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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM AIKEN COUNTY
Court of Common Pleas

J. Cordell Maddox, Jr., Circuit Court Judge

Appellate Case No. 2023-001479

Case No. 2021-CP-02-00889

Julianne Foster, Respondent,

v.

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

of which Airbnb, Inc., is the Appellant and Rhett Riviere is a Respondent.

/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

MOTION TO EXPEDITE APPEAL

Pursuant to Rule 240 of the South Carolina Rules of Appellate Procedure, Respondent respectfully requests this Court expedite consideration of the appeal of the Order denying Airbnb's Motion to Compel Arbitration.

I. Background Facts and Procedural History

This action stems from Respondent’s stay at an Airbnb in Aiken from May 17-18, 2019. Respondent’s friend, Michelle Jain, booked the Airbnb rental owned and/or hosted by Airbnb Hosts Rhett Riviere and Defendant Katherine Thomas. During the stay, Riviere surreptitiously recorded Respondent 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, Respondent filed this action on April 28, 2021, alleging claims against Riviere, Thomas, and Airbnb.¹ After Respondent settled with Riviere, Airbnb brought a Third-Party Complaint against Rivere for indemnification.

Airbnb’s Terms of Service (“TOS”) in effect at the time of the rental included an arbitration provision. However, there is no dispute that Respondent never entered into *any* agreement with Airbnb and that it was Ms. Jain who held an Airbnb account and had booked the rental.²

Soon after Respondent filed this action on April 28, 2021, Airbnb informed Respondent’s counsel several times that it would be filing a motion to compel arbitration. (Ex. A, Email from Airbnb’s counsel). Airbnb, however, did not file a motion to compel arbitration at that time. Instead, waited for over two years while aggressively litigating this action in court—participating in extensive discovery and mediation, filing two motions to dismiss based on the merits, and engaging in numerous discovery disputes.

¹Respondent filed a motion for leave to file an amended complaint on September 2, 2022, which added several causes of action. Airbnb vigorously opposed this motion. However, the Court granted the Motion to Amend, and Respondent filed her Amended Complaint on November 30, 2022. Without asserting any right to arbitration, Airbnb filed a motion to dismiss the Amended Complaint and continued to extensively litigate and engage in numerous discovery disputes. When its Motion to Dismiss the Amended Complaint was denied, Airbnb answered the Amended Complaint on April 20, 2023, and continued litigating until it finally filed its Motion to Compel Arbitration on May 15, 2023.

²Respondent disputes whether Ms. Jain entered into an agreement to arbitrate. However, the circuit court did not need to reach this issue as it denied Airbnb’s Motion to Compel Arbitration on other grounds.

After the circuit court denied its second motion to dismiss and granted Respondent's motions to compel production, Airbnb retained new counsel and filed a motion to compel arbitration. (Ex. B, Airbnb's Mot. to Compel Arb, filed May 15, 2023). After the motion was fully briefed (well beyond the usual briefing to include numerous letters to the court) and a hearing held on June 13, 2023, the circuit court denied Airbnb's Motion to Compel Arbitration on three separate grounds on September 15, 2023. (Ex. C, Order denying Airbnb's Mot. to Compel Arb.)³

On July 26, 2023, the circuit court also denied Riviere's Motion to Compel Arbitration of Airbnb's third-party claims. (Ex. D, Order Denying Riviere's Mot. to Compel Arb.). Despite there being no opposition and both Riviere and Airbnb wanting to arbitrate Airbnb's third party claims against Riviere, Riviere immediately filed an interlocutory appeal of that Order, and Airbnb and Riviere jointly moved to stay the case.⁴ On August 24, 2023, the circuit court granted Riviere and Airbnb's Joint Motion and stayed the entire action pending the resolution of the appeal. (Ex. E, Order Granting Joint Mot. to Stay).

II. ARGUMENT

"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). An appeal of the denial of a motion for arbitration is a rare exception to the usual rule barring interlocutory appeals. *See Cape Romain Contractors, Inc. v. Wando E., LLC*, 405 S.C. 115, 121 n.4, 747 S.E.2d 461, 464 n.4 (2013) (citing

³ Meanwhile Respondent filed a Motion for a Rule to Show Cause ("RTSC") based upon Airbnb's failure to comply with the Circuit Court's discovery orders. The circuit court granted this motion and Airbnb has also appealed from that Order.

⁴ Respondent has also filed a Motion to Dismiss this appeal based on the lack of a justiciable controversy.

Towles v. United HealthCare Corp., 338 S.C. 29, 34-35, 524 S.E.2d 839, 842-43 (Ct. App. 1999)); *see also* S.C. Code Ann. § 15-48-200(a)(1) (providing that an appeal may be taken from an order denying a motion to compel arbitration). However, “to prevent unwarranted delay and deter frivolous interlocutory appeals,” “a party can ask the court of appeals to summarily affirm, to expedite an interlocutory appeal, or to dismiss the interlocutory appeal as frivolous.” *See Coinbase, Inc. v. Bielski*, 143 S.Ct. 1915, 599 U.S.736, 143 S.Ct. 1915, 1922 (2023) (applying the FAA). Respondent requests that the Court expedite its consideration of this frivolous appeal of the circuit court denying Airbnb’s Motion to Compel Arbitration to prevent further unwarranted delays.

Despite having been filed over two years ago, Respondent’s litigation against Airbnb is still very early in the discovery process due to numerous discovery disputes. Pursuant to the circuit court’s orders, Airbnb only recently produced a partial response to Respondent’s discovery requests that were originally served a year ago.⁵ The current stay and the pending appeals further prolong the time which Respondent will have to wait to receive the discovery that she was entitled to receive well over a year ago. Moreover, as time passes, there is an increased risk of a loss of evidence as witnesses become unavailable and memories fade. Further, each day that this litigation is stayed is an additional day that Respondent will spend without a resolution of her claims. The appeal of the Order denying Airbnb’s Motion to Compel Arbitration is frivolous and taken to cause further delay. The appeal and the stay pending resolution of the appeal are adversely affecting Respondent’s ability to litigate and obtain a resolution of her claims through increased expenses and unwarranted delays.

III. Conclusion

⁵Because of Airbnb’s failure to comply with the circuit court’s discovery orders, Respondent was forced to file a Motion for a Rule to Show Cause (“RTSC”), which the circuit court granted. The circuit court ordered Airbnb to fully respond to the discovery requests. Airbnb has also appealed from that Order.

For the foregoing reasons, Respondent requests that the Court expedite its consideration of these appeals and summarily affirm the Circuit Court's Orders denying arbitration or dismiss this appeal as frivolous. Further, Respondent also requests that the Court impose sanctions as provided for in Rule 269, SCACR. Rule 269, SCACR (providing that when an appeal is frivolous or taken solely for the purposes of delay, the appellate court may impose sanctions). Accordingly, Respondent respectfully request the Court grant this Motion and expedite consideration of this appeal.

Respectfully submitted,

/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

Wesley D. Few, S.C. Bar. No. 15565

WESLEY D. FEW, LLC

Post Office Box 9398

Greenville, South Carolina 29605

Phone: (864) 527-5906

Email: wes@wesleyfew.com

Ryan L. Beasley, S.C. Bar No. 68307

RYAN L. BEASLEY, ATTORNEY AT LAW, P.A.

416 East North Street

Greenville, South Carolina 29601

Phone: (864) 679-7777

Email: rlb@ryanbeasleylaw.com

Attorneys for Respondent Julianne Foster

October 4, 2023
Columbia, South Carolina

EXHIBIT A

RE: Julianne Foster v. Airbnb et al.

1 message

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

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

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

Thanks

Andy

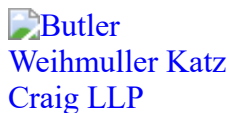
L. Andrew Watson | Partner | Licensed in NC, SC, FL & GA

BUTLER WEIHMULLER KATZ CRAIG LLP

11605 N. Community House Road, Suite 150 | Charlotte, NC 28277

Direct 704.940.9805 | Office 704.543.2321

www.butler.legal | [email](#) | [bio](#) | [linkedin](#) | [vCard](#) | [location](#)



Butler
Wehmuller Katz
Craig LLP

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

Hi Debbie,

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

Thank you,

Ryan

Ryan P. Duffy | Attorney at Law

BUTLER WEIHMULLER KATZ CRAIG LLP

11605 N. Community House Road, Suite 150 | Charlotte, NC 28277

Direct 267.507.1401 | Office 704.543.2321

www.butler.legal | [email](#) | [vCard](#) | [location](#)

From: Deborah Barbier <dbb@deborahbarbier.com>

Sent: Friday, July 9, 2021 4:42 PM

To: Andrew Watson <awatson@butler.legal>; 'wes@wesleyfew.com' <wes@wesleyfew.com>; 'rlb@ryanbeasleylaw.com' <rlb@ryanbeasleylaw.com>

Cc: Julie D'Aeth <jdaeth@butler.legal>; Whitney Hill <whill@butler.legal>; Ryan Duffy <rduffy@butler.legal>

Subject: RE: Julianne Foster v. Airbnb et al.

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

Best regards,

Debbie

Deborah B. Barbier

Deborah B. Barbier, LLC

1811 Pickens Street

Columbia, South Carolina 29201

(803) 445-1032 (office)

(803) 445-1036 (fax)

(803) 730-6290 (cell)

www.deborahbarbier.com

From: Andrew Watson <awatson@butler.legal>

Sent: Wednesday, July 7, 2021 9:16 AM

To: 'wes@wesleyfew.com' <wes@wesleyfew.com>; Deborah Barbier <dbb@deborahbarbier.com>; 'rlb@ryanbeasleylaw.com' <rlb@ryanbeasleylaw.com>

Cc: Julie D'Aeth <jdaeth@butler.legal>; Whitney Hill <whill@butler.legal>; Ryan Duffy <rduffy@butler.legal>

Subject: RE: Julianne Foster v. Airbnb et al.

Importance: High

Ryan, Wes and Deborah,

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

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

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

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

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

Thanks

Andy

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

BUTLER WEIHMULLER KATZ CRAIG LLP

[11605 N. Community House Road, Suite 150 | Charlotte, NC 28277](#)

Direct 704.940.9805 | Office 704.543.2321

[www.butler.legal](#) | [email](#) | [bio](#) | [linkedin](#) | [vCard](#) | [location](#)

From: Andrew Watson

Sent: Thursday, May 27, 2021 10:13 AM

To: 'wes@wesleyfew.com' <wes@wesleyfew.com>; 'dbb@deborahbarbier.com' <dbb@deborahbarbier.com>; 'rlb@ryanbeasleylaw.com' <rlb@ryanbeasleylaw.com>

Cc: Julie D'Aeth <jdaeth@butler.legal>; Whitney Hill <whill@butler.legal>; Ryan Duffy <rduffy@butler.legal>

Subject: Julianne Foster v. Airbnb et al.

Good morning everyone.

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

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

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

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

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

Thanks,

Andy

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

BUTLER WEIHMULLER KATZ CRAIG LLP

11605 N. Community House Road, Suite 150 | Charlotte, NC 28277

Direct 704.940.9805 | Office 704.543.2321

www.butler.legal | [email](#) | [bio](#) | [linkedin](#) | [vCard](#) | [location](#)

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EXHIBIT B

STATE OF SOUTH CAROLINA
COUNTY OF AIKEN

IN THE COURT OF COMMON PLEAS
SECOND JUDICIAL CIRCUIT

JULIANNE FOSTER,
Plaintiff,

v.

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

Defendants.

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

**ORDER DENYING DEFENDANT AIRBNB'S
MOTION TO COMPEL ARBITRATION**

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

BACKGROUND

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

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

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

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

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

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

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

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

APPLICABLE LAW

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

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

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

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

ANALYSIS

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

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

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

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

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

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

1) Estoppel

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

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

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

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

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

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

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

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

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

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

2) Outrageous Acts

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

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

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

3) Waiver

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

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

IT IS SO ORDERED.



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 C

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.

EXHIBIT D

STATE OF SOUTH CAROLINA

COUNTY OF AIKEN

IN THE COURT OF COMMON PLEAS
SECOND JUDICIAL CIRCUIT
C/A NO.: 2021-CP-02-00889

JULIANNE FOSTER,

Plaintiff,

v.

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

Defendants.

**DEFENDANT AIRBNB, INC.’S
MOTION TO DISMISS AMENDED
COMPLAINT**

TO: THE HONORABLE COURT AND ALL COUNSEL OF RECORD

PLEASE TAKE NOTICE that Defendant Airbnb, Inc. (“Airbnb”), by and through its undersigned counsel, moves this Honorable Court, under Rule 12(b)(6) of the South Carolina Rules of Civil Procedure, for an Order dismissing Plaintiff’s Amended Complaint as to Airbnb in this matter. As explained more fully below and in the forthcoming memorandum of law, the Amended Complaint fails to allege facts sufficient to support any cause of action against Airbnb and should therefore be dismissed as to Airbnb.

Plaintiff’s Amended Complaint, filed November 30, 2022, alleges that co-defendant Rhett Riviere surreptitiously video-recorded Plaintiff during her one-night stay in May 2019 at a property in Aiken (the “Property”) owned by Riviere and managed by co-defendant Katherine Thomas, who was the Property’s “host.” FAC ¶¶ 17, 90-91, 95-96. Plaintiff’s harm was caused by Riviere—who has been criminally charged in connection with recording Plaintiff, *id.* ¶ 104—and Thomas—who is alleged to have known about Riviere’s cameras, *id.* ¶ 117. Airbnb’s only connection to this case is that Plaintiff’s friend used Airbnb’s online platform to locate and book

the stay at the Property. *Id.* ¶¶ 93, 95, 121. Plaintiff’s friend invited Plaintiff to stay at the Property with her; Plaintiff is not alleged to have ever made an Airbnb account herself. Plaintiff has settled with Riviere, the individual facing criminal charges for illegally filming individuals including Plaintiff and two other individuals who stayed at one of his properties years before Airbnb even existed. *Id.* ¶ 22-23.

Negligence Claim

Plaintiff’s negligence claim fails because she does not plead facts sufficient to show that Airbnb owed a duty to Plaintiff to prevent the alleged harm. *Doe v. Wal-Mart Stores, Inc.*, 393 S.C. 240 (2011) (plaintiff must show that “the defendant owes a duty of care to the plaintiff”). Every single other court across the nation that has considered this issue has reached the same conclusion: Airbnb does not owe a duty to protect individuals staying at a property booked on Airbnb’s platform from the criminal acts of others.¹ South Carolina negligence law—under which there is “no affirmative duty to control the conduct of another or to warn a third person of danger,”

¹ See, e.g., *Esposito v. Airbnb Action, LLC*, 2022 WL 2980700, at *5 (W.D. Ark. July 27, 2022) (ruling that no “particular duty of care stemm[ed] from [Airbnb’s] relationship with the users of [its] online platform”); *Carroll v. Am. Empire Surplus Lines Ins. Co.*, 289 F. Supp. 3d 767, 772 (E.D. La. 2017) (dismissing negligence claim against Airbnb upon finding no duty to property hosts or guests because the contractual “relationship does not involve the direct control, and corresponding responsibility, of the more custodial relationships that have traditionally given rise to a duty to protect third parties.”); *Jackson v. Airbnb, Inc.*, --- F. Supp. 3d ---, 2022 WL 16752071, at *7 (C.D. Cal. Nov. 4, 2022) (rejecting arguments that Airbnb had a duty based upon premises liability, a special relationship, or a negligent undertaking and finding third-party misconduct unforeseeable); *Maduagwu v. Airbnb, Inc.*, No. 296-00503-2021 (Tex. Dist. Ct. Feb. 15, 2022) (granting Airbnb’s no-evidence motion for summary judgment on negligence claim for lack of duty to protect against third-party criminal acts on property booked via Airbnb’s platform); *Ramirez v. Airbnb, Inc.*, No. CGC-21-590076 (Cal. Sup. Ct. Sept. 1, 2021) (dismissing negligence claim against Airbnb because no duty to protect against third-party criminal acts on property booked via Airbnb’s platform); *Dier v. Armbruster*, No. MSC20-01743 (Cal. Sup. Ct. Oct. 12, 2021) (same).

McCord v. Laurens Cnty. Health Care Sys., 429 S.C. 286, 296 (Ct. App. 2020)—commands the same result.

Even if Plaintiff had alleged a duty, it would not extend to the unforeseeable and intervening criminal misconduct alleged here. *Bass v. Gopal, Inc.*, 395 S.C. 129, 135 (2011). Plaintiff points to alleged hidden cameras incidents in other states involving completely different parties occurring over the past decade. FAC ¶¶ 6-10, 79-82. But there are millions of people who list their properties on Airbnb’s website and millions of such properties across the country and the world. The mere conceivability that one of the millions of hosts somewhere else in the world could commit such a crime does not suffice to allege that it was foreseeable to Airbnb that *Riviere* in Aiken would commit the specific crime alleged. *Jenkins v. CEC Ent. Inc.*, 421 F. Supp. 3d 257, 263 (D.S.C. 2019) (“Plaintiffs must first offer evidence that *Mr. King’s* crime was foreseeable.” (emphasis added)).

Employment-Based and Vicarious Liability Claims

Plaintiff’s vicarious liability and negligent hiring, retention, and supervision claims fail because she cannot adequately allege that *Riviere* and *Thomas* were Airbnb employees. *See Bank of N.Y. v. Sumter Cnty.*, 387 S.C. 147, 156 (2010) (rejecting negligent supervision claims because there was no employment relationship); *Callum v. CVS Health Corp.*, 137 F. Supp. 3d 817, 861 (D.S.C. 2015) (granting motion to dismiss negligent supervision and retention claims where plaintiff had “not alleged facts creating a plausible inference that the [defendants] qualify as employers”); *Armstrong v. Food Lion, Inc.*, 371 S.C. 271, 276 (2006) (“The doctrine of *respondeat superior* rests upon the relation of master and servant”). Similar claims have been resoundingly rejected by the courts because Airbnb only provides a service (the use of its platform) to hosts for a fee, which is a run-of-the-mill business-customer relationship.

These negligent hiring, supervising, and retention claims also fail because Plaintiff has not adequately alleged that Airbnb knew or had reason to know of prior misconduct by Riviere or Thomas, or that Riviere's alleged acts furthered Airbnb's business. *See Callum*, 137 F. Supp. 3d at 860 (negligent hiring and retention require that employer had "knowledge" of employee's "habit of prior wrongdoings"); *Doe v. Bishop of Charleston*, 407 S.C. 128, 139 (2014) (similar for negligent supervision).

Premises Liability Claim

Plaintiff does not and cannot allege that Airbnb owned or controlled the Property, a fatal defect to her premises liability claim. Simply put, "[o]ne who controls the use of property has a duty of care not to harm others by its use," and "one who has no control owes no duty." *Miller v. City of Camden*, 329 S.C. 310, 314 (1997). Courts nationwide recognize that Airbnb does not own or control the properties listed on its platform.²

Misrepresentation-Based Claims

Plaintiff's constructive fraud and SCUTPA claims necessarily fail because she does not allege that Airbnb made any affirmative statement that was false. Rather, her claims are premised on Airbnb's alleged failure to notify her of the presence of the camera (constructive fraud) and Airbnb's general statements about "safety and security" (SCUTPA). These allegations are insufficient as a matter of law. *Wright v. PRG Real Estate Mgmt*, 413 S.C. 276, 289-90 (Ct. App. 2019), *reversed on different grounds*, 426 S.C. 202 (2019) ("[G]eneralized statements" about an apartment's safety and security "simply cannot be unfair or deceptive acts under [SCUTPA].");

² *See, e.g., Carroll*, 289 F. Supp. 3d at 772; *King v. Pleasant 30 LLC*, 2022 WL 12827986, at *2 (N.Y. Sup. Ct. Oct. 06, 2022) (dismissing premises liability claim on motion to dismiss because "Airbnb is not an owner of nor has any control over the properties listed on its platform"); *Jackson*, 2022 WL 16752071 at *7 (dismissing complaint, in part, because "Airbnb does not exercise sufficient control over the subject property").

Pitts v. Jackson Nat'l Life Ins. Co., 352 S.C. 319, 334 (Ct. App. 2002) (constructive fraud requires an “affirmative statement”). Plaintiff also fails to plead her constructive fraud claim with the particularity required by Rule 9(b), SCRCP.

Claims Based on Real Estate Licensing Statute

Plaintiff’s negligence per se and the second theory of her SCUTPA claim are premised on an allegation that Airbnb violated S.C. Code Ann. § 40-57-20, South Carolina’s real-estate licensure statute. FAC ¶¶ 238, 254. This statute, which regulates only “*individuals*” who act as real-estate brokers or property managers, plainly does not apply to a corporation like Airbnb. S.C. Code Ann. § 40-57-20 (“It is unlawful for an *individual* to act as a real estate broker, real estate salesperson, or real estate property manager or to advertise or provide services as such without an active, valid license issued by the commission.” (emphasis added)). This point is bolstered by the statutory prerequisites to obtaining such a license, which include obtaining certain education requirements like obtaining a degree or participating in “classroom instruction,” passing an examination, submitting to a fingerprint-based criminal records check, and supplying a social security number and residential address. *Id.* § 40-57-30; *id.* § 40-57-320; *id.* § 40-57-510; *id.* § 40-57-115. These requirements make clear that the statute is not directed at corporations.

Further, both claims independently fail because Plaintiff cannot adequately allege that any violation of the licensure statute—whether by Airbnb, Riviere, or Thomas—proximately caused the harm she allegedly suffered, given that the statute governs *licensing* and has nothing to do with protecting individuals from undisclosed recording devices. *Whitlaw v. Kroger Co.*, 306 S.C. 51, 53-54 (1991) (for negligence per se claims, in addition to establishing breach of a statute, “[t]he causation of the injury must also be evaluated”); *Callum*, 137 F. Supp. 3d at 862 (for SCUTPA

claims, plaintiffs must show the “plaintiff suffered actual, ascertainable damages *as a result of* the defendant’s use of the unlawful trade practice”) (emphasis added).

The negligence per se claim additionally fails because licensing statutes that do not “set forth a standard of care” “will not ordinarily provide a basis for a negligence per se action.” *Hurst v. Sandy*, 329 S.C. 471, 479-80 & n.5 (Ct. App. 1997). Moreover, the “essential purpose” of a statute like this one, which merely sets out the requirements for obtaining a real-estate license, was not to “protect from the kind of harm [Plaintiff allegedly] suffered”—*i.e.*, criminal voyeurism. *Whitlaw*, 306 S.C. at 53.

Punitive Damages

Plaintiff fails to allege any facts that would support punitive damages as to Airbnb under South Carolina law. Punitive damages are available only when a defendant’s conduct was “willful, wanton, or in reckless disregard of the plaintiff’s rights.” *Sea Island Food Grp., LLC v. Yaschik Dev. Co.*, 433 S.C. 278, 289 (Ct. App. 2021). Here, Plaintiff’s allegations that Airbnb merely failed to discover Riviere’s background or the hidden camera at issue, *e.g.*, FAC ¶¶ 16, 88, fall far short of willfulness, wantonness, or reckless disregard of Plaintiff’s rights, especially where Airbnb allegedly promulgated policies prohibiting hidden cameras. *Id.* ¶ 179.

* * * * *

This Motion is supported by the pleadings, applicable statutes and case law, and may be further supplemented by the arguments of counsel, and any memoranda or other evidence the Court may receive at or prior to hearing as permitted under the South Carolina Rules of Civil Procedure.

Airbnb expects to file a memorandum in support of this Motion under South Carolina Rule of Civil Procedure Rule 12 and in compliance with applicable law.

Dated this 20th day of January, 2023.

Respectfully submitted,

/s/ Beattie B. Ashmore
Beattie B. Ashmore
SC Bar No. 10419
650 East Washington Street
Greenville, SC 29601
PH: (865) 467-1001.
E: beattie@beattieashmore.com

Attorney for Defendant Airbnb, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Defendant Airbnb's Motion to Dismiss Amended Complaint has been served by electronic filing on the 20th day of January, 2023 to the following:

Wesley D. Few
Wesley D. Few, LLC
P.O. Box 9398
Greenville, SC 29604
Attorney for Plaintiff

Deborah B. Barbier
Deborah B. Barbier, LLC
1811 Pickens Street
Columbia, SC 29201
Attorney for Plaintiff

Ryan L. Beasley
Ryan L. Beasley, Attorney at Law, P.A.
416 East North Street, 2nd Floor
Greenville, SC 29601
Attorney for Plaintiff

John W. Harte
Law Offices of John W. Harte
P.O. Box 7215
Aiken, SC 29804
Attorney for Rhett Riviere and Chase
Enterprises, LLC of South Carolina

Joe McCullouch
Kathy R. Schillachi
1116 Blanding Street
Columbia, SC 29201
Attorneys for Rhett Riviere

James Mixon Griffin
Margaret Nicole Fox
4408 Forest Drive, Ste. 300
Columbia, SC 29202
Attorneys for Rhett Riviere and Chase
Enterprises, LLC of South Carolina

Damon C. Włodarczyk
Riley Pope & Laney, LLC
P.O. Box 11412
Columbia, SC 29211
Attorney for Katherine A. Thomas

/s/ Beattie B. Ashmore
Beattie B. Ashmore

EXHIBIT E

STATE OF SOUTH CAROLINA
COUNTY OF AIKEN

IN THE COURT OF COMMON PLEAS
SECOND JUDICIAL CIRCUIT
C/A NO.: 2021-CP-02-00889

JULIANNE FOSTER

Plaintiff,

v.

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

Defendants.

**AIRBNB, INC.’S OBJECTION TO
PLAINTIFF’S MOTION TO AMEND
HER COMPLAINT**

(Hearing Requested)

NOW COMES the Defendant Airbnb, Inc. (“Airbnb”) and hereby opposes the Plaintiff’s Motion to Amend her Complaint and requests a hearing thereon. Although Rule 15, SCRPC provides that leave should be freely granted when justice requires it, it is within the Court’s discretion “to deny a motion to amend if the party opposing the amendment can show a valid reason for denying the motion.” *Skydive Myrtle Beach, Inc. v. Horry Cnty.*, 426 S.C. 175, 182, 826 S.E.2d 585, 588 (2019); *see also Forrester v. Smith & Steele Builders, Inc.*, 295 S.C. 504, 507, 369 S.E.2d 156, 158 (Ct. App. 1988) (the Court may deny leave to amend where there is bad faith, undue delay, or prejudice); *Patton v. Miller*, 420 S.C. 471, 490, 804 S.E.2d 252, 262 (2017) (Court may deny leave to amend where there is “undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc.”) (quoting *Foman v. Davis*, 371 U.S. 178, 182, 83 S.Ct. 227, 230, 9 L.Ed.2d 222, 226 (1962)). Here, there is ample reason to deny Plaintiff’s motion.

First, the proposed amended complaint relies solely on facts concerning Airbnb that were known to Plaintiff before she filed the original complaint on April 28, 2021. There is no valid

justification for her undue delay in asserting those allegations, which have been known to her for a year and a half. Next, Plaintiff's proposed amended complaint fails to state a cause of action against Airbnb. The uncontroverted evidence here shows that Airbnb had zero notice of Defendant Rhett Riviere's (or Defendant Katherine Thomas's) alleged criminal history. Airbnb had no knowledge that Riviere illegally filmed anyone and Airbnb quickly banned Riviere and Thomas from the platform upon learning of the crimes. Plaintiff's Motion to Amend attaching her new proposed complaint was filed only after the Court ordered the parties to submit briefing so that the Court could reconsider its August 3, 2022 Order granting Plaintiff overbroad 30(b)(6) deposition discovery. Plaintiff never conferred with Airbnb before seeking leave to file this proposed amended complaint. Plaintiff previously shared only a completely different proposed amended complaint with Airbnb—not the one she filed as an exhibit to her Motion to Amend.

For these reasons, and for those that may be stated in a supplemental memorandum and at a hearing on this matter, Airbnb respectfully requests that this Court deny plaintiff's motion to amend her complaint.

Dated this 13th day of September, 2022.

Respectfully submitted,

/s/ Beattie B. Ashmore
Beattie B. Ashmore
S.C. Bar No. 10419
650 East Washington Street
Greenville, SC 29601
PH: (865) 467-1001.
E: beattie@beattieashmore.com

Attorney for Defendant Airbnb, Inc.

RECEIVED

Oct 04 2023

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM AIKEN COUNTY
Court of Common Pleas

J. Cordell Maddox, Jr., Circuit Court Judge

Appellate Case No. 2023-001479

Case No. 2021-CP-02-00889

Julianne Foster, Respondent,

v.

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

of which Airbnb, Inc., is the Appellant and Rhett Riviere is a Respondent.

/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 Partial Motion 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-

Beattie Ashmore/ Stephanie Gray
Beattie B. Ashmore, P.A.
650 East Washington Street
Greenville, South Carolina 29601
beattie@beattieashmore.com

Damali Taylor
O'Melveny & Myers LLP
Two Embarcadero Center, 28th Floor
San Francisco, CA 94111
DTaylor@omm.com

Jim Griffin/ Joe McCulloch
GRIFFIN DAVIS
4408 Forest Drive
Columbia, SC 29206
JGriffin@griffindavislaw.com
joe@mccullochlaw.com

/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

RECEIVED

Oct 04 2023

SC Court of Appeals

October 4, 2023

Via Email-Filing:

The Hon. Jenny Abbott Kitchings, Clerk of Court

South Carolina Court of Appeals

P.O. Box 11629

Columbia, South Carolina 29211

ctappfilings@sccourts.org

RE: Airbnb Inc. v. Rhett Riviere
Appellate Case No.: 2023-001479
Case No. 2021-CP-02-00889
Our File No.: 00305-001

Dear Ms. Kitchings:

Enclosed for filing are Julianne Foster's Partial Motion 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*)