incorporation
5 provisions in the terms of service and policy that it
6 specifically incorporate all the other -- all the other
7 things into the agreement. So, you know, that's not me
8 making that up. Those are specific provisions that say
9 that in there, so I'd like to just --

10 THE COURT: Send me whatever you want. Just know
11 that I've been to Malta and three weeks ago in a bike
12 race and had COVID and so I don't think anything else
13 bad can happen to me, but it will take a week or so for
14 me to get through all this. Just know that, okay?

15 So --

16 MR. BROWN: Yes, sir.

17 MS. BARBIER: Your Honor, I appreciate that. The
18 case on equitable estoppel is Hodge versus UniHealth
19 Post-Acute Care of Bamberg and that -- in that case the
20 Court declined to apply equitable estoppel against a
21 non-signatory to an arbitration agreement and that was a
22 nursing home case and a death because they said the only
23 arguable benefit that the plaintiff received was being
24 admitted to the facility, but they said that their
25 injuries later led to her death and we find it difficult

1 to say that they benefitted from that, and it's very
2 similar to what we have here, Your Honor. Yes, she got
3 to stay in the house, but she was also -- now is on, you
4 know, the web undressing, so we think that the detriment
5 to that far outweighs any benefit.

6 THE COURT: And, Mr. Brown, I assume you take the
7 opposite position and that's in your brief?

8 MR. BROWN: Yes, sir. We're -- we're pointing to
9 the -- she's trying to take advantage of the terms to
10 advance claims. Those are the benefits she's trying to
11 -- trying to take.

12 THE COURT: Okay.

13 MR. GRIFFIN: And, Judge, I hate to weigh in, but
14 there's zero evidence that her client is on the web
15 doing anything. Zero evidence. Why she would say that
16 is astonishing.

17 THE COURT: Well --

18 MS. BARBIER: We'd disagree with that, Your Honor.

19 THE COURT: I know. I suspect -- you know, like I
20 said, with the exception of one person here, you're all
21 good lawyers, and I appreciate it. And Beattie knows
22 I'm talking about him and --

23 MR. ASHMORE: Sorry, Your Honor.

24 (Discussion off the record.)

25 THE COURT: You-all, I will take all this under

1 advisement. I'm not gonna issue a stay at this point,
2 but I will get to this pretty quick. And if you've got
3 anything else that you want me really to see -- this is
4 a large file and I'm fine doing that, but if you've got
5 something that you really want me to look at just send
6 an e-mail to me and make sure everybody's included and
7 we'll go through it, okay?

8 MR. BROWN: Thank you, Your Honor.

9 MS. BARBIER: Thank you, Your Honor.

10 MR. ASHMORE: Yes, Your Honor.

11 (Whereupon, the proceedings were concluded at
12 11:11 AM.)

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C E R T I F I C A T E

I, Stacy S. Johnson, Official Court Reporter for the Eleventh Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete transcript of record of all the proceedings had and the evidence introduced in the hearing of the captioned case in Circuit Court on the 13th day of June, 2022, recorded via WebEx, and transcribed by me to the best of my ability.

This transcript may contain quoted material. Such material is reproduced as read by the speaker. This transcript may also contain transmission interruptions and/or technical difficulties and inaudible or unintelligible indications due to being conducted remotely via videoconferencing.

I do further certify that I am neither of kin, counsel, nor have an interest to any party hereto.

August 3, 2023

/s/ Stacy S. Johnson
STACY S. JOHNSON, RPR
CIRCUIT COURT REPORTER

EXHIBIT D

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
) SECOND JUDICIAL CIRCUIT
 COUNTY OF AIKEN)

Julianne Foster,) Civil Action No. 2021-CP-02-00889
)
 Plaintiff,)
)
 vs.) **Order Denying Motions to Compel**
) **Arbitration and Dismiss by Third-**
 Rhett Riviere, Katherine A. Thomas,) **Party Defendant Rhett Riviere**
 Chase Enterprises, LLC of South)
 Carolina, and Airbnb, Inc.)
)
 Defendants.)
)

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

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

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).

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.]



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

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF AIKEN) SECOND JUDICIAL CIRCUIT
)

Julianne Foster,) Civil Action No. 2021-CP-02-00889
)

Plaintiff,)

vs.)

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

ORDER

Defendants.)

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.

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

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.]



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.

EXHIBIT F

which involves her assertion of what she claims to be various business practices allegedly violative of that statute. For all of these reasons, Airbnb has taken no action to restrain itself from moving to compel arbitration as to this matter.

Plaintiff's primary argument in response to Airbnb's motion is that she is not bound by the terms of the arbitration agreement in the Terms of Service. However, her friend, Michele Jain, expressly agreed to the Airbnb Terms of Service and Plaintiff was a direct beneficiary of the Airbnb rental transaction governed by the Terms. Therefore, Plaintiff is bound by the Terms, including the arbitration agreement.

First, despite no party disputing that this property was booked through Airbnb by Plaintiff's friend, (*see* Pltf. Resp. at 2 (stating that "Plaintiff's friend, Michelle Jain, booked the Airbnb")), Plaintiff argues that Airbnb attached no evidence supporting that Jain ever agreed to the Terms of Service and has "not produced any records showing an agreement to arbitrate in discovery." (Pltf. Resp. at 8.) However, Airbnb *has* produced user information for Jain's account in discovery supporting that she assented to the Terms of Service. (*See* User Information, attached as **Exhibit A**.) Moreover, Airbnb's corporate representative also testified in her deposition that Jain's user data supported that she agreed to the Terms. (*See* Airbnb Dep. Tr. 263:25–264:22, attached as **Exhibit B**.) Plaintiff even used the user information as an exhibit during this examination. Therefore, Airbnb was under the impression that this was not a disputed fact and stated as much in its motion to compel arbitration. Nevertheless, Airbnb has attached the relevant documents supporting that Michele Jain agreed to the operative version of the Terms of Service.¹ Plaintiff is

¹ Plaintiff cites to the submissions of Airbnb in support of its motion to compel arbitration in *Shaw v. Airbnb, Inc.*, No. 2:20-cv-00214-DCN-MGB (D.S.C.) in her discussion of what Airbnb has done in other matters. As noted, what Airbnb did in that case has no bearing on whether arbitration should be compelled in this case. Regardless, the affidavit attached to Airbnb's motion in that matter further contradicts Plaintiff's argument. As it explained, all users are required to agree to

simply wrong in contending that “there is no evidence Ms. Jain expressly agreed to the TOS.” (Pltf. Resp. at 7 n.2.)

Plaintiff then argues that regardless of whether Jain agreed to the Terms of Service, she is not bound by them. Plaintiff concedes that South Carolina law recognizes several situations where a non-signatory can be bound to arbitration agreements, including estoppel. *See Wilson v. Willis*, 426 S.C. 326, 338, 827 S.E.2d 167, 174 (2019). As Airbnb contended in its motion, direct benefit estoppel applies under these facts because Plaintiff directly benefitted from use of the rental property booked pursuant to Airbnb’s Terms of Service. Plaintiff contends that this is negated by the fact that she later learned about Riviere’s actions during her stay and has brought tort claims. However, the *only* relationship between Plaintiff and Airbnb is through the rental transaction booked pursuant to the Terms of Service, and Plaintiff *relies* on that relationship to contend 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”)) As a result, direct benefits estoppel should apply.

Hofer v. Emley, No. 19-CV-02205-JSC, 2019 WL 4575389, at *6 (N.D. Cal. Sept. 20, 2019) addressed an analogous situation in finding that direct benefits estoppel applied. *Hofer* involved a passenger in a rental car subjected to a traffic stop who brought civil rights and tort claims arising out of the incident. The rental company contended that the vehicle rental agreement between it and the driver, which contained an arbitration provision, applied to the passenger under

the Airbnb Terms of Service prior to creating an account and, if the Terms of Service are updated, agree to the new version in order to continue using the platform. *See Mot. to Compel Arbitration*, Ex. A – Affidavit, *Shaw v. Airbnb, Inc.*, No. 2:20-cv-00214-DCN-MGB (D.S.C. Jan. 29, 2020), ECF No. 6-1 (attached hereto as **Exhibit C**). The Court may take judicial notice of this affidavit. *Witthohn v. Fed. Ins. Co.*, 164 F. App’x 395, 396 (4th Cir. 2006) (“A court may consider official public records, documents central to plaintiff’s claim, and documents sufficiently referred to in the complaint so long as the authenticity of these documents is not disputed.”).

direct benefits estoppel. *Id.* The court agreed with the company’s assertion that the arbitration agreement applied because the passenger “received direct and substantial benefits” from the driver’s rental through the company’s application and the driver’s “required consent to the Agreement’s terms.” *Id.* As the court explained, the complaint suggested that the passenger was an active participant in the rental and “at the very least aware that his brother rented the car.” *Id.* He “knowingly received a direct benefit as a result of the Agreement—the ability to travel as a passenger in a rental car,” and the benefit conferred was the “exact benefit conferred on the signatory.” *Id.* Thus, the nonsignatory “knowingly received benefits flowing directly from the Agreement.” *Id.*

The same logic applies here. Plaintiff knew that her friend rented a property for in which to stay for them for an event, and Plaintiff knowingly obtained the exact same direct benefits as the signatory friend, flowing directly from the Agreement.

The *Hodge* case cited by Plaintiff is distinguishable. *See Hodge v. UniHealth Post-Acute Care of Bamberg, LLC*, 422 S.C. 544, 556, 813 S.E.2d 292, 299 (Ct. App. 2018). In that case, the decedent and her husband signed an admission agreement with a nursing facility along with a separate, standalone arbitration agreement. After she passed, her son brought claims on behalf of the estate as personal representative and her husband individually. As the court noted, the facility’s direct benefits estoppel argument necessitated finding that the two separate agreements merged since the alleged benefits (receipt of medical care and treatment) emanated from the admission agreement, not the standalone arbitration provision. *Id.* at 561, 813 S.E.2d at 301. The estate and husband received no benefit *from the standalone arbitration agreement*, and thus estoppel did not apply. *Id.* at 563, 813 S.E.2d at 302. The *Hodge* facts are not present here.

Finally, in the conclusion section of her response brief, Plaintiff requests that if the Court finds any genuine issues of material fact as to whether Plaintiff is bound to arbitrate, it should hold a jury trial on this issue. *See* 9 U.S.C. § 4 (provision of the FAA stating that if “making of the arbitration agreement be in issue,” then “the court shall proceed summarily to the trial thereof”). The Court is obligated to conduct a trial on this issue “only ‘when a party unequivocally denies ‘that an arbitration agreement exists,’ and ‘show[s] sufficient facts in support thereof,’ under a summary judgment standard.” *Harris v. Piedmont Fin. CNAC*, No. 5:20-CV-00669-M, 2021 WL 2459797, at *2 (E.D.N.C. June 16, 2021) (quoting *Chorley Enters., Inc. v. Dickey’s Barbecue Rests., Inc.*, 807 F.3d 553, 564 (4th Cir. 2015)). Plaintiff has not met this burden for the reasons detailed herein.

Therefore, for the reasons stated in Airbnb’s motion and herein, Jain expressly agreed to the Airbnb Terms of Service and Plaintiff is bound by the same pursuant to direct benefits estoppel.

II. The arbitrator should decide the issue of arbitrability.

Having established the threshold question of whether there is an applicable agreement to arbitrate, the issue of arbitrability is properly reserved for the Arbitrator under the Terms of Service.

The Airbnb 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.” (Terms of Service at 291, § 19.4.) Therefore, the matter must be compelled to arbitration to resolve the issue of arbitrability. *See Palmetto Wildlife Extractors, LLC v. Ludy*, 435 S.C. 690, 699–700, 869 S.E.2d 859, 864 (Ct. App. 2022) (“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.” (quoting *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 529–30 (2019))).

Plaintiff’s response does not dispute that the Airbnb Terms of Service contain a delegation clause. Instead, she contends that the Terms of Service were amended in 2017 to add the delegation clause and there is no evidence that Jain signed the version with the clause. However, the user information attached as is dispositive on this point since it reflects that Jain accepted the operative terms of service on April 11, 2019. (*See* Exhibit A.)

III. Airbnb did not waive the right to arbitrate.

Contrary to Plaintiff’s assertion, Airbnb has not acted inconsistently with its arbitration right such that waiver should result. As Plaintiff acknowledges, Airbnb has consistently noted in its pleadings that it was reserving the right to compel arbitration and it indicated at the outset of the case that it may seek to compel arbitration.²

Additionally, Plaintiff cannot avoid the plain fact that she knowingly and voluntarily amended her pleading to add 174 new paragraphs and state five new claims, significantly expanding the scope of this lawsuit as a result. A considerable portion of Plaintiff’s amended pleading is devoted to allegations made against Airbnb by strangers to this matter and Plaintiff has telegraphed that she intends to explore and present those matters in this action through her claim for violation of the S.C. Unfair Trade Practices Act. For example, just six paragraphs into her Amended Complaint, Plaintiff adds a new paragraph alleging:

² Plaintiff takes issue with Airbnb not listing the applicability of an arbitration agreement as an “affirmative defense,” but Airbnb’s preservation of the right was clearly delineated in the first paragraph of its Answer. To the extent the Court finds that it was also required to plead it again in the “Affirmative Defenses” section of the Answer, Airbnb respectfully requests leave to amend its answer accordingly. Airbnb does not believe this is required in the Answer to raise the defense. *See* Rule 8, SCRPC.

As a result of numerous instances involving hidden cameras in Airbnb properties that precede this events giving rise to this lawsuit occurring in May 2019, Airbnb has been on notice for many years that their properties are not safe and have been used by sexual predators to video record people of all ages while nude and also while engaged in sexual acts.

(Plft. Am. Compl. ¶ 6.) Plaintiff’s Amended Complaint then proceeds to add new discussion about incidents wholly unrelated to this matter that took place in California, Florida, Maine, and Texas. (*Id.* ¶¶ 7–10, 79–82.) Plaintiff presumably intends to introduce evidence about other matters in support of her claim for violation of SCUTPA, noting “[b]ecause Defendants’ unfair and deceptive acts or practices *have affected and continue to affect other consumers and have the potential of repetition*, Defendants’ unlawful trade practices have an adverse impact on the public. (*Id.* ¶¶ 7–10.) As noted in Airbnb’s motion to compel arbitration, such amendments provide new points in time to choose to compel arbitration rights.

Finally, Plaintiff ignores the effect of the non-waiver provision, which provides 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.” (*See* Terms of Service at 294.) Although she correctly notes that *Liberty Builders* stated that a non-waiver term is not dispositive on the issue of waiver, that case does not stand for the proposition that it has *no import at all*. *See* 336 S.C. at 665, 521 S.E.2d at 753.

Therefore, Airbnb has not waived its right to enforce the arbitration agreement and, as the case law detailed in Airbnb’s motion supports, even if a waiver occurred in response the initial pleading, Plaintiff’s decision to greatly expand the scope of her lawsuit revived Airbnb’s right.³

³ The *Liberty Builders* case cited by Plaintiff is further distinguishable for two reasons. First, the moving party sought to compel the matter to arbitration when the litigation was “nearly complete,” and the court’s holding was premised on the prejudice to the non-moving party (which can no longer factor into the analysis under the United States Supreme Court decision in *Morgan v.*

Conclusion

For the reasons stated above and in Airbnb's motion, 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.

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.

NELSON MULLINS RILEY & SCARBOROUGH LLP

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Attorneys for Airbnb, Inc.

Columbia, South Carolina
June 12, 2023

Sundance). *Liberty Builders, Inc. v. Horton*, 336 S.C. 658, 665, 521 S.E.2d 749, 753 (Ct. App. 1999). Second, although the nonmoving party in *Liberty Builders* had recently amended its complaint, the moving party did not argue that the amended pleading expanded the scope of the suit such that the right to compel arbitration was revived even if waived initially. *See generally id.* at 666–68, 521 S.E.2d at 754–55.

EXHIBIT G

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF AIKEN) SECOND JUDICIAL CIRCUIT
)

Julianne Foster,) Civil Action No. 2021-CP-02-00889
)

Plaintiff,)

vs.)

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

ORDER

Defendants.)

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.

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

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.]



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.

EXHIBIT H

STATE OF SOUTH CAROLINA
COUNTY OF AIKEN

IN THE COURT OF COMMON PLEAS
2ND 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 GRANTING PLAINTIFF'S MOTION
FOR RULE TO SHOW CAUSE
AGAINST AIRBNB, INC.**

This matter came before the Court pursuant to Plaintiff's Motion for a Rule to Show Cause, filed June 8, 2023. A hearing was held on the matter on June 13, 2023. Having fully considered the matter, including the motion, exhibits, and the parties' arguments, it is hereby **ORDERED** that Plaintiff's Motion for a Rule to Show Cause is **GRANTED**.

On June 7, 2022, Plaintiff served Airbnb, Inc. ("Airbnb") with her Requests for Production Nos. 16-44.ⁱ In its responses, Airbnb objected on numerous grounds. (Ex. B, Feb. 10, 2023 Motion to Compel). On February 10, 2023, Plaintiff filed a Motion to Compel regarding her Requests for Production Nos. 16-44.

On November 1, 2022, Plaintiff served Airbnb with her Requests for Production Nos. 45-48. In its responses, Airbnb objected on numerous grounds. (Ex. B, Jan. 18, 2023 Motion to Compel). On January 18, 2023, Plaintiff filed her Motion to Compel regarding Requests for Production Nos. 45-48.

Each of Plaintiff's above-identified motions to compel were heard on April 5, 2023. The Court granted the motions during the hearing – giving Airbnb 60 days within which to comply and

produce the documents requested. Subsequently on May 25, 2023, the Court entered a Form 4 Order memorializing its decision.

On June 5, 2023, Airbnb produced some documents to Plaintiff, but informed her that it was unilaterally withholding production of other responsive documents, stating as follows:

Contemporaneous with this production, Airbnb is filing a motion for reconsiderationⁱⁱ and to stay enforcement with respect to Plaintiff's Request for Production Nos. 45, 46, 47 (Non-Party Guest Contact Information) and 48 (Non-Party Host Criminal Convictions). Consequently, Airbnb is withholding production of documents responsive to these requests at this time.

(Ex. 6, Plaintiff's June 8, 2023 Motion for Rule to Show Cause ("RTSC Motion")).

"Direct contempt involves contemptuous conduct in the presence of the court." *State v. Jolly*, 405 S.C. 622, 629, 749 S.E.2d 114, 118 (Ct. App. 2013) (citing *State v. Kennerly*, 337 S.C. 617, 620, 524 S.E.2d 837, 838 (1999)). South Carolina courts "have held the 'presence of the court' extends beyond the mere physical presence of the judge or the courtroom to encompass all elements of the system." *Id.*; *see also* S.C. Code Ann. § 14-5-320 (providing, "The circuit court may punish by fine or imprisonment, at the discretion of the court, all contempts of authority in any cause or hearing before the same.").

I find that the record before this Court shows an ongoing discovery dispute. Rule 11, SCRCPP, requires counsel to ensure the factual accuracy of all allegations in their filings. Airbnb did not dispute the accuracy of the dates upon which it was served with the Plaintiff's Requests for Production Nos. 16-44 or 45-48 (Exs. 1 and 3, RTSC Motion), and also did not dispute the dates for which it served its objections thereto. (Exs. 2 and 4, RTSC Motion). Certainly, Airbnb does not dispute the facts it presented in its June 5, 2023 letter to counsel to Plaintiff. (Ex. 6, RTSC Motion).

The record before this Court on the matters put at issue is not disputed. As shown by Airbnb's own statements in the record, it is acting in direct defiance of this Court's order dated May 25, 2023. Accordingly, I find Airbnb's actions show continuing "contemptuous conduct" towards the authority of this Court, and its orders.

Plaintiff has additionally argued and noted Airbnb has failed to produce other responsive documents, including, for example, none of its internal email communications, and no privilege log. (Ex. 7, RTSC Motion, at p. 5 of 5). Prior to the filing of her motion for a Rule to Show Cause, Plaintiff sought to communicate with Airbnb about how it intended to perform its searches for responsive ESI, but Airbnb did not respond. Instead, Plaintiff contends and the record reflects Airbnb simply decided which documents it would produce and withheld the remainder. This is undeniable in view of the block quote above taken from Airbnb's June 5, 2023 letter to Plaintiff's counsel (Ex. 6, RTSC Motion).

This Court finds Airbnb's stated plans to not comply with this Court's May 25, 2023 Order on the Motions to Compel and violate this Court's order. Airbnb must comply with this Court's May 25, 2023 Order on the Motions to Compel and produce all responsive documents to Plaintiff within forty-five (45) days of the date of this order.

IT IS SO ORDERED.

The Honorable J. Cordell Maddox, Jr.
Presiding Judge, 2nd Judicial Circuit

July __, 2023
Anderson, South Carolina

ⁱ Plaintiff notes her Request for Production Nos. 16-44 are substantially identical in scope and substance to the 24 topics in her 30(b)(6) deposition notice, which has already been the subject of two Airbnb motions. (*see e.g.*, Orders on 30(b)(6) motions, filed Aug. 3, 2022 (at pp. 4-7, approving 24 topics) and Oct. 11, 2022 (denying reconsideration motion filed August 4, 2022)). This is the same notice for which Airbnb initially sought a protective order via motion filed June 14, 2022, and later its first motion to

reconsider on Aug. 4, 2022. Both of those motions were denied. As of the hearing on April 5, 2023, Airbnb had yet to provide any documents in response to these requests. (*See* April 5, 2023 Hearing Transcript, at pp. 105 to 110 (Airbnb continuing argument in support of its “compromise position” rejected)).

ii Airbnb has already filed two motions to reconsider this Court’s discovery orders, as follows: (i) Motion to Reconsider Denial of Airbnb’s Motion for Protective Order [as relates to Plaintiff’s 30(b)(6) deposition notice], filed August 4, 2022; and (ii) Airbnb, Inc.’s Motion to Reconsider and to Stay Enforcement, filed June 5, 2023. By the time Airbnb’s Aug. 4, 2022 first motion to reconsider was fully briefed, Airbnb had filed and presented 51 pages (6 + 30 + 15 = 51) of argument in support of its motion, which was denied in all substantive respects by order dated October 11, 2022.



Aiken Common Pleas

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

Case Number: 2021CP0200889

Type: Order/Rule To Show Cause

So Ordered

s/ J. Cordell Maddox Jr.

RECEIVED

Oct 04 2023

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

Attorney at Law

P.O. Box 9398, Greenville, South Carolina 29604

www.wesleyfew.com | wes@wesleyfew.com

O: 864-527-5906 | M: 864-404-7792

October 4, 2023

RECEIVED

Oct 04 2023

SC Court of Appeals

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*)