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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM AIKEN COUNTY
Court of Common Pleas
The Honorable J. Cordell Maddox, Jr. Circuit Court Judge

Appellate Case No. 2023-001479
Case No. 2021-CP-02-00889

Julianne FosterRespondent,

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.

Appellant’s Initial Brief

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STATEMENT OF ISSUES ON APPEAL

The issues presented are:

- I. Whether the circuit court erred in denying Airbnb's motion to compel arbitration when a valid arbitration agreement exists, Plaintiff directly benefited from the contractual relationship, and is thus bound to arbitration by direct benefits estoppel.
- II. Whether the circuit court erred in deciding issues of enforcement delegated in the arbitration agreement to the arbitrator, and ruling that: (a) the outrageous torts exception to arbitration applied, when no outrageous tort was alleged against Airbnb, and in any event that exception is no longer valid and (b) that Airbnb waived arbitration, when Airbnb always reserved its right to arbitration, and Plaintiff filed an amended complaint that expanded the litigation, which reinforced or revived Airbnb's right to compel arbitration.
- III. Whether the circuit court erred in ruling on Plaintiff's Motion for a Rule to Show Cause and concluding that Airbnb engaged in contemptuous conduct when Plaintiff failed to satisfy the prerequisites for a rule to show cause, the record contains no evidence of willful noncompliance of orders by clear and convincing evidence, and Plaintiff's Motion for Rule to Show Cause was not properly before the circuit court.

STATEMENT OF THE CASE AND FACTS

In 2019, Michelle Jain booked a rental property in Aiken, South Carolina through Airbnb for herself and several friends, including Plaintiff Julianne Foster (“Plaintiff”), for a stay during a tennis tournament. (Am. Compl. ¶¶ 93, 100; R. ___.) This property was owned by Defendant Chase Enterprises, which Defendant Rhett Riviere manages. (*Id.* ¶¶ 89–91; R. ___.) Defendant Katherine Thomas held herself out to be the “host,” or account manager, for the property. (*Id.* ¶ 95; R. ___.) Plaintiff and her friends stayed at the property rented through Airbnb from May 17–18, 2019, and all “paid the Defendants to rent the Airbnb property.” (*Id.* ¶ 100; R. ___.)

Airbnb’s Terms of Service governed this transaction. (*See* Airbnb’s Mot. Compel Arbitration, Ex. A – Terms of Service, AIRBNB-000272–314 (“Terms of Service”); R. ___.) As detailed more fully below, Plaintiff’s friend expressly agreed to the terms in registering for an Airbnb account and booking the rental. (Reply in Support Mot. to Compel, Ex. B. Chauvet Oct. 26, 2022 Dep. Tr. 264:1–12; R. ___.) Plaintiff stayed at the property thus directly benefitting from the transaction (which Airbnb argues below subjects her to direct benefits estoppel). As hosts, Riviere and Thomas—the property’s owner and manager, respectively—also agreed to the Terms of Service as a condition of listing their properties on Airbnb’s online platform. (Airbnb’s 3d Party Compl. ¶ 1; R. ___.)

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

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

(Terms of Service at 272; R. __.) Section 19 is entitled “Dispute Resolution and Arbitration Agreement,” and provides that it applies to all residents of the United States. (*Id.* at 290–93; R. __.) 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; R. __.)

A. Plaintiff’s Original Complaint

On April 28, 2021, Plaintiff sued Defendants Riviere, Thomas, Chase Enterprises, and Airbnb in Aiken County. (Compl.; R. __.) Plaintiff alleges that during the time she was staying at the property, Defendant Riviere had a hidden camera placed in a bedroom which captured recordings of her in various stages of undress. (*Id.* ¶ 100.) Plaintiff’s original 83-paragraph complaint asserted five claims: negligence (all Defendants); invasion of privacy (Riviere); intentional infliction of emotional distress (Riviere); constructive fraud/misrepresentation (Riviere); and negligence per se (Riviere, Thomas, Airbnb). (Compl. ¶¶ 35–83; R. __.)

On August 3, 2021, Airbnb moved to dismiss the complaint for failure to state a claim on the grounds that Plaintiff had not established any exception to South Carolina law that Airbnb had a duty to protect Plaintiff from the criminal acts of third parties. (Mot. to Dismiss; R. __.) The motion was denied, and on February 4, 2022, Airbnb filed its answer. (Airbnb’s Ans.; R. __.) On

the first page of the answer, Airbnb expressly reserved its right to compel mandatory contractual arbitration. (*Id.*)

B. Plaintiff's Amended Complaint

On November 30, 2022, Plaintiff amended her complaint. (Am. Compl.; R. __.) The 257-paragraph amended pleading asserted twelve claims and new factual allegations. (*Id.*) Plaintiff added two claims for premises liability and a claim for unfair trade practices seeking treble damages against all Defendants. (Am. Compl. ¶¶ 182–88, 246–57.) Plaintiff also added three new claims against Airbnb only: negligent hiring, supervision, or retention of employees; negligent hiring, supervision, or retention of employees or alternatively independent contractors; and vicarious liability for invasion of privacy. (*Id.* ¶¶ 136–61, 162–81, 196–213; R. __.) On January 20, 2023, Airbnb again moved to dismiss for failure to state a claim, arguing that (1) Airbnb did not owe Plaintiff any duty given that it had no possession or control over the premises being rented and knew nothing of the camera Plaintiff alleges Riviere had placed in the bedroom; (2) Riviere was not an employee of Airbnb and thus Airbnb could not be vicariously liable for his actions, nor could Airbnb be liable for negligent hiring, retention, or supervision; and (3) Airbnb had not made any misrepresentations or committed any fraudulent or deceptive conduct. (Mot. Dismiss Am. Compl.; R. __.) The circuit court denied the motion to dismiss. (Order; R. __.)

A month after amending her complaint, Plaintiff entered into a confidential settlement with Riviere. (*See* 4/5/2023 Hr'g Tr. 19:4–8; R. __.) Plaintiff and Riviere filed a stipulation purporting to dismiss Riviere on December 20, 2022. (Stipulation of Dismissal; R. __.) Airbnb did not join the stipulation. (*Id.*)

On April 20, 2023, Airbnb answered Plaintiff's amended complaint and crossclaimed against Thomas for breach of contract, contractual indemnification, and equitable indemnification.

(*See* Airbnb’s Ans. to Am. Compl.; R. __.) On the first page of its answer to the Amended Complaint, Airbnb again expressly reserved its right to compel mandatory contractual arbitration and to amend its answer and assert cross-claims, if any, for contribution or indemnity. (*Id.*) Airbnb filed a third-party complaint against Riviere as ordered by the circuit court, who ruled that Plaintiff’s unilateral dismissal of Riviere was effective despite Airbnb having not joined that stipulation. (Form 4 Order, May 25, 2023; R. __; Airbnb’s 3d Party Compl.; R. __.)

C. The Parties’ Motions Practice

During discovery, several disputes arose about document production. Plaintiff moved to compel responses to requests for production on January 18, 2023, and February 10, 2023. (Mot. Compel, Jan. 18, 2023; R. __; Mot. Compel, Feb 10, 2023; R. __.) On April 5, 2023, Judge Jocelyn Newman held a hearing on the motion to compel, among other motions. (*See* 4/5/2023 Hr’g Tr.; R. __.) At the hearing, Judge Newman stated she planned to grant the motion to compel and require production of the disputed documents, but also suggested there was still some uncertainty with her final ruling. (*Id.* at 108:13–110:15; R. __.) Judge Newman did not enter any written order at that time.

Following that hearing, Airbnb’s counsel wrote Judge Newman to raise issues with a portion of the potential document production, where the requested documents, if produced, would violate the privacy rights of certain non-parties. (Brown Ltr., to J. Newman dated May 15, 2023; R. __.) Airbnb also informed Judge Newman that it would be moving to compel arbitration. (*Id.*; Harpootlian Ltr. to J. Newman dated May 16, 2023; R. __.) Given that Judge Newman had not yet entered an order on Plaintiff’s motion to compel, Airbnb requested a status conference for the circuit court to fully address the weighty privacy concerns and give notice to third parties before issuing its written order. (*See* 5/15/2023 Brown Ltr.; R. __.)

After this correspondence, Airbnb moved to compel arbitration and also moved to stay the litigation. (Airbnb’s Mot. Compel Arbitration; R. ___; Mot. Stay; R. ___.) About a week later, Riviere also moved to compel arbitration of Airbnb’s claims against him. (Riviere’s Mot. to Compel Arbitration; R. ___.) The Aiken Clerk of Court set a hearing on the motions to compel and stay for June 13, 2023, before Judge Cordell Maddox.

On May 25, 2023, Judge Newman issued a Form 4 order granting Plaintiff’s motions to compel (the “Production Order”). (Form 4 Order; R. ___.) On June 5, 2023, Airbnb—subject to its arbitration rights—timely produced certain responsive documents but did not produce documents responsive to two narrow sets of requests: (1) production of contact information for non-party guests (RFPs 45, 46, 47); and (2) the identity and related information of non-party hosts with any criminal convictions from a list of 82 offenses (RFP 48). (Taylor Ltr. Producing Docs., June 5, 2023; R. ___.) On the same day as the document production, Airbnb moved to reconsider the Production Order, focusing on these two narrow sets of documents. (Airbnb’s Mot. to Reconsider; R. ___.) Airbnb also moved to stay enforcement of the order as to that limited set of records, citing *Hollman v. Woolfson*, 384 S.C. 571, 683 S.E.2d 495 (2009).¹ (*Id.*) Airbnb’s motion to reconsider and stay enforcement is still pending before Judge Newman and has not yet been set for a hearing or ruled upon.

¹ In *Hollman v. Woolfson*, 384 S.C. 571, 577–78, 683 S.E.2d 495, 498–99 (2009), the South Carolina Supreme Court granted two extraordinary writs of certiorari and reversed and vacated discovery orders compelling production of non-party contact information and allowed the plaintiff’s counsel to contact those non-parties. *Id.* Although it recognized that the scope of discovery is broad, *id.* at 577, 683 S.E.2d at 498, the Court held that it was an abuse of discretion for the Court to require the production of the non-parties’ contact information and then to authorize the plaintiff’s counsel to contact those non-parties, *id.* at 578, 683 S.E.2d at 498–99. The party seeking the production in *Hollman* also failed to carry its burden of “demonstrate[ing] with specificity exactly how the lack of information [would] impair the presentation of the case on the merits to the point that an unjust result is a real, rather than a merely possible, threat.” *Id.* at 578, 683 S.E.2d at 498.

On June 8, 2023, just three days after Airbnb produced responsive documents and moved for reconsideration, Plaintiff filed a Motion for a Rule to Show Cause (the “Show Cause Motion”). (Pl’s Mot. for Rule to Show Cause; R. __.) Plaintiff asked the circuit court to require Airbnb to “show cause why it should not be held in contempt for failing to comply with the Court’s Orders,” *i.e.* purportedly failing to comply with Judge Newman’s Production Order, which was subject to Airbnb’s (still pending) Motion to Reconsider and Stay Enforcement. (*Id.* at 1; R. __.) Plaintiff’s motion was not verified, was not accompanied by an affidavit, or filed with a summons. (*See id.*) Plaintiff’s counsel then contacted the Clerk of Court to request that the Show Cause Motion be heard by Judge Maddox during the already scheduled June 13, 2023 hearing. (Young Email dated June 8, 2023; R. __.) Airbnb’s counsel responded to this request by saying, “For Airbnb, we take no position as to the motion being sent to the judge for consideration to add to the schedule but we reserve and do not waive all rights, objections and positions, including but not limited to those related to this motion.” (Brown Email dated June 8, 2023; R. __.)

On June 13, 2023, Judge Maddox held a hearing. (6/13/2023 Hr’g Tr.; R. __.) The parties argued Airbnb’s Motion to Compel Arbitration extensively, but did not address Plaintiff’s Show Cause Motion in detail apart from some general statements about the course of discovery in the case. (*Id.* 17:11–12, 33:19–34:2; R. __.) Airbnb’s counsel disagreed with Plaintiff’s general characterization of the discovery that had occurred in the case. (*Id.* 38:21–39:3; R. __.) Otherwise, the hearing was focused on arbitration—the word “contempt” does not even appear in the transcript for the hearing.

During the hearing, the circuit court indicated the Parties could make subsequent filings and present him with clarifications on their positions. Plaintiff sent a letter to the circuit court taking the position that both Airbnb and Riviere’s motions to compel should be denied. (Barbier

Letter, June 16, 2023; R. __.) Airbnb also submitted correspondence to the circuit court addressing various issues. (Brown Ltr. to J. Maddox, June 14, 2023; R. __; Brown Ltr. to J. Maddox, June 16, 2023; R. __.)

After the hearing, the circuit court emailed the parties informing them that it intended to deny Airbnb and Riviere's motions to compel arbitration and grant Plaintiff's Show Cause Motion. (Maddox Email dated July 11, 2023; R. __.) The circuit court directed Plaintiff's counsel to draft the proposed order for Airbnb's arbitration motion and Plaintiff's Show Cause Motion, explaining that the proposed order on the Show Cause Motion "shall provide that Defendants shall comply with the previously filed Motion to Compel within forty-five (45) days upon Judge Maddox's signing of the order." (*Id.*) The circuit court's email makes no mention of intending to order that Airbnb would be found in contempt. (*Id.*) When Airbnb received Plaintiff's proposed order purporting to hold Airbnb in contempt, (Few Email dated July 24, 2023; R. __), Airbnb filed its memorandum in opposition to the Show Cause Motion and Plaintiff's proposed order less than 48 hours later, (Mem. Opp. Show Cause Mot.; R. __). Among other things, Airbnb argued in that memorandum that contempt was improper because: (1) the subject documents were subject to Airbnb's motions to reconsider and stay enforcement pending before Judge Newman; (2) Plaintiff did not establish the procedural prerequisites for a rule to show cause order; (3) the circuit court did not hold the required rule to show cause hearing; and (4) Plaintiff could not and did not establish willful noncompliance by Airbnb. (*Id.*; R. __.)

D. Judge Maddox's Orders

On July 26, 2023, Judge Maddox entered a formal order denying Riviere's motion to compel arbitration. (Order Denying Riviere's Mot. to Compel.; R. __.) Riviere filed his notice of appeal two days later, on July 28, 2023. (Riviere's Not. of Appeal; R. __.) Also on July 28, after

Riviere filed and served the notice of appeal, Riviere and Airbnb jointly moved that Judge Maddox acknowledge the automatic stay of the litigation resulting from the appeal pursuant to the Supreme Court of the United States’s recent opinion in *Coinbase, Inc. v. Bielski*, 143 S. Ct. 1915, 1918 (2023). (Joint Mot. to Acknowledge Automatic Stay; R. __.) After receiving briefing, Judge Maddox entered an order on August 24, 2023, granting this joint motion, acknowledging the automatic stay emanating from the Riviere appeal taken on July 28, 2023, and otherwise in his discretion staying further judicial proceedings. (Order Granting Stay; R. __.) This stay order was not appealed.

After considering the parties’ arguments and making modifications to Plaintiff’s proposed order, Judge Maddox also entered an order granting Plaintiff’s Show Cause Motion (the “Show Cause Order”) on August 24, 2023.² (Order Granting Rule to Show Cause; R. __.)

On September 13, 2023, the circuit court issued an order denying Airbnb’s motion to compel arbitration. (Order Denying Airbnb’s Mot. to Compel Arbitration; R. __.) On September 15, 2023, Airbnb timely filed and served its Notice of Appeal of both the order denying its motion to compel arbitration and the Show Cause Order. (Airbnb’s Not. of Appeal; R. __.)

STANDARD OF REVIEW

Appeal from the denial of a motion to compel arbitration is subject to *de novo* review. *Chassereau v. Global Sun Pools, Inc.*, 373 S.C. 168, 171, 644 S.E.2d 718, 720 (2007).

“Civil contempt must be [shown] by clear and convincing evidence.” *Ex parte Lipscomb*, 398 S.C. 463, 469, 730 S.E.2d 320, 323 (Ct. App. 2012) (quoting *Poston v. Poston*, 331 S.C. 106,

² Although these two orders show the same date and time on the docket, the “Official File Stamp” on the Notice of Electronic Filing (“NEF”) for the two orders show that the Stay Order preceded the Show Cause Order. (*Compare* Stay Order; R. __; *with* Show Cause Order; R. __.).

113, 502 S.E.2d 86, 89 (1998)). “A trial court’s determination regarding contempt is subject to reversal where it is based on findings that are without evidentiary support or where there has been an abuse of discretion.” *Henderson v. Puckett*, 316 S.C. 171, 173, 447 S.E.2d 871, 872 (Ct. App. 1994). “An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support.” *State v. Jones*, 416 S.C. 283, 290, 786 S.E.2d 132, 136 (2016) (citing *State v. Pittman*, 373 S.C. 527, 647 S.E.2d 144 (2007)). Contempt orders are immediately appealable. *Ex parte Whetstone*, 289 S.C. 580, 580, 347 S.E.2d 881, 881–82 (1986).

ARGUMENT

The Court should reverse the circuit court’s Order Denying Airbnb’s Motion to Compel Arbitration and vacate its Show Cause Order.

First, this dispute is covered and governed by a valid arbitration agreement. Airbnb properly moved to compel Plaintiff’s claims to arbitration under the Federal Arbitration Act, 9 U.S.C. §§ 1–16 (“FAA”). All of Plaintiff’s claims against Airbnb arise out of a transaction involving interstate commerce and are subject to a binding arbitration agreement that is governed by the FAA. The Terms of Service provide, among other things, that *any dispute, claim, or controversy* arising out of or relating to the Terms and Conditions *or* the use of the Airbnb online marketplace are subject to arbitration. (See Airbnb’s Mot. to Compel. Arbitration, Ex. A – Terms of Service at 291; R. __.) All of Plaintiff’s claims fall within the Arbitration Agreement’s broad scope. Although Plaintiff did not sign the rental contract and arbitration agreement, direct benefits estoppel applies, both because Plaintiff relies on the contract containing the arbitration agreement to assert her claims against Airbnb, and because she benefited from the rental contract. This Court should enforce the arbitration agreement according to its terms and carry out the federal and state

policy favoring arbitration. *Parsons v. John Wieland Homes & Neighborhoods of the Carolinas, Inc.*, 418 S.C. 1, 6, 791 S.E.2d 128, 131 (2016); *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1621 (2018).

Second, the circuit court erred as a matter of law by considering the “outrageous torts exemption” and Plaintiff’s claims of waiver in denying Airbnb’s motion to compel arbitration because those issues had properly been delegated to the arbitrator. In any event, Airbnb did not engage in any outrageous conduct and that judicially created exemption to arbitration is no longer viable under United States Supreme Court precedent. The circuit court also erred in ruling that Airbnb waived its right to compel arbitration; Airbnb repeatedly expressly reserved its right to arbitrate, and that right was renewed when the Plaintiff vastly expanded the case with her amended complaint.

Third, the circuit court erred as a matter of law when finding Airbnb had engaged in contemptuous conduct. Plaintiff failed to satisfy the procedural prerequisite to obtaining such an order, so the Court never should have entertained the motion. Further, there was no evidence—let alone clear and convincing evidence—that Airbnb engaged in willfully disobedient conduct. It did not. Additionally, Plaintiff’s Show Cause Motion was improperly considered by Judge Maddox given the automatic stay emanating from Riviere’s appeal filed nearly a month earlier, and the fact that Airbnb’s Motion to Reconsider and Stay Enforcement was still pending before Judge Newman with respect to her Production Order. For these and other reasons detailed below, this Court should vacate the Show Cause Order.

I. The circuit court erred in denying Airbnb’s motion to compel arbitration because a valid arbitration agreement exists, Plaintiff directly benefited from the contractual relationship, and Plaintiff is thus bound to arbitration by direct benefits estoppel.

The circuit court erred as a matter of law when denying Airbnb’s motion to compel arbitration. There is a valid arbitration agreement, Plaintiff’s claims are subject to the agreement, and the matter must be compelled to arbitration. The FAA “leaves no place for the exercise of discretion by a . . . court, but instead mandates that . . . courts *shall* direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed.” *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 218 (1985); *Adkins v. Labor Ready, Inc.*, 303 F.3d 496, 50 (4th Cir. 2002) (“[A] court . . . has no choice but to grant a motion to compel arbitration where a valid agreement exists and the issues in a case fall within its purview.”). Here, a valid arbitration agreement exists and all of Plaintiff’s claims fall within its broad scope.

A. A valid arbitration agreement exists that Airbnb may enforce.

Plaintiff’s friend, Michelle Jain agreed to Airbnb’s Terms of Service that included the arbitration agreement when she created her Airbnb account and used it to book the rental. (*See* Am. Compl. ¶¶ 93–95; Pl.’s Resp. in Opp’n to Mot. Compel Arbitration at 2; R. __.) Although the circuit court discusses a purported disagreement about whether there is a binding arbitration agreement between Plaintiff’s friend, Michelle Jain, and Airbnb in its order, this discussion is merely dicta, as the circuit court made no ruling in this regard. (Order at 5, n.3; R. __.)

Airbnb produced user information for Jain’s account in discovery confirming that she agreed to the Terms of Service on April 11, 2019. (*See* Reply in Support Mot. to Compel Arbitration, Ex. A – User Information; Brown Ltr. Judge Maddox dated June 14, 2023 & Exhibits; R. __.) Moreover, Plaintiff knew that her friend agreed to the Terms of Service from Airbnb’s

corporate representative’s deposition on October 26, 2022. (Reply in Support Mot. to Compel, Ex. B. Chauvet Oct. 26, 2022 Dep. Tr. 264:1–12; R. ___.)

To try to contradict this evidence, Plaintiff provided an affidavit from her friend Jain claiming that she does not recall agreeing to the arbitration provision. (Jain Aff., Exhibit to Barbier Ltr. to J. Maddox, June 16, 2023; R. ___.) But lack of memory is not grounds for avoiding an arbitration provision contained within a clickwrap agreement. *See, e.g., Liptak v. Accelerated Inventory Mgmt., LLC*, No. 2:20-CV-967, 2021 WL 650514, at *2 (W.D. Pa. Feb. 19, 2021). Further, as expressed in the declaration of Airbnb’s Legal Investigations Coordinator, Monique Chavet, Plaintiff’s friend could not have made the reservation unless she consented to the Terms of Service. (Brown Ltr. to J. Maddox, June 16, 2023 & Exhibit; R. ___.) Airbnb’s records prove that Plaintiff’s friend indeed accepted the Terms of Service—including the arbitration provision, which was flagged for Ms. Jain in bold typeface on the very page of those terms. There is thus no serious dispute about the validity of the arbitration agreement, or the Terms of Service containing that agreement.³ After all, Plaintiff’s claims are based on the contractual relationship her friend had with Airbnb, which was established under those very same Terms of Service.

B. Plaintiff’s claims fall under the broad scope of the Arbitration Agreement with Airbnb.

The FAA provides that arbitration agreements “shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.” 9 U.S.C. § 2. The FAA mandates that “any doubts concerning the scope of arbitrable issues should be

³ The other prerequisites to a valid arbitration agreement are also present. The transaction involves interstate commerce. The Arbitration Agreement in the Contract specifically provides that the transaction involved interstate commerce and that the FAA governs. (Airbnb’s Mot. to Compel Arbitration, Ex. A – Terms of Service at 291, § 19.6; R. ___.) Further, the rental transaction at issue involved the payment of funds over the interstate wires between Airbnb, a Delaware entity with its principal place of business in California and Plaintiff’s friend, a South Carolina resident.

resolved in favor of arbitration.” *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24–25 (1983); *see also Brown v. Santander Consumer USA, Inc.*, No. CA 0:12-2825-CMC-PJG, 2013 WL 4017162, at *2 (D.S.C. Aug. 5, 2013) (“Arbitration is compelled ‘unless it may be said with positive assurance that the arbitration [agreement] is not susceptible of an interpretation that covers the asserted dispute.” (quoting *Peoples Sec. Life Ins. Co. v. Monumental Life Ins. Co.*, 867 F.2d 809, 812 (4th Cir. 1989))). The Supreme Court dictates that a presumption of arbitrability exists where a contract contains an arbitration clause. *AT&T Technologies, Inc. v. Commc’ns Workers of Am.*, 475 U.S. 643, 650 (1986). The presumption in favor of arbitrability “is particularly applicable where the [arbitration] clause is . . . broad,” as it is in this case. *Id.*

Here, each of Plaintiff’s claims fall within the Arbitration Agreement’s broad scope. The Arbitration Agreement requires that Plaintiff arbitrate “any claim” arising out of the Terms of Service or use of the Airbnb platform. (Airbnb’s Mot. to Compel Arbitration, Ex. A – Terms of Service at 291; R. __.) All of Plaintiff’s claims arise out of her stay at the property, booked through Airbnb, and thus arise out of both the Terms of Service and the Airbnb platform. Hence, because all of Plaintiff’s claims have a significant relationship to the Terms of Service and fall within the scope of the Arbitration Agreement, they are all subject to arbitration.

C. Direct benefits estoppel applies to prevent Plaintiff from avoiding the obligation to arbitrate while simultaneously benefiting from the Airbnb contract.

Although Plaintiff was not a signatory to the arbitration agreement between her friend and Airbnb, Plaintiff is estopped from avoiding the requirement to arbitrate Plaintiff’s claims. South Carolina law estops a non-signatory from avoiding an arbitration cause when Plaintiff receives a direct benefit from the contract containing the clause. (Order at 6; R. __.); *Pearson v. Hilton Head Hosp.*, 400 S.C. 281, 290, 733 S.E.2d 597, 601 (Ct. App. 2012); *Wilson v. Willis*, 426 S.C. 326,

344, 827 S.E.2d 167, 177 (2019) (“[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.”). The estoppel test focuses on the benefit the non-signatory receives from the contract in the dispute. *Wilson*, 426 S.C. at 344, 827 S.E.2d at 177.

The circuit court misapplied the direct benefits estoppel test in denying Airbnb’s motion to compel arbitration. (Order at 5; R. __.) Direct benefits estoppel applies here because Plaintiff is seeking to enforce the contract between Airbnb and her friend. The circuit court incorrectly concluded that Plaintiff has not sued under the Terms of Service and only brings claims imposed by statute or common law. (*Id.* at 7; R. __.) Although Plaintiff pleads tort and other non-contractual claims arising under state law, the substance of her claims—that Airbnb owed a special duty to Plaintiff because Plaintiff stayed as a guest at a property rented through Airbnb—arises solely from rental contract and must be determined by reference to it. *See Wilson*, 426 S.C. at 343, 827 S.E.2d at 176 (“When a claim depends on the contract’s existence and cannot stand independently—that is, the alleged liability ‘arises solely from the contract or must be determined by reference to it’—equity prevents a person from avoiding the arbitration clause that was part of that agreement.”) (citation omitted). Plaintiff references her friend’s contractual relationship with Airbnb by both citing the contract and citing Airbnb’s policies and standards (which are incorporated by reference into the Terms of Service).

First, the only alleged relationship between Plaintiff and Airbnb would be through the rental transaction booked under the Terms of Service. Plaintiff’s Amended Complaint references Airbnb’s rental agreement specifically: “Plaintiff was in a special relationship with Defendant based on the rental agreement between the parties.” (Am. Compl. ¶ 222; *see also id.* ¶ 224; R. __)

(referencing the importance of knowing about cameras before making the decision to “enter into the contractual relationship.”.) Plaintiff also relies on Airbnb’s contractual relationship to establish the alleged duty owed to her: “Airbnb owed a duty to Plaintiff because Plaintiff has a special relationship with Airbnb, by virtue of their staying at an accommodation rented through Airbnb” (*See* Am. Compl. ¶ 140; R. __.) Plaintiff argued this point to the circuit court. (4/5/2023 Hr’g Tr. 11:20–23; R. __ (“And plaintiff, as Your Honor knows, was a guest in an Airbnb rental. And our position is that they undertook a duty to keep her safe and her friend safe while she was staying there.”.) Similarly, when contending that Airbnb has sufficient control over the property to support a claim for premises liability, Plaintiff asserts that “Airbnb controls the entire transaction. They control the payment. They control the terms. . . .They can control all of the terms of the rental Airbnb is in control of.” (*Id.* at 13:18–23; R. __.)

Second, Plaintiff points to and relies on Airbnb policies, terms, standards, and Airbnb’s website numerous times to support the claims in her Amended Complaint. Plaintiff references Airbnb’s privacy policy, (Am. Compl. ¶ 249; R. __), content policy, (*id.* ¶ 62–63; R. __), and cancellation policy, (*id.* ¶ 66; R. __), and asserts that Airbnb has an in-person inspection policy, (*id.* ¶ 73; R. __). Plaintiff specifically references standards and policies related to recording devices to form the basis of her claims, alleging:

- “Airbnb represents that it has developed ‘community standards to help guide user behavior and codify the company’s values’ as to certain subjects, including safety, security, fairness, authenticity, and reliability.” (Am. Compl. ¶ 84; R. __.)
- “Airbnb states that its Hosts are required to inform guests of any cameras or recording devices on their property, even if they are turned off, and undisclosed cameras and recording devices are never permitted to be located in private spaces,

such as a bedroom or bathroom. However, Airbnb does nothing to enforce or effectuate this policy.” (*Id.* ¶ 85; R. ___.)

- “Thus, due to Airbnb’s own restrictive policies, guests must rely entirely on Airbnb to ensure their accommodations are safe and secure.” (*Id.* ¶ 154; R. ___.)
- “To the extent policies were in place, those policies were not enforced, ignored and/or violated.” (*Id.* ¶ 242; R. ___.)

Plaintiff cites Airbnb’s policies and standards another 19 times throughout her Amended Complaint. (*See, e.g.*, Am. Compl. ¶¶ 47, 59–61, 66–68, 72, 73, 86, 96, 139, 144, 146, 170, 172, 200, 215, and 222; R. ___.) Each of these 19 references were added by Plaintiff for the first time in her Amended Complaint. Plaintiff claims that “Airbnb ‘Controls’ its Hosts through Its Standards and Policies” as a heading in her Amended Complaint. (*Id.* at 11 (emphasis added); R. ___.) Plaintiff cannot assert contractual provisions from the Terms of Service to her benefit while shunning the obligations under the arbitration provision in the same agreement.

Plaintiff’s repeated reliance on the Terms of Service for her claims is more than sufficient to establish the applicability of direct benefits estoppel. The circuit court improperly focused its analysis solely on the benefit Plaintiff received from the contract while Plaintiff was staying at the Airbnb rental. *See Wilson*, 426 S.C. at 344, 827 S.E.2d at 177. That said, even with such a narrow focus, Plaintiff would be estopped from avoiding arbitration here. Plaintiff directly benefited from staying at the property for the tennis tournament. Plaintiff knew that the house she stayed in was “booked with Airbnb,” and Plaintiff paid her share of the Airbnb reservation fee, meaning Plaintiff

exchanged money for the ability to stay at the property.⁴ (See, e.g., Am. Compl. ¶¶ 3, 121, 100, 140, 165, 183, 205, 222, 239–40, 248; R. ___.)

As a result, Plaintiff is estopped from avoiding the arbitration clause, and Airbnb may enforce the agreement.

II. The circuit court erred in deciding issues of enforcement delegated in the arbitration agreement to the arbitrator, and in ruling that the outrageous torts exception to arbitration applied to preclude arbitration, and that Airbnb waived arbitration.

Because the parties properly delegated issues of enforcement or application to an arbitrator, any questions as to the outrageous torts exception or waiver were not properly before the circuit court. Even if the circuit court could properly consider them, it erred in applying the outrageous torts exception because Airbnb did not engage in any outrageous conduct and the exception is no longer viable following *Concepcion*. The circuit court also erred in ruling that Airbnb waived its right to arbitration because Airbnb never relinquished or abandoned its right to arbitrate. Thus, this Court should reverse.

A. Questions as to the enforceability of the arbitration agreement should be decided by the arbitrator, not the court.

Airbnb’s arbitration agreement clearly and unmistakably delegates issues of arbitrability to the arbitrator, providing that “[i]f there is a dispute about whether this Arbitration Agreement can be enforced or applies to our Dispute, you and Airbnb agree that the arbitrator will decide that

⁴ Even if the circuit court found Airbnb’s performance deficient, Plaintiff paid for accommodations and Airbnb’s partial performance was still a direct benefit to Plaintiff. See *Nicosia v. Amazon.com, Inc.*, 384 F. Supp. 3d 254, 275 (E.D.N.Y. 2019) (binding plaintiff to arbitration after his use of spouse’s Amazon account to order product and later suing under federal consumer law about the marketing of that product), *aff’d*, 815 F. App’x 612 (2d Cir. 2020); see also *In re Lloyd’s Reg. N. Am., Inc.*, 780 F.3d 283, 292–93 (5th Cir. 2015) (granting mandamus of tort and fraud claims on direct benefits estoppel theory, reasoning that “if we assume that [the defendant’s] performance was deficient, however, that partial performance was still a direct benefit to [the plaintiff].”).

issue.” (Terms of Service at 291, § 19.4; R. ___.) Plaintiff did not dispute that the Airbnb Terms of Service contain such a delegation clause, but raised the outrageous torts exception and waiver to attempt to avoid the agreement. Because both arguments go to whether the arbitration agreement “can be enforced or applies to our Dispute,” the circuit court erred in even addressing these arguments.

Parties may agree to have an arbitrator decide not only the merits but also questions of enforcement of the arbitration agreement. *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)). “As long as the parties’ agreement delegates the arbitrability question to an arbitrator ‘by clear and unmistakable evidence,’ a court may not override the contract and decide the arbitrability question.” *Id.* (quoting *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 529–30 (2019)). In *Palmetto Wildlife*, the Court of Appeals found that the parties had agreed to have the arbitrator decide issues of arbitrability and held that “if there is any dispute over the arbitrability of [respondent’s] counterclaims, the circuit court should send the counterclaims to the arbitrator to decide which are arbitrable under the Agreement.” *Id.* at 706, 869 S.E.2d at 867.

As it specifically relates to the outrageous torts exception to arbitration, this Court confirmed that such a question is one for the arbitrator:

In the present case, the [Arbitration] Agreement provided, “Any dispute as to whether a controversy or claim is subject to arbitration shall be submitted as part of the arbitration proceeding.” This statement is clear that issues of arbitrability are to be determined by the arbitrator. This includes claims arising out of conduct that Respondents assert was unforeseeable.

Palmetto Wildlife, 435 S.C. at 702, 869 S.E.2d at 865 (citation omitted); *Doe v. TCSC, LLC*, 430 S.C. 602, 615–16, 846 S.E.2d 874, 881 (Ct. App. 2020) (“We express no opinion on whether the

2011 arbitration contract covers Doe’s claims, or, if so, whether the claims are still subject to arbitration due to the ‘outrageous and unforeseen torts’ exception. The dissent argues this exception does apply, but whether the exception applies is a question the parties delegated to the arbitrator, not the court.”) (citation omitted).). The same is true with respect to the question of waiver—it too must be decided by the arbitrator. *See Chatman v. Jimmy Gray Chevrolet, Inc.*, 2016 WL 4975044, at *6 (N.D. Miss. 2016) (“Given that the waiver issue goes to the scope of arbitration, which in this case must be decided by the arbitrator given the existence of the delegation clause, unquestionably, the issue must be decided by the arbitrator and not this Court.”).

The circuit court’s decision to enforce the arbitration agreement despite this clear and unmistakable delegation provision ignores the line of cases confirming that an arbitrator must decide whether the outrageous torts exception applies. *Palmetto Wildlife*, 435 S.C. at 699–700, 869 S.E.2d at 864 (quoting *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 529–30 (2019)); *Doe v. TCSC, LLC*, 430 S.C. 602, 615–16, 846 S.E.2d 874, 881 (Ct. App. 2020); *Chatman*, 2016 WL 4975044, at *6. Therefore, the circuit court committed legal error in failing to compel the action to arbitration and in failing to leave the issue of whether the exception applies to the arbitrator.

The circuit court also erred by considering whether Airbnb waived its right to compel arbitration. Whether a party has waived its arbitration right is “a dispute about whether this Arbitration Agreement can be enforced” (Terms of Service at 291, § 19.4; R. __), so the issue is only appropriate for the arbitrator to decide. *See Airbnb, Inc. v. Rice*, 518 P.3d 88, 91 (Nev. 2022) (“[W]hen a contract delegates the arbitrability question to the arbitrator, a court has no authority to decide whether the arbitration agreement applies to the dispute, even where the argument for arbitrability is wholly groundless.” (quoting *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139

S. Ct. 524, 528–29 (2019))). Thus, the circuit court erred in even considering Plaintiff’s outrageous torts exception and waiver arguments.

B. Plaintiff did not even allege an outrageous tort against Airbnb, nor did Airbnb engage in outrageous conduct, and in any event the outrageous torts exception is no longer a viable ground for denying arbitration.

The circuit court erred in declining to enforce the arbitration agreement on the grounds that an outrageous act occurred that was unforeseeable to reasonable consumers—the so-called “outrageous torts exception” to arbitration. (Order, at 8; R. __.) Plaintiff brought no outrageous tort claim against Airbnb, Airbnb engaged in no outrageous conduct, and the outrageous tort exception is no longer viable in any event.

In South Carolina, the outrageous torts exception 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 created this exception to arbitration in 2007. *Id.* (citing *Aiken v. World Fin. Corp. of South Carolina*, 373 S.C. 144, 151–52, 644 S.E.2d 705, 709 (2007)). In *Aiken*, the Court “pronounce[d] a more definitive rule” that the State’s courts “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*, 373 S.C. at 151, 644 S.E.2d at 709.

Plaintiff brings no claim of outrageous conduct against Airbnb. Although she sues Riviere for invasion of privacy and intentional infliction of emotional distress, (Am. Compl. ¶¶ 189–95, 214–20; R. __), she does not bring those same claims against Airbnb. Yet the circuit court failed to conduct any analysis of the different claims asserted by Plaintiff against the two different parties as a part of its outrageous torts exception analysis.

Lumping Airbnb and Riviere together led to the court erring in finding Airbnb engaged in outrageous conduct sufficient to establish the exception. Airbnb did no such thing. Plaintiff bears the burden of any challenge to the validity of the Arbitration Agreement. *See Swanson v. Prof'l Serv. Indus.*, No. 2:11-cv-2880, 2012 WL 1130664 at *4–5 (D.S.C. Jan. 4, 2012). Plaintiff failed to meet her burden of challenging the arbitration agreement under the exception because Airbnb did not engage in outrageous conduct. Plaintiff's claims against Airbnb center around the amount of control it had over the property she and her friends rented in Aiken, whether Airbnb sufficiently supervised and monitored Riviere in his listing the property for rent, and whether Airbnb engaged in unfair trade practices. None of Airbnb's alleged inaction giving rise to Plaintiff's claims rise to the level of intentional outrageous conduct directed at Plaintiff to implicate the exception. *Parsons*, 418 S.C. at 6, 791 S.E.2d at 130 (applying outrageous torts exception where seller sold buyer property with known environmental hazard).

Furthermore, the exception is no longer viable. Although the FAA allows courts to invalidate arbitration agreements based upon generally applicable contract defenses, 9 U.S.C. § 2, they cannot apply arbitration-specific defenses. *See Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996). And even when analyzing defenses of general applicability, courts cannot employ those defenses in a manner which would subject arbitration agreements to special scrutiny. *See, e.g., Perry v. Thomas*, 482 U.S. 483, 492 n.9 (1987) (“A court may not, then, in assessing the rights of litigants to enforce an arbitration agreement, construe that agreement in a manner different from that in which it otherwise construes nonarbitration agreements . . .”). That is, arbitration agreements must be placed on the same footing as any other contract. *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 593, 553 S.E.2d 110, 116 (2001) (citing *Doctor's Assocs.*, 517 U.S. at 687).

The outrageous torts exception offends these basic principles under the FAA. Like the California unconscionability precedent in *Concepcion*, South Carolina’s outrageous torts exception is “unique” and “restricted” to the field of arbitration. *Parsons*, 418 S.C. at 11, 791 S.E.2d at 133 (Pleicones, J.) (plurality opinion). No South Carolina precedent has definitively addressed whether the doctrine remains viable following *Concepcion*, although two justices in *Parsons* would have held that the “exception cannot survive.” *Id.* at 13, 791 S.E.2d at 134.⁵

All cases that have applied the outrageous torts exception since Aiken have focused explicitly on arbitration.⁶ In fact, the one opinion that tried to apply the exception outside of the arbitration context was reversed by our Supreme Court. *Wachovia Bank, Nat. Ass’n v. Blackburn*, 407 S.C. 321, 333–34, 755 S.E.2d 437, 444 (2014) (“[H]owever, we reverse the portion [of the Court of Appeals opinion] finding that the outrageous and unforeseeable torts exception to arbitration applies in the jury trial waiver context, and find instead that Respondents waived their right to a jury trial on all of their counterclaims.”).

⁵ Three justices in *Parsons*, in statements spread across multiple, non-plurality opinions, expressed their view that *Concepcion* did not eliminate the doctrine under South Carolina law.

⁶ See, e.g., *MCE Auto., Inc. v. Wetherald*, No. 6:10-cv-00409-JMC, 2010 WL 5257233, at *3 (D.S.C. Dec. 17, 2010); *Timmons v. Starkey*, 389 S.C. 375, 378, 698 S.E.2d 809, 810 (2010); *Partain v. Upstate Auto. Grp.*, 386 S.C. 488, 493–94, 689 S.E.2d 602, 605 (2010); *Osborne v. Marina Inn at Grande Dunes, LLC*, No. 4:08-cv-0490, 2009 WL 3152044, at *8 (D.S.C. Sept. 23, 2009); *Chassereau v. Glob. Sun Pools, Inc.*, 373 S.C. 168, 172, 644 S.E.2d 718, 720 (2007); *Simpson v. World Fin. Corp. of S.C.*, 373 S.C. 178, 179, 644 S.E.2d 723, 724 (2007) (affirming in Rule 220, SCACR opinion relying on *Aiken*); *Hatcher v. Edward D. Jones & Co., L.P.*, 379 S.C. 549, 553, 666 S.E.2d 294, 297 (Ct. App. 2008); cf. *Davis v. ISCO Indus., Inc.*, 434 S.C. 488, 499, 864 S.E.2d 391, 397 (Ct. App. 2021) (declining to rule on the exception by affirming on another ground); *Woods v. Dolgencorp, Inc.*, No. 7:20-CV-04399-DCC, 2021 WL 5989965, at *3 (D.S.C. Dec. 17, 2021) (rejecting application of the exception); *Edens v. Synovus Fin. Corp.*, No. 3:17-cv-0806-MBS, 2017 WL 5001290, at *3 (D.S.C. Nov. 2, 2017) (same); *Doe v. TCSC, LLC*, 430 S.C. 602, 615–16, 846 S.E.2d 874, 881 (Ct. App. 2020) (declining to rule on exception given delegation clause); *Palmetto Wildlife Extractors, LLC v. Ludy*, 435 S.C. 690, 702, 869 S.E.2d 859, 865 (Ct. App. 2022) (same).

South Carolina's unique application of the exception only to arbitration agreements requires the exception to yield to the Federal Arbitration Act's "national policy favoring arbitration and places arbitration agreements on equal footing with all other contracts." *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006) (citing 9 U.S.C. § 2). The circuit court erred by finding that this exception remains viable following *Concepcion*. This Court should reverse.

Because the outrageous torts exception does not apply here and is no longer viable in any event, the Court should reverse the circuit court's refusal to compel arbitration.

C. Airbnb did not waive its right to compel arbitration.

1. No waiver occurred under South Carolina's established test.

Even if the court should have considered Plaintiff's waiver argument, it erred in ruling that Airbnb had waived its arbitration rights. 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." *Benson Chrysler-Plymouth, Inc.*, 374 S.C. 122, 125, 647 S.E.2d 249, 250 (Ct. App. 2007). "These factors, of course, are not mutually exclusive, as one factor may be inextricably connected to, and influenced by, the others." *Id.* Waiver "is an affirmative defense and the burden of proof is upon the party who asserts it." *Provident Life & Acc. Ins. Co. v. Driver*, 317 S.C. 471, 478, 451 S.E.2d 924, 929 (Ct. App. 1994).

Airbnb did not waive its arbitration rights under this established test. Although Airbnb filed its Motion to Compel Arbitration well after Plaintiff filed her original complaint, Airbnb did not waive its arbitration rights given Plaintiff's expansion of the case with the Amended

Complaint. *Brown v. Green Tree Servs., LLC*, 585 F. Supp. 2d 770, 782 (D.S.C. 2008) (holding that where the amended complaint altered the lawsuit significantly by adding allegations, the defendant would not have been “deemed to have waived its right to compel arbitration merely because of the delay [of 13 months]”). Plaintiff amended her Complaint to add 174 new paragraphs and stated five new claims. For example, Plaintiff’s amended complaint added the following paragraph:

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

(Am. Compl. ¶ 6; R. ___.) Plaintiff’s Amended Complaint also added new discussion about incidents (wholly unrelated to this matter that took place here) in California, Florida, Maine, and Texas. (*Id.* ¶¶ 7–10, 79–82; R. ___.)

Plaintiff presumably intends to introduce evidence about other matters in support of her claim for violation of South Carolina’s Unfair Trade Practices Act, noting “[b]ecause Defendants’ unfair and deceptive acts or practices have affected and continue to affect other consumers and have the potential of repetition, Defendants’ unlawful trade practices have an adverse impact on the public.” (*Id.* ¶¶ 7–10; R. ___.) A central element of such a claim requires demonstrated impact on the public interest, which is shown through capability of repetition, *see Crary v. Djebelli*, 329 S.C. 385, 387, 496 S.E.2d 21, 22–23 (1998), significantly expanding the scope of this lawsuit. *Daisy Outdoor Adver. Co. v. Abbott*, 322 S.C. 489, 496, 473 S.E.2d 47, 51 (1996). This expansion of the litigation is exactly why courts have held that “[w]hen a plaintiff files an amended complaint which changes the theory or scope of the case, the [d]efendant is allowed to plead anew as though it were the original complaint filed by the [p]laintiff.” *Haarslev, Inc. v. Nissen*, No. 5:19-CV-

06128-BCW, 2023 WL 2782313, at *7 (W.D. Mo. 2023) (quoting *Troisi*, 2009 WL 10710732, at *2); *Cannon Equip. Co. v. Troisi*, No. CV 08-2391 (PAM/AJB), 2009 WL 10710732, at *2 (D. Minn. 2009). Some courts even refer to an amendment as having “revived” a previously waived right to compel arbitration. *See Solis v. Experian Info. Sols., Inc.*, No. SACV2200102CJCKESX, 2022 WL 4376077, at *3 (C.D. Cal. 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.”).

Here, Plaintiff’s amendments caused Airbnb to alter its response significantly, thereby restarting the timeframe for any waiver analysis. The roughly six months that passed here between the amendment and Airbnb’s Motion to Compel Arbitration are insufficient to establish waiver. Generally, South Carolina courts have found waiver only after a party has waited years—not mere months—to move to compel arbitration. *Compare Deloitte & Touche, LLP v. Unisys Corp.*, 358 S.C. 179, 184, 594 S.E.2d 523, 526 (Ct. App. 2004) (more than five-year delay in seeking to compel arbitration was sufficient to constitute waiver of right to compel arbitration), *and Liberty Builders, Inc. v. Horton*, 336 S.C. 658, 666, 521 S.E.2d 749, 753-54 (Ct. App. 1999) (two-year delay), *with Rhodes v. Benson Chrysler-Plymouth, Inc.*, 374 S.C. 122, 128, 647 S.E.2d 249, 252 (Ct. App. 2007) (ten-month delay insufficient to establish waiver), *Toler’s Cove Homeowners Ass’n, Inc. v. Trident Constr. Co.*, 355 S.C. 605, 612, 586 S.E.2d 581, 585 (2003) (thirteen-month delay insufficient), *Rich v. Walsh*, 357 S.C. 64, 67, 590 S.E.2d 506, 507 (Ct. App. 2003) (same), *Gen. Equip. & Supply Co. v. Keller Rigging & Constr., Inc.*, 344 S.C. 553, 556, 544 S.E.2d 643, 645 (Ct. App. 2001) (less than eight-month delay insufficient). While there was some discovery that the parties engaged in during that six months, including the deposition of Plaintiff and document requests to some of the parties, none of this discovery caused any prejudice to Plaintiff.

Indeed, she cited no prejudice to the circuit court, confirming that she has failed to carry her burden to establish Airbnb waived its arbitration rights.

2. *Morgan v. Sundance* does not alter this conclusion.

The validity of the above arbitration-specific waiver test is also doubtful in light of the Supreme Court’s opinion in *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.* This harkens back to the basic principle that the court cannot create arbitration-specific rules to refuse to enforce an otherwise valid arbitration agreement. *See Doctor’s Assocs.*, 517 U.S. at 687; *Perry*, 482 U.S. at 492 n.9. Therefore, the waiver analysis, both within and without the arbitration context, should examine whether the party seeking to compel arbitration has voluntarily relinquished its right. *Janasik v. Fairway Oaks Villas Horizontal Prop. Regime*, 307 S.C. 339, 344, 415 S.E.2d 384, 387 (1992). And in either case, waiver “is an affirmative defense and the burden of proof is upon the party who asserts it.” *Provident Life & Acc. Ins. Co. v. Driver*, 317 S.C. 471, 478, 451 S.E.2d 924, 929 (Ct. App. 1994).

As the circuit court acknowledges, Airbnb has consistently noted in its pleadings that it was reserving the right to compel arbitration, and it stated at the outset of the case that it may seek to compel arbitration. (Order at 12; R. __.) Airbnb expressly reserved its right to compel arbitration in the first paragraph of its original Answer and its Answer to the Amended Complaint, satisfying the notice requirement of Rule 8, SCRCF. (*See* Airbnb’s Answer; R. __; Airbnb’s Ans. to Am. Compl.; R. __.) By maintaining this right in its pleading and providing Plaintiff notice, Airbnb made it clear that it was maintaining this right and was not voluntarily relinquishing it. *See, e.g., Soriano v. Experian Info. Sols., Inc.*, No. 2:22-CV-197-SPC-KCD, 2022 WL 6734860,

at *3 (M.D. Fla. Oct. 11, 2022) (highlighting the importance of a party’s pleading of arbitration as an affirmative defense in assessing waiver); *Armstrong v. Michaels Stores, Inc.*, 59 F.4th 1011, 1015 (9th Cir. 2023) (compelling arbitration and noting that defendant pleaded arbitration as an defense in its two filed answers and in the initial case management conference). Expressly referencing arbitration is the opposite of knowingly relinquishing the right to compel it. Airbnb’s reservation of its right is sufficient to preclude Plaintiff from meeting her burden of establishing waiver. *Driver*, 317 S.C. at 478, 451 S.E.2d at 929.

For all these reasons, Airbnb has never waived its right to compel arbitration, but even assuming *arguendo* that it did, the Amended Complaint reactivated its rights to compel arbitration. Accordingly, the circuit court erred by not compelling Plaintiff’s claims to arbitration.⁷

III. The circuit court erred in ruling on Plaintiff’s Show Cause Motion and concluding that Airbnb engaged in contemptuous conduct because Plaintiff failed to satisfy the prerequisites for a rule to show cause, the record contains no evidence of willful noncompliance of orders by clear and convincing evidence, and Plaintiff’s Show Cause Motion was not properly before Judge Maddox.

This Court should vacate the circuit court’s improper Show Cause Order. First, Plaintiff failed to satisfy the procedural prerequisites to secure a rule to show cause. Second, there is no evidence that Airbnb engaged in “contemptuous conduct”—let alone the requisite clear and convincing evidence. It did not. There is nothing disrespectful about seeking to protect the privacy rights of third parties from abusive discovery requests by properly seeking reconsideration and a

⁷ Additionally, the circuit court’s order ignores the effect of the non-waiver provision in the Terms of Service, which provides that “Airbnb’s failure to enforce any right or provision in these Terms will not constitute a waiver of such right or provision unless acknowledged and agreed to by us in writing.” (See Airbnb’s Mot. to Compel Arbitration, Ex. A – Terms of Service at 294; R. __.) This provision is enforceable. *Catwalk, LLC v. Sea Pines S. Beach Owners’ Ass’n, Inc.*, No. 2016-000637, 2018 WL 774827, at *1 (S.C. Ct. App. Feb. 7, 2018) (unpublished) (relying on non-waiver provision in covenants).

stay of enforcement. Third, the Court incorrectly issued its Show Cause Order after the proceedings were automatically stayed, and Plaintiff's Show Cause Motion was not otherwise properly before Judge Maddox. This Court should vacate the circuit court's Show Cause Order.

A. Plaintiff's Show Cause Motion was procedurally improper.

Plaintiff's Show Cause Motion was procedurally improper, depriving Airbnb of its due process. Plaintiff's failures infected the show cause proceedings to the degree that the Show Cause Order fails as a matter of law, so this Court should vacate it.

“Contempt is an extreme measure; this power vested in a court is not lightly asserted.” *Bigham v. Bigham*, 264 S.C. 101, 104, 212 S.E.2d 594, 596 (1975). Because it is such an extreme measure, courts have developed numerous procedural safeguards over the years to ensure it is used only in appropriate circumstances. A party seeking a contempt order is required to support its motion by admissible evidence in the form of an affidavit or verified petition, provide sufficient notice in the form of a summons or other process, and ensure that the opposing party is given an opportunity to defend against the claims. Plaintiff failed to satisfy these requirements.

For example, Plaintiff filed no affidavit or verification in support of the motion—and her “failure to support the rule to show cause by an affidavit or verified petition is a fatal defect.” *Toyota of Florence, Inc. v. Lynch*, 314 S.C. 257, 267, 442 S.E.2d 611, 617 (1994) (citing *State v. Blackwell*, 10 S.C. 35 (1878)) (reversing contempt finding for trial court's failure to require affidavit supporting rule to show cause). Nor did Plaintiff include any type of summons or other process to institute the contempt proceedings. *Grosshuesch v. Cramer*, 377 S.C. 12, 30, 659 S.E.2d 112, 121 (2008) (“[T]he proper procedure to determine whether a party should be held in contempt is to bring a summons and a rule to show cause.”); *see also State v. Johnson*, 249 S.C. 1, 7–8, 152 S.E.2d 669, 672 (1967) (“A rule to show cause, an attachment, or other process should issue. And

it is said in *State v. Nathans*, . . . that ‘the almost universal method by which contempt proceedings are begun is by affidavit, and an examination of the authorities will generally disclose that in all contempt proceedings, save for such as are committed in the court's immediate presence, an affidavit is essential.’”).

Plaintiff also failed to provide Airbnb with sufficient notice of the Show Cause Motion. “Before a person can be found guilty of contempt not committed in the presence of the Court, he must have due and reasonable notice of the proceeding.” *State v. Johnson*, 249 S.C. 1, 7, 152 S.E.2d 669, 672 (1967). In addition to this “due and reasonable notice” standard, litigants also must serve motions and affidavits “ten days before the time specified for the hearing, unless a different period is fixed by these rules or by an order of the court.” Rule 6(d), SCRCF. Plaintiff failed to meet either of these standards. Plaintiff filed her Motion for Rule to Show Cause just five days before the motions hearing before Judge Maddox. (Mot. for R. Show Cause; R. __.) In response to the hasty request by the Clerk to schedule the motion to be heard by Judge Maddox on June 13, 2023, Airbnb’s counsel responded that “we take no position as to the motion being sent to the judge for consideration to add to the schedule but we reserve and do not waive all rights, objections and positions, including but not limited to those related to this motion.” (Airbnb’s Resp. in Opp’n to Mot. for R. to Show Cause at 3; R. __.) As a result, Plaintiff failed to provide sufficient notice of her motion under *State v. Johnson* and Rule 6(d), SCRCF.

Thus, the circuit court abused its discretion by entering its Show Cause Order where Plaintiff failed to satisfy the prerequisites for contempt.

B. Plaintiff failed to support the Show Cause Order with any evidence and Airbnb did not engage in contemptuous conduct.

The circuit court abused its discretion in entering the Show Cause Order because Plaintiff did not support her contempt claim with clear and convincing evidence. *See Ex parte Lipscomb*,

398 S.C. 463, 469, 730 S.E.2d 320, 323 (Ct. App. 2012) (“Civil contempt must be [shown] by clear and convincing evidence.”). At the June 5, 2023 hearing, Plaintiff offered only a passing complaint that Airbnb did not fully comply with the production order, (6/13/2023 Hr’g Tr. 16:19–17:8; R. ___), but that is *not* evidence of contempt. See *S.C. Dep’t of Transp. v. Thompson*, 357 S.C. 101, 105, 590 S.E.2d 511, 513 (Ct. App. 2003) (“Arguments made by counsel are not evidence.”). And “before a court may find a person in contempt, the record must clearly and specifically reflect the contemptuous conduct.” *Ex parte Lipscomb*, 398 S.C. at 469, 730 S.E.2d at 323 (quoting *Widman v. Widman*, 348 S.C. 97, 119, 557 S.E.2d 693, 705 (Ct. App. 2001)). Plaintiff’s Motion for Rule to Show Cause is devoid of any evidence meeting this standard—let alone clear and convincing evidence required for contempt. Therefore, on this basis alone, it was an error for the circuit court to issue its Show Cause Order.

There is no clear and convincing evidence that Airbnb failed to comply with the Production Order—let alone that it willfully failed to comply. “A willful act is one . . . done voluntarily and intentionally with the specific intent to do something the law forbids, or with the specific intent to fail to do something the law requires to be done; that is to say, with bad purpose either to disobey or disregard the law.” *Id* (quoting *Ex parte Cannon*, 385 S.C. 643, 661, 685 S.E.2d 814, 824 (Ct. App. 2009)). “One may not be convicted of contempt for violating a court order which fails to tell him in definite terms what he must do.” *Cty. of Greenville v. Mann*, 347 S.C. 427, 435, 556 S.E.2d 383, 387 (2001).

Airbnb substantially complied with the Court’s April 5, 2023 Production Order, withholding only two narrow sets of documents whose production would unnecessarily reveal the private information of non-parties in violation of our Supreme Court’s ruling in *Hollman*, 384 S.C. at 577–78, 683 S.E.2d at 498–99. Airbnb also communicated to Plaintiff the reason for

withholding the specific documents and contemporaneously moved Judge Newman to both reconsider the Production Order and to stay enforcement of the order. This was not a pro forma motion—it was detailed, explaining Airbnb’s legal basis for its objection and asking Judge Newman to reconsider the Production Order as to those two sets of documents because of weighty privacy and notice concerns not previously addressed by the circuit court.

Airbnb’s actions were taken in good faith, with the specific intent to protect privacy interests in accordance with settled South Carolina authority, and to withhold documents until Judge Newman has the opportunity to reconsider her ruling. This is far removed from conduct taken “with bad purpose either to disobey or disregard the law” that would amount to contempt. *Ex parte Lipscomb*, 398 S.C. at 469, 730 S.E.2d at 323.

C. The Court erred by entering its Show Cause Order after Riviere appealed and Plaintiff’s Show Cause Motion was otherwise not properly before Judge Maddox.

Plaintiff moved the court to issue a rule to show cause because it claims Airbnb failed to comply with Judge Newman’s Production Order. Yet the circuit court ruled on Plaintiff’s Show Cause Motion after Riviere appealed the order denying his motion to compel arbitration, and during the pendency of an automatic appellate stay of judicial proceedings. Further, the Show Cause Motion was not properly before Judge Maddox because Judge Newman had not yet ruled on Airbnb’s Motion to Reconsider and Stay Enforcement.

The Show Cause Order is procedurally improper given its timing. Judge Maddox’s Show Cause order was entered nearly a month after Riviere filed his notice of appeal. (Order Granting R. to Show Cause; R. __.) In granting Riviere an Airbnb’s Joint Motion to Acknowledge the Automatic Stay, (Joint Motion; R. __), Judge Maddox correctly held that a stay of the proceedings was automatic under *Coinbase* and Rule 241, SCACR: “Stated succinctly, continuing trial court

proceedings while arbitrability is pending on appeal ‘largely defeats the point of the appeal.’” (Order Granting Stay at 3 (quoting *Coinbase*, 143 S. Ct. at 1921); R. ___.) Given that the proceedings were stayed immediately and automatically upon Riviere’s filing of his notice of appeal as Judge Maddox’s order recognizes, the circuit court erred in granting Plaintiff’s Show Cause Motion.

The Show Cause Order is also procedurally improper given that Plaintiff’s sought enforcement from Judge Maddox of Judge Newman’s Production Order. As detailed above, Judge Newman heard Plaintiff’s two motions to compel on April 5, 2023. During that hearing, she instructed Airbnb to produce responsive documents, including the two contested categories of documents involving non-party guests and hosts, within 60 days but did not enter an order. (4/5/2023 Hr’g Tr. 109:7–110:1; R. ___); *Spartanburg Buddhist Ctr. of S.C. v. Ork*, 417 S.C. 601, 608, 790 S.E.2d 430, 434 (Ct. App. 2016) (order not final until written and entered); *Case v. Case*, 243 S.C. 447, 451, 134 S.E.2d 394, 396 (1964). Following that hearing, Airbnb’s counsel wrote Judge Newman to raise issues with a portion of the potential document production because of privacy rights belonging to non-parties and to inform her that Airbnb was moving to compel arbitration. (Brown Ltr., to J. Newman dated May 15, 2023; R. ___; Harpootlian Ltr. to J. Newman dated May 16, 2023. Newman; R. ___.) Because there still had not been any written, entered order on Plaintiff’s motions to compel, Airbnb requested a status conference for the circuit court to fully address the weighty privacy concerns and give notice to third parties before issuing its written order. (See 5/15/2023 Brown Ltr.; R. ___.)

Judge Newman did not respond to Airbnb's request for a status conference. She also did not enter any written order until more than a month after Airbnb raised the non-party privacy and notice concerns. (Form 4 Order, May 25, 2023; R. ___.) When she entered the Form 4 Production

Order, the order stated that Plaintiff's two motions to compel were granted "with Defendant Airbnb being allowed 60 days to respond." (*Id.*) The Form 4 Production Order did not address the non-party privacy issues that Airbnb raised.

Airbnb then timely filed its June 5, 2023, Motion to Reconsider and Stay Enforcement of Judge Newman's Production Order and sent her a copy per the requirements of Rule 59(g), SCRPC. (Mot. to Reconsider; R. __; Brown Ltr. to J. Newman, June 5, 2023; R. __.) Because of Plaintiff's haste in filing her Show Cause Motion and efforts to schedule it with Judge Maddox, Judge Newman had not yet had the chance to review Airbnb's motion to reconsider or consider whether to stay her Production Order. Judge Newman never was able to consider or rule on that motion. A litigant should not make contempt assertions before a circuit court judge when the alleged contemptuous conduct relates to an order that is still subject to reconsideration and modification by the different circuit court judge who issued that order. Hence, the circuit court should have refrained from ruling on the Show Cause Motion. *Enoree Baptist Church v. Fletcher*, 287 S.C. 602, 604, 340 S.E.2d 546, 547 (1986) (confirming limitations on circuit court judges' powers to modify or overrule orders of a separate circuit court judge); *Steele v. Charlotte, C. & A.R. Co.*, 14 S.C. 324, 330 (1880) ("One Circuit judge upon the same state of facts, has no power to change, alter or reverse a decision of a brother judge of the same Circuit."); Rule 59(g), SCRPC (requiring motion for rule to show cause be served on judge entering the order to be reconsidered).

Thus, for all of the above reasons, the circuit court's entry of its August 24, 2023 order granting Plaintiff's Motion for Rule to Show Cause should be vacated.

CONCLUSION

In light of the strong state and federal policies favoring arbitration, as well as the existence of a valid and enforceable arbitration agreement covering Plaintiff's claims against Airbnb, this

Court should reverse the circuit court and remand the matter for entry of an order dismissing Plaintiff's claims without prejudice and compelling her to submit her claims against Airbnb to arbitration. Airbnb further requests that the Court reverse and vacate the Show Cause Order as procedurally improper, and devoid of evidence meeting the requisite standard of contempt.

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