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Oct 23 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

And Airbnb, Inc., is the..... Respondent,

v.

Rhett Riviere, ..... Appellant.

**PLAINTIFF JULIANNE FOSTER’S MOTION TO INTERVENE**

Plaintiff Julianne Foster (“Plaintiff” herein) moves to intervene and be added as a party to this appeal. Plaintiff originally filed motions to appeal and to expedite this appeal on October 4,

2023. However, on October 16, 2023, the Court informed Plaintiff that if she wanted to file a motion in this case, she must first file a motion to be added as a party. Accordingly, Plaintiff files this motion to intervene or to be allowed to join as a party.

### **I. 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 Appellant Rhett Riviere and Defendant Kathrine Thomas. Plaintiff never entered into any agreement with Respondent Airbnb, Inc. During the stay, Riviere surreptitiously made video recordings of Plaintiff in various states of undress in the bedroom of the Airbnb rental.

Based on this egregious invasion of her privacy while staying in the Airbnb rental, Plaintiff brought several claims against Appellant Riviere, Thomas, and Respondent 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 response to the motion. 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**.<sup>1</sup>

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

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<sup>1</sup> Airbnb also brought a motion to compel arbitration, which the Court denied. *See* Circuit Court's Order denying Airbnb's Motion to Compel Arbitration, attached as **Exhibit D**. Airbnb has appealed that Order, and it is currently pending before this Court.

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

## II. Argument

Both Riviere’s Motion to Compel Arbitration and this appeal of its denial are unnecessary because Riviere and Airbnb agree that Airbnb’s third-party claims against Riviere are arbitrable and they both seek to arbitrate Airbnb’s third-party claims. In fact, Airbnb recently confirmed that both it and Rhett Riviere have “asserted that the entire case be compelled to arbitration.” Airbnb Inc.’s Return to Respondent’s Motion to Dismiss in part and Respondent’s Motion to Expedite Appeal filed Oct. 6, 2023, at 3, attached as **Exhibit G**. In short, there is not, and never has been, a justiciable controversy as to this issue of the arbitrability of the third-party claims in this action. *See Sloan v. Friends of the Hunley, Inc.*, 369 S.C. 20, 25, 630 S.E.2d 474, 477 (2006) (“Generally, th[e] Court only considers cases presenting a justiciable controversy.”). Riviere’s appeal and Riviere and Airbnb’s Joint Motion to Stay the entire case pending this appeal, including Plaintiff’s claims against Airbnb, are simply a means to delay discovery and resolution of Plaintiff’s claims. Thus, Plaintiff seeks to intervene in this appeal to protect her interests. Because no appellate court rule specifically governs intervention, Plaintiff seeks to join this appeal guided by Rules 19 or 24 of the South Carolina Rules of Civil Procedure.<sup>2</sup>

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<sup>2</sup> Although there is no specific appellate court rule addressing intervention in an appeal, South Carolina appellate courts have allowed intervention. *See e.g., Spanish Wells Property Owners Asso. v Board of Adjustment*, 295 SC 67, 367 SE2d 160 (1988) (holding successful applicant for preliminary development permit before town planning commission is necessary party to appeal of action approving preliminary development permit); *Nat’l Health Corp. v. S.C. Dept. of Health & Environmental Control*, 298 S.C. 373, 377, 380 S.E.2d 841, 843 (Ct. App. 1989) (noting that “Waccamaw thereafter moved to intervene in the appeal in order to protect its interests, and that motion was properly granted.”).

**A. The Court should grant Plaintiff's motion to intervene pursuant to Rule 24, SCRPC.**

Plaintiff seeks intervention of right to protect her interests under Rule 24, SCRPC. Rule 24(a)(2) provides:

when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

Rule 24(a)(2), SCRPC. In determining whether intervention is warranted, the Court "should consider the practical implications of a decision denying or allowing intervention." *Ex parte Gov't Emp.'s Ins. Co. v. Goethe*, 373 S.C. 132, 138, 644 S.E.2d 699, 702 (2007). "[The Court] interpret[s] [Rule 24(a)(2)] to permit liberal intervention particularly where, as here, judicial economy will be promoted by the declaration of the rights of all parties who may be affected." *Berkeley Elec. Coop., Inc. v. Town of Mt. Pleasant*, 302 S.C. 186, 394 S.E.2d 712 (1990).

When seeking intervention as a matter of right under Rule 24(a)(2), the movant must:

(1) establish timely application; (2) assert an interest relating to the property or transaction which is the subject of the action; (3) demonstrate that it is in a position such that without intervention, disposition of the action may impair or impede its ability to protect that interest; and (4) demonstrate that its interest is inadequately represented by other parties.

*Ex parte Builders Mutual Ins. Co.*, 431 S.C. 93, 99, 8457 S.E.2d 87, 90 (citing *Berkeley Elec. Coop., Inc. v. Town of Mt. Pleasant*, 302 S.C. 186, 189, 394 S.E.2d 712, 714 (1990)).

Addressing each of these factors in turn below, Plaintiff establishes that her intervention in this appeal is warranted. First, Plaintiff has timely moved to intervene. "Courts have adopted a four-part test for determining timeliness: (1) the time that has passed since the applicant knew or should have known of his or her interest in the suit; (2) the reason for the delay; (3) the stage to which the litigation has progressed; and (4) the prejudice the original parties would suffer from

granting intervention and the applicant would suffer from denial.” *Cooper v. South Carolina Dep’t of Soc. Servs.*, 428 S.C. 402, 412 n.2, 835 S.E.2d 516, 521 n.2 (2019) (quotation marks and citations omitted)). This appeal is in the initial stages; the parties have not filed final briefs or the Record on Appeal. Further, Plaintiff originally filed motions in this appeal attempting to protect her interests on October 4, 2023, but was informed on October 16, 2023, that she must first file a motion to be added as party. Finally, the current parties to this appeal would not be prejudiced by Plaintiff’s intervention, but, as discussed in more depth below, Plaintiff would suffer from the denial of her motion to intervene. Plaintiff’s motion to intervene is timely.

As to the second and third factors, Plaintiff has an interest in the subject of the action and without intervention, disposition of the action may impair her ability to protect that interest. In this appeal, Riviere seeks to overturn the circuit court’s order denying his motion to compel arbitration of Defendant/Respondent Airbnb’s third-party indemnification claims. After the circuit court denied the motion, Riviere and Defendant/Respondent Airbnb filed a joint motion to stay the entire action below. The circuit court granted this motion and stayed the case, including Plaintiff’s claims. As stated above, Riviere and Airbnb both seek arbitration of Airbnb’s third-party indemnification. Because the parties are in agreement, there simply is not a justiciable controversy. However, this appeal is impacting Plaintiff’s interest and has delayed the resolution of Plaintiff’s claims.

Despite having been filed over two years ago, the underlying litigation is unfortunately still very early in the discovery process due to numerous discovery disputes with Airbnb. Airbnb has fought almost every discovery request from Plaintiff. Airbnb only recently produced (pursuant to an order from the circuit court after extensive litigation) a partial response to Plaintiff’s discovery requests that were originally served a year ago. The appeal and the stay pending resolution of the

appeal are adversely affecting Plaintiff's ability to litigate and obtain a resolution of her claims through increased expenses and unwarranted delays. The current stay and the pending appeals further prolong the time which Plaintiff 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 Plaintiff will spend without a resolution of her claims. The appeal of the Order denying Riviere's Motion to Compel Arbitration, where both of the current parties want to arbitrate their claims, is frivolous and taken to cause further delay. Accordingly, Plaintiff requests that she be allowed to intervene in this appeal.

Finally, as to the last factor, Plaintiff's interest is inadequately represented by the other parties to this appeal. The South Carolina Supreme Court has adopted the following factors for determining the adequacy of representation:

- (1) whether the existing parties will undoubtedly make all of the intervenor's arguments; (2) whether the existing parties are capable and willing to make such arguments; and (3) whether the intervenor offers different knowledge, experience, or perspective on the proceedings that would otherwise be absent.

Berkeley Electric, 302 S.C. at 191, 394 S.E.2d at 715. The current parties to this appeal, Riviere and Airbnb, will *not* be willing to and undoubtedly will not make Plaintiff's arguments because they want to continue the stay of the underlying action for as long as possible. Further, Plaintiff clearly offers a different perspective on this appeal from the current parties. Plaintiff will provide the Court with much needed information and aid the Court in determining whether there is a justiciable controversy. *In re Horry Cnty. State Bank*, 361 S.C. 503, 510, 604 S.E.2d 723, 726 (Ct. App. 2004) (courts "look to whether the absentee is likely to have anything of his own to say that will be of value."). Based on the foregoing, Plaintiff should be allowed to intervene in this appeal.

**B. Alternatively, because Plaintiff is materially interested in this appeal, Plaintiff should be joined as party to this appeal pursuant to Rule 19, SCRCP.**

Alternatively, because Plaintiff is materially interested in this appeal and its impact on her underlying claims, the Court should grant her motion to be added as party to this appeal pursuant to Rule 19, SCRCP. Rule 19(a) provides in pertinent part:

A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest.

Rule 19(a), SCRCP. “The principle behind this Rule is that whenever possible persons materially interested in the action should be joined so that they may be heard and a complete determination had.” Rule 19, SCRCP note. As discussed above, Plaintiff is materially interested in this appeal as the circuit court has stayed the entire action below pending the resolution of this frivolous appeal.

Plaintiff is not a stranger to this litigation; she has been involved for over two years. She has an interest in the subject of this appeal, which is frivolous and taken solely for delay. Plaintiff has been victimized by Airbnb during two years of litigation in which it has objected to every single discovery request and boldly defied Orders from the circuit court compelling them to produce and to participate in discovery in good faith. As the circuit court found when granting Plaintiff’s Motion for a Rule to Show Cause based upon Airbnb’s failure to comply with discovery, Airbnb’s actions have shown continuing “contemptuous conduct.” *See* Order granting Plaintiff’s Motion for a Rule to Show Cause at 3, attached as **Exhibit H**. Allowing Plaintiff to intervene, the Court would ensure that a litigant in the action below, who is substantially effected by this appeal,

has a voice and can provide the Court a different perspective from that of the current parties and much needed information which would aid the Court.

## **II. Conclusion**

Based on the foregoing, Plaintiff respectfully request the Court grant her motion to intervene or join this appeal.

Respectfully submitted,

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Attorneys for Plaintiff Julianne Foster

October 23, 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.

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

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

Defendants.

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AIRBNB, INC.,

Third-Party Plaintiff,

v.

RHETT RIVIERE,

Third-Party Defendant.

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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.

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*s/ James M Griffin*

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ATTORNEYS FOR DEFENDANT RIVIERE

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.<sup>1</sup>

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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<sup>1</sup> 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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\*\*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.

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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  
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).<sup>1</sup> While federal law governs the

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

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.<sup>2</sup> Because there is a delegation clause in its standard arbitration agreement contained in its TOS, Airbnb argues it a question for the arbitrator. Plaintiff, however, contends that is a question for the Court. The Court finds it is to determine whether a valid arbitration agreement was formed.

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

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

<sup>2</sup> “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.<sup>3</sup> 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

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

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

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

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

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).<sup>4</sup> 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,

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<sup>4</sup> 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.<sup>5</sup> 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).

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<sup>5</sup> 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.<sup>6</sup> 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).

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<sup>6</sup> 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 E

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. )

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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 F

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 G

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM AIKEN COUNTY  
Court of Common Pleas  
The Honorable J. Cordell Maddox, Jr., Circuit Court Judge  
Case No. 2021-CP-02-00889

---

Appellate Case No. 2023-001479

---

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.

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**Airbnb, Inc.’s Return to Respondent’s Motion to Dismiss in Part and  
Respondent’s Motion to Expedite Appeal**

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Respondent Julianne Foster (“Respondent”) moved to dismiss this appeal in part and to expedite its consideration. Respondent’s arguments confirm that no exigency or other emergency exists warranting resolution of this appeal on truncated briefs and an incomplete record, or a departure from this Court’s standard briefing process. Further, Respondent’s arguments that Airbnb, Inc.’s (“Airbnb”) appeal is frivolous should be rejected. As a result, Airbnb requests the Court deny Respondent’s motions.

## Background

### A. The Underlying Action

This action arose from an incident that allegedly occurred from May 17–18, 2019. (Am. Compl. ¶ 89.) Respondent alleges that her friend used Airbnb to locate and rent a property in Aiken, South Carolina. (*Id.* ¶ 93.) The subject property was owned by Defendant Chase Enterprises, which was managed by Defendant Riviere. (*Id.* ¶¶ 89–91.) Defendant Thomas was the host for the property. (*Id.* ¶ 95.) Respondent alleges that during the time she was staying at the property, Defendant Riviere had a hidden camera placed in a bedroom. (*Id.* ¶ 100; Order Denying Airbnb’s Mot. Compel Arbitration at 1.)<sup>1</sup>

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

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<sup>1</sup> This order is attached to Respondent’s Motion to Dismiss in Part as Exhibit B.

Defendants), and (10) *violation of the South Carolina Unfair Trade Practices Act (all Defendants)*.  
(The newly added claims are italicized above.)

**B. The Underlying Motions and Orders on Appeal**

Defendant Airbnb and Third-Party Defendant Riviere separately moved the Circuit Court to compel arbitration of all claims brought by Respondent and arising from the underlying allegations in the Amended Complaint of Respondent, and based on the arbitration agreement at issue. Airbnb sought arbitration of all claims in Respondent's Amended Complaint and Riviere sought to compel arbitration of Airbnb's third-party claims in the same civil action against him for breach of contract and indemnity. Both Airbnb and Riviere asserted that Respondent's claims belonged in arbitration in their motions. Both asserted that the entire case be compelled to arbitration. Respondent argued to the Circuit Court that it should deny both Airbnb's and Riviere's motions to compel arbitration.

On April 5, 2023, the Circuit Court considered both motions to compel arbitration at a single hearing. In an email dated July 11, 2023, the Circuit Court noted its intention to deny both motions to compel arbitration. On September 13, 2023, the Circuit Court issued an order on Airbnb's motion to compel arbitration.

### **C. This Appeal**

Two days later after the Circuit Court denied Airbnb's motion to compel arbitration, on September 15, 2023, Airbnb noticed this appeal.<sup>2</sup> Respondent has filed a Motion to Dismiss and Motion to Expedite this appeal.<sup>3</sup> For the reasons set forth below, those motions should be denied.

#### **Argument**

##### **I. Respondent's motions attack the merits of Airbnb's appeal and should not be decided without the benefit of more complete briefing.**

The introduction to Respondent's motion opens with a direct attack on Airbnb's claim that the underlying orders denying arbitration was incorrect, arguing "the evidence supports the circuit court's determinations that Respondent never agreed to arbitration; she is not bound to arbitrate by estoppel because she is not raising any contract claims and has not benefitted from any contract with Airbnb[.]" Although it takes the form of a motion instead of an appellate brief, Respondent's motion is simply an attack on the merits of Airbnb's appeal.

South Carolina's courts have established procedures for efficiently briefing issues presented for consideration. These procedures allow for fair administration of the appellate process via the briefing procedures and oral argument in order to provide the Court with sufficient information about the underlying matter with which to make an appropriate decision. The Court's motions practice is not a substitute for this briefing procedure. Consistent with this Court's established procedures, the merits of an action are appropriately decided only after the benefit of

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<sup>2</sup> This is the second appeal from the same underlying action. Although the Circuit Court notified the parties in a single email that it would be denying both motions to compel arbitration, the court issued an order on Riviere's motion to compel on July 26, 2023, and Riviere noticed his appeal the next day, creating Appellate Case No. 2023-001211.

<sup>3</sup> This Court's docket reflects that briefing deadlines in this appeal are stayed by the pending motion to dismiss this appeal.

complete briefs. Dismissal on the merits before complete briefing would improperly circumvent these established procedures and should not be permitted in this case.

Dismissal would also be premature because the record before the Court is incomplete. Respondent asks this Court to consider the merits of Airbnb's appeal on a 13-page motion and 41 pages of select exhibits. Respondent is essentially trying to convert the normal appellate procedures regarding briefing and the creation of the Record on Appeal into a motions practice. If this was permitted, especially in cases like this where no exigency exists, it would become a frequent occurrence before this Court. Thus, Airbnb respectfully requests that this Court deny Respondent's motions and instead require her to adhere to this Court's procedure for responding to Airbnb's appeal as set forth in the briefing schedule pursuant to the South Carolina Appellate Court Rules.<sup>4</sup>

**II. Airbnb's appeal is meritorious; there was extensive briefing and arguments below and the lack of any suggestion from the Circuit Court that Airbnb's arguments were made in bad faith.**

Respondent seeks dismissal and sanctions under Rule 269, SCACR, arguing that this appeal is frivolous. In the Circuit Court, Respondent specifically argued that Airbnb's motion to compel arbitration was frivolous and sought to have the court strike it. *See* Hr'g Tr. 34:18 (“[F]rankly, Your Honor, this is a frivolous motion. This is a frivolous motion that you should strike . . .”). Yet the Court below did not find anything frivolous about Airbnb's arguments. Although the Circuit Court ultimately disagreed with the arguments, it did so only after reviewing

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<sup>4</sup> Should this Court desire to fully assess the merits as improperly urged by Respondent in Respondent's motion to dismiss, this Court would need all materials and arguments that were actually before the Circuit Court, as well as the motions hearing transcript, and not just select materials furnished by Respondent. Should Respondent attempt to submit all of those materials to this Court along with its Reply to this Return, Appellant Airbnb reserves the right to request to address those materials in a supplemental filing.

additional briefing and carefully considering the arguments. Just because the trial court ultimately did not agree with Airbnb does not mean its arguments were unfounded. Yet it is a strong indicator that sanctions under Rule 269, SCACR are inappropriate. *Cf. Culbertson v. Clemens*, 322 S.C. 20 n.5, 25, 471 S.E.2d 163, 165 n.5 (1996) (denying motion for sanctions under precursor to Rule 269, SCACR because sanctions were determined as not appropriate in underlying matter by trial judge).

Airbnb's appeal of the arbitration issue is meritorious. Each of Airbnb's arguments to the Circuit Court were properly supported by existing case law:

- Arbitrability: Airbnb appropriately argued below that the question of whether the arbitral agreement should apply to Respondent is a question reserved for the arbitrator. This arbitrability issue is amply supported by binding precedent. *See Palmetto Wildlife Extractors, LLC v. Ludy*, 435 S.C. 690, 699–700, 869 S.E.2d 859, 864 (Ct. App. 2022) (discussing *Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S. 63, 68–69 (2010)); *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 529–30 (2019). Therefore, Airbnb argued that even if Respondent's arguments attacking the validity of the arbitration agreement in this case could be accepted, they would have to be accepted by an arbitrator and not the Circuit Court.
- Direct Benefits Estoppel: The doctrine of direct benefits estoppel is deeply rooted in arbitration case law and Airbnb's request that the Court apply the doctrine was supported by an array of cases from this court and the Fourth Circuit. *See Pearson v. Hilton Head Hosp.*, 400 S.C. 281, 290, 733 S.E.2d 597, 601 (Ct. App. 2012); *Weaver v. Brookdale Senior Living, Inc.*, 431 S.C. 223, 230–31, 847 S.E.2d 268, 272 (Ct. App. 2020); *R.J. Griffin & Co. v. Beach Club II Homeowners Assoc., Inc.*,

384 F.3d 157, 160 (4th Cir. 2004). Although the Circuit Court rejected this argument, Airbnb will argue in this appeal that the court below erred in doing so because Foster directly benefited from use of the rental property booked pursuant to Airbnb's Terms of Service, and because Respondent referenced and relied on Airbnb policies, terms, and standards *more than 20 times* to support her claims against Airbnb. (See, e.g., Am. Compl. ¶¶ 47, 62–63, 66–68, 72, 73, 84–86, 96, 139, 144, 146, 154, 170, 172, 200, 215, 222, 224, and 242.) Thus, Airbnb's argument that direct benefits estoppel is supported by the law and the record.

- Outrageous Torts Exception: South Carolina's Supreme Court justices have questioned the continued validity of the outrageous tort exception. *Parsons v. John Wieland Homes & Neighborhoods, of the Carolinas, Inc.*, 418 S.C. 1, 12, 791 S.E.2d 128, 133–34 (2016) (plurality opinion asserting that South Carolina case law recognizing the outrageous tort exception should be overruled). In *Parsons*, two justices indicated their view that the judicially created exception conflicted with the United States Supreme Court's opinion in *AT&T Mobility, LLC v. Concepcion*, 563 U.S. 333 (2011), because the exception is not a general contract principle and applies only to arbitration clauses. *Parsons*, 418 S.C. at 11–12 (Pleicones, C.J., joined by Kittredge, J.) (plurality opinion); see also *DIRECTV, Inc. v. Imburgia*, 577 U.S. 47, 56–57 (2015). Airbnb's position is that *Concepcion* vitiates this exception as a matter of United States Supreme Court precedent. This is a meritorious argument. Further, even if this exception could apply in some cases, whether it could apply here is a question for the arbitrator. *Palmetto Wildlife Extractors*, 435 S.C. at 702, 869 S.E.2d at 865.

- No Waiver: Although Respondent argued Airbnb waived its right to arbitration by prejudicing her rights, this argument is based on an outdated understanding of arbitral waiver. Airbnb appropriately pointed out below that the United States Supreme Court recently clarified the appropriate waiver analysis in *Morgan v. Sundance, Inc.*, 142 S. Ct. 1708, 1714 (2022). See also *Armstrong v. Michaels Stores, Inc.*, 59 F.4th 1011, 1015 (9th Cir. 2023) (compelling arbitration and noting that defendant pleaded arbitration as a defense in its two filed answers and in the initial case management conference). Airbnb repeatedly referenced its reservation of the right to compel arbitration in this matter, as opposed to knowingly relinquishing such rights. Moreover, Plaintiff made the decision to amend the complaint to add entirely new causes of action and grossly expand the scope and type of claims being litigated. Thus, Respondent’s amended pleadings revived Airbnb’s right to compel arbitration, even if there was somehow a waiver regarding the original pleadings. *Solis v. Experian Info. Sols., Inc.*, No. SACV2200102CJCKESX, 2022 WL 4376077, at \*3 (C.D. Cal. Sept. 21, 2022) (“The Court need not—and therefore does not—decide whether Experian in fact waived its right to compel arbitration, because Cantong’s amended complaint revived the right even if it were waived.”); *Haarslev, Inc. v. Nissen*, No. 5:19-CV-06128-BCW, 2023 WL 2782313, at \*7 (W.D. Mo. Jan. 30, 2023); *Cannon Equip. Co. v. Troisi*, No. CV 08-2391 (PAM/AJB), 2009 WL 10710732, at \*2 (D. Minn. Oct. 30, 2009); *Brown v. Green Tree Servs., LLC*, 585 F. Supp. 2d 770, 782 (D.S.C. 2008). This is not a frivolous argument by Airbnb.

Indeed, the complexity of this issue is borne out by the fact that the trial court accepted several rounds of extensive briefing (as Foster concedes), denied the arbitration motions, but then issued a stay of this litigation pending resolution of appellate proceedings.<sup>5</sup>

### **III. Foster provides no valid reason to expedite the appeal.**

Our Supreme Court's orders and state law mandate expedited consideration of certain cases. *See, e.g., In Re: Expediting Appeals in Matters Involving Child Custody and Visitation*, Appellate Case No. 2022-001278 (S.C. Sup. Ct. November 17, 2012) (requiring expedited consideration of child-custody actions); *In re Expediting Appeals from Termination of Parental Rts. Proc.*, 366 S.C. 670, 623 S.E.2d 661 (Ct. App. 2005) (similar); *In Re: Extension Requests in Criminal Direct Appeals and Post-Conviction Relief Certiorari Proceedings* (S.C. Sup. Ct. March 18, 2009); *In Re: Extensions in Cases Seeking a Petition for a Writ of Certiorari to Review a Decision of the South Carolina Court of Appeals* (S.C. Sup. Ct. July 16, 2014) (limiting extensions for matters on certiorari); S.C. Code Ann. § 17-30-110 (requiring expedited consideration of wiretap claims by this Court); S.C. Code Ann. § 63-15-376 (requiring expedited appellate consideration under the UCCJEA); S.C. Code Ann. § 44-41-34 (requiring expedited appellate review of judicial bypass actions by minors seeking abortions). Our Supreme Court has also expedited consideration of important healthcare matters, *Amisub of S.C., Inc. v. S.C. Dep't of Health & Env't Control*, 423 S.C. 50, 55, 813 S.E.2d 719, 721 (2018), of an order incarcerating a journalist for failing to reveal a source, *Matter of Decker*, 322 S.C. 212, 214–15, 471 S.E.2d 459,

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<sup>5</sup> Like its non-waiver argument was supported by recent Supreme Court precedent, the motion to stay was also supported by the Supreme Court's opinion issued just this last term. *See Coinbase, Inc. v. Bielski*, 143 S. Ct. 1915, 1918 (2023). Airbnb's reliance on relatively new cases, or extension of those cases to new circumstances is wholly permissible. *Cf.* Rule 3.1, SCRPC, Rule 407, SCACR (permitting claims that include "a good faith argument for an extension, modification or reversal of existing law," because "the law is not always clear and never is static.").

461 (1995), in an appeal involving a state grand jury investigation of the Speaker of the House, *Ex parte Harrell v. Att’y Gen. of State*, 409 S.C. 60, 64, 760 S.E.2d 808, 810 (2014), and in various termination of parental rights actions, *S.C. Dep’t of Soc. Servs. v. Michelle G.*, 407 S.C. 499, 502, 757 S.E.2d 388, 390 (2014).

Each of these types of cases involve matters of significant public interest, minors, or potential criminal prosecutions. A common thread between these types of cases garnering expedited consideration is the potential for immediate and irreparable harm absent expedited consideration on appeal. Although interlocutory appeals from an order denying arbitration are expressly permitted by state law, these types of cases are not included in the types of cases requiring (or justifying) expedited consideration under state law or procedure. Although this case certainly raises important questions to the litigants, this appeal does not involve the welfare of children, potential incarceration, or the possibility of irreparable harm.

This is likely why Respondent cites no cases supporting her position that expedited consideration is necessary here. The two cases she does cite offer no support. First, *Coinbase* does not purport to alter the Court’s standard appellate procedure for accepting full briefing and argument in an appeal. The Supreme Court merely explained in *Coinbase* that if a truly frivolous appeal were filed, procedures already exist for rectifying such an affront to the judicial process. For the reasons set forth above, there is no reason for the Court to resort to such procedures given the strength of the arguments Airbnb has presented. Second, *Evans v. Accent Manufactured Homes, Inc.*, 352 S.C. 544, 550, 575 S.E.2d 74, 76–77 (Ct. App. 2003) is the type of case deciding arbitrability on grounds of “prejudice” that was overruled by the Supreme Court’s opinion last year in *Morgan v. Sundance, Inc.*, 142 S. Ct. 1708, 1714 (2022). Prejudice should not be a factor in the analysis under *Morgan v. Sundance*. Neither case supports expediting this appeal.

## Conclusion

For the foregoing reasons, Airbnb asks this Court to deny Respondent's Motion to Dismiss in Part and Motion to Expedite.

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Columbia, South Carolina  
October 16, 2023

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM AIKEN COUNTY  
Court of Common Pleas  
The Honorable J. Cordell Maddox, Jr., Circuit Court Judge  
Case No. 2021-CP-02-00889

---

Appellate Case No. 2023-001479

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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.

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**Proof of Service**

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I, the undersigned of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Airbnb, Inc., certify that I have served all counsel in this action with a copy of the documents(s) set forth below under Supreme Court Order 2022-05-06-04, and a copy of that email is attached to this certificate.

Document(s): **Appellant Airbnb, Inc.’s Return to Respondent’s Motion to Dismiss in Part and Respondent’s Motion to Expedite Appeal**

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Enterprises LLC of South Carolina*

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: /s/ Matthew A. Abee

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*Attorney for Airbnb, Inc.*

Columbia, South Carolina  
October 16, 2023

## Matt Abee

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**From:** Matt Abee  
**Sent:** Monday, October 16, 2023 5:42 PM  
**To:** dbb@deborahbarbier.com; rlb@ryanbeasleylaw.com; wes@wesleyfew.com; cassy@wesleyfew.com; damonw@rplfirm.com; john@jwhartelaw.com; joe@mccullochlaw.com; kathy@mccullochlaw.com; mfox@griffindavislaw.com; jgriffin@griffindavislaw.com; Jaime Harmon  
**Cc:** Mitch Brown; Blake Williams; Eileen Hindman; beattie@beattieashmore.com; pdb@harpootlianlaw.com; Dick Harpootlian; dsestito@omm.com; dtaylor@omm.com  
**Subject:** Service Copy: Airbnb's Return - Foster v. Airbnb (No. 2023-001479)  
**Attachments:** Airbnb's Return to Motions to Dismiss and Expedite - Foster v. Airbnb (2023-001479).pdf; MAA Proof of Service - Airbnb Appeal (2023-001479).pdf

Counsel:

For service on you by email under Supreme Court Order No. 2022-05-06-03, please find Appellant Airbnb, Inc.'s Return to Respondent's Motion to Dismiss in Part and Respondent's Motion to Expedite Appeal. Please feel free to contact me should you have any questions. Thanks.

-Matt



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MATT ABEE **PARTNER**  
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# EXHIBIT H

STATE OF SOUTH CAROLINA  
COUNTY OF AIKEN

IN THE COURT OF COMMON PLEAS  
2<sup>ND</sup> 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.<sup>i</sup> 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 reconsideration<sup>ii</sup> 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.**

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The Honorable J. Cordell Maddox, Jr.  
Presiding Judge, 2<sup>nd</sup> Judicial Circuit

July \_\_, 2023  
Anderson, South Carolina

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<sup>i</sup> 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

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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 23 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](mailto:dbb@deborahbarbier.com)

**PROOF OF SERVICE**

The undersigned hereby certifies that on October 4, 2023, **Julianne Foster's Motion to Intervene** 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](mailto:ctappfilings@sccourts.org)

-and-

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/s/Cassy Young  
Cassy Young

October 23, 2023  
Columbia, South Carolina

**WESLEY D. FEW, LLC**

Attorney at Law

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**RECEIVED**

**Oct 23 2023**

**SC Court of Appeals**

October 23, 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](mailto:ctappfilings@sccourts.org)

**RE:** Rhett Riviere v. Airbnb Inc.  
Appellate Case No.: 2023-001211  
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 Motion to Intervene in Case No.: 2023-001211 and Reply to Airbnb's Return to Respondent's Motions to Dismiss Appeal in Part and to Expedite Appeal in Case No.: 2023-001479 and Proof of Service for same.

Sincerely Yours,



Wesley D. Few

Enclosures

WDF/cgy

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