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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM ANDERSON COUNTY
Court of Common Pleas
The Honorable R. Lawton McIntosh, Circuit Court Judge

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Appellate Case No.2023-001506
Case No. 2022-CP-04-02159

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Skylar Blume, Virgil Dowis, Rhi Greer, Jonathan Hudson,
Natalie Mann, Mya Ourada, Braden Terrill, & Aneil Tripathi.....Respondents,

v.

Starbucks, Inc. and Melissa Morris,..... Appellants,

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# INITIAL BRIEF OF RESPONDENTS BLUME ET AL.

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Matthew R. Ozment
Grove Ozment LLC
100 Williams Street
Greenville, SC 29601
(864) 516-2222
Matt@go-lawyers.com

Daniel M. Rosenthal
Michael P. Ellement
Charlotte H. Schwartz
James & Hoffman, P.C.
1629 K St. NW, Suite 1050
Washington, DC 20006
(202) 496-0500
dmrosenthal@jamhoff.com
mpellement@jamhoff.com
chschwartz@jamhoff.com

Mary Joyce Carlson
1629 K St. NW, Suite 1050
Washington, DC 20006
(202) 230-4096
carlsonmjj@yahoo.com

Richard P. Rouco
Quinn, Connor, Weaver, Davies & Rouco LLP
2 – 20 Street North, Suite 930
Birmingham, AL 35203
(205) 870-9989
rrouco@qcwdr.com

*Attorneys for Respondents Blume et al.*

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## Introduction

This case arises from a false police report filed against Plaintiffs by Defendant Melissa Morris and subsequently publicized by Defendants Starbucks Corporation to a national audience. After investigating Defendant's accusations of criminal misconduct against Plaintiffs, the Anderson Sheriff's Office publicly announced that "none of the allegations" made by Morris, which were repeated and publicized by Starbucks, were true. Plaintiffs then filed a complaint asserting two causes of action under South Carolina law: defamation and abuse of process. Plaintiffs seek damages for harm to reputation, as well as other injuries.

After months of litigating these state law claims, after failing to have the case transferred to the Business Court and failing to have the case dismissed, Starbucks and Morris sought to force Plaintiffs to arbitrate their claims. The trial court properly denied these motions on the basis that Starbucks and Morris waived arbitration, and that Plaintiffs' claims are not subject to arbitration in any event.

Starbucks and Morris now ask this Court to reverse. In doing so, they rely on precedent that even Starbucks recognizes is no longer good law. Following the United States Supreme Court's decision in *Morgan v. Sundance, Inc.*, 142 S. Ct. 1708 (2022), courts may no longer adjudicate arbitration agreements according to arbitration-specific tests. Applying that holding to waiver, *Morgan* specifically rejected an arbitration-specific test requiring that waiver be supported by a finding of prejudice to the party opposing compelled arbitration. Because any precedents requiring a showing of prejudice have thus been abrogated, the trial court applied the appropriate standard for determining waiver: whether Defendants have made "'any speech or perform any act from which a reasonable inference may be drawn that the company does not stand upon its right.'" *Lawrimore v. Am. Health & Life Ins. Co.*, 276 S.C. 112, 118, 276 S.E.2d 296, 299 (S.C. 1981). And using that standard, Starbucks and Morris waived arbitration. Their

litigation conduct is inconsistent with the intention to arbitrate: they submitted issues to the court that could have been decided by an arbitrator and sought to transfer the case to the Business Court, only to then attempt to force the Plaintiffs into arbitration after transfer was denied. Neither Starbucks nor Morris even attempt to rebut the conclusion that they waived arbitration under this standard.

Even absent a finding of waiver, the trial court correctly held that Plaintiffs' claims are not covered by the arbitration agreement. Plaintiffs' claims of defamation and abuse of process arising from Starbucks' and Morris' false police reports and false accusations of kidnapping and criminal assault are not in any way related to Plaintiffs' employment status, working conditions, benefits, or any other employment-related claims. *See Davis v. ISCO Indus., Inc.*, 434 S.C. 488, 492, 498–99, 864 S.E.2d 391, 393, 396–97 (S.C. Ct. App. 2021). Furthermore, Plaintiffs' claims are subject to the outrageous tort exception as recognized by the Supreme Court of South Carolina in *Aiken v. World Fin. Corp. of S.C.*, 373 S.C. 144, 151, 644 S.E.2d 705, 709 (S.C. 2007) (holding that a litigant "could not possibly have been agreeing to provide an alternative forum for settling claims arising from this wholly unexpected tortious conduct"); *Chassereau v. Globa-Sun Pools, Inc.*, 373 S.C. 168, 170, 171–72, 644 S.E.2d 718, 719, 720 (S.C. 2007) (applying outrageous tort exception to a defamation claim).

Besides relying on abrogated cases applying arbitration-specific rules, Morris and Starbucks' only remaining argument is that the trial court lacked authority to consider waiver and the scope of the arbitration agreement due to the presence of a delegation clause in the arbitration agreement. But that argument fails to persuade. First, Starbucks and Morris did not raise the delegation issue before the trial court in a timely and appropriate manner. Morris never raised the argument until *after* the trial court issued its decision. Starbucks only raised it in its reply brief,

filed the night before the hearing on the motion. Making matters worse, Starbucks' eleventh-hour delegation argument was inconsistent with its motion to compel arbitration, in which it asked the court to find that Plaintiffs' claims were covered by the arbitration agreement, rather than arguing that the court should delegate that inquiry to the arbitrator. *See* Starbucks' Mot. to Compel at 11–14. In any event, the delegation clause fails to "clear[ly] and unmistakabl[y]" delegate issues concerning arbitrability in the context of a motion to compel arbitration, as the arbitration agreement specifically excludes such actions from its scope. *Sanders v. Savannah Highway Auto. Co.*, 440 S.C. 377, 384, 892 S.E.2d 112, 115 (S.C. 2023). At the very least, the delegation clause does not cover waiver by litigation, as a reasonable litigant would not expect a delegation clause to cover this distinct issue absent a specific reference. *See Marie v. Allied Home Mortg. Corp.*, 402 F.3d 1, 15 (1st Cir. 2005) ("The issue of who would decides" wavier by litigation "is an 'arcane' one that employees are unlikely to have considered unless clearly spelled out by the employer.").

Plaintiffs should not be forced to wait any longer to pursue their claims against Starbucks and Morris. This Court should affirm the trial court's order and remand for further proceedings.

## Statement of the Case

### I. Factual Background

Plaintiffs are eight current or former employees of a Starbucks store in Anderson, South Carolina. On August 1, 2022, Plaintiffs and other workers peacefully approached their manager, Defendant Morris, and presented a letter. Compl. ¶ 20. Morris then walked toward the store exit, pushing past one of the workers, Plaintiff Jonathan Hudson, as she did so. *Id.* ¶¶ 21–22. During the interaction, all workers remained peaceful and non-violent; no employee touched Morris or blocked the exit. *Id.* ¶ 23.

That same day an attorney for Starbucks emailed an attorney representing the workers' union and falsely stated that Plaintiff Aneil Tripathi had engaged in "abusive, belligerent, and menacing conduct" by blocking Morris from leaving the store. Compl. ¶¶ 31–33.

Two days later, Morris falsely reported to the police that the workers had prevented Morris from leaving the store and that one of them had assaulted Morris. *Id.* ¶ 27–28. The police report indicates that the workers were accused of "Assault / Assault & Battery 3rd degree" and "Kidnapping." *Id.* ¶ 29.

On August 8, Starbucks published a statement falsely asserting that Plaintiffs engaged in conduct that threatened Morris and falsely insinuating that Plaintiffs had engaged in criminal misconduct. *Id.* ¶¶ 36, 37.

Defendants knew that their statements were false. *Id.* ¶ 54. Morris knew that no worker had committed assault or blocked the exit. *Id.* ¶ 23. And Starbucks had access to a video, posted publicly online, showing that the workers had engaged in no violent or unlawful conduct. *Id.* ¶¶ 3, 22.

The police investigated the incident following Morris' false report. *Id.* ¶ 39. The police interviewed Plaintiffs at their homes, informing them that they were being investigated for criminal assault and kidnapping based on Morris' report. *Id.* ¶¶ 40–42. At Morris' request, the police also sought an arrest warrant for one or more of the Plaintiffs. *Id.* ¶ 43. A magistrate judge denied the request based on insufficient evidence. *Id.*

On September 15, 2022, the Anderson Sheriff's Office confirmed that Morris' report was false, stating that "[t]he employees did not stop her from leaving and did not put their hands on her, which is what the boss reported had happened." *Id.* ¶¶ 44–45. The Sheriff's Office clarified

that it was Morris "who initiated any kind of contact when she pushed past one of the employees as she was walking out of the door." Compl. ¶ 45.

Despite the Sheriff's Office's statement, Defendants have never retracted their false and misleading statements accusing Plaintiffs of criminal assault and kidnapping. *Id*. ¶ 53. As a result of Defendants' conduct, Plaintiffs suffered harm to their reputations as well as emotional distress and mental suffering. *Id.* ¶¶ 46–48.

## II. Procedural Background

Plaintiffs brought this suit in October 2022, alleging that Morris and Starbucks are liable for defamation and abuse of process under South Carolina law. *Id.* ¶¶ 58–63.

On December 22, 2022, Starbucks filed a motion seeking to transfer the case to the Business Court. Starbucks argued that the case was due to be transferred because the case involved "complex issues and legal doctrines," specifically its contention that Plaintiffs' state law claims were preempted by the National Labor Relations Act. *See* Starbucks' Mot. to Transfer to Bus. Ct. at 3. Starbucks further argued that the fact that some of Plaintiffs' attorneys sought admission to represent their clients *pro hac vice* supported transfer to the Business Court. *Id.* at 4. Starbucks made no mention of any arbitration agreement in this motion.

On December 23, 2022, Starbucks filed a motion to dismiss, claiming that Plaintiffs' claims were preempted by the National Labor Relations Act. On the same day, after filing its motion asking the Court to resolve its preemption arguments, Starbucks filed an answer claiming that the dispute was subject to an arbitration agreement. However, Starbucks did not move to dismiss on that basis or ask the Court to compel arbitration.

Defendant Morris filed a motion to dismiss on preemption grounds on December 29, 2022. Neither Defendant's motion to dismiss made any mention of any arbitration agreement.

Judge McIntosh held oral argument regarding Defendants' motions to dismiss, and denied both motions in February 2023. Judge Young denied Starbucks' motion to transfer to the Business Court on March 15, 2023.

On March 9, 2023, Plaintiffs served their First Set of Discovery Requests to Starbucks and Morris.

Months after the complaint was filed; following briefing, oral argument, and denial of the previous motions to dismiss and motion to transfer to Business Court; and after Plaintiffs issued discovery requests to both Defendants, Starbucks sought dismissal pursuant to the Federal Arbitration Act (FAA), 9 U.S.C. §§ 3–4, in April 2023. It did so on the day its discovery responses were due. Defendant Morris filed a similar motion on June 2, 2023. The Court heard oral argument regarding Defendants' motions, and denied those motions on July 18, 2023.

Defendants filed motions to reconsider Judge McIntosh's order denying their motions to compel arbitration, Starbucks on September 8, and Morris on September 11. Judge McIntosh denied the reconsideration motions without a hearing or briefing on September 15. On September 22, 2023, Starbucks and Morris each filed a notice of appeal.

**Standard of Review**

The question whether a claim is subject to arbitration is reviewed *de novo*, but a circuit court's factual findings will be upheld so long as "any evidence reasonably supports the findings." *Aiken v. Word Fin. Corp. of S.C.*, 373 S.C. 144, 148, 644 S.E. 2d 705, 707 (S.C. 2007).

"Waiver is a question of fact for the finder of fact." *Parker v. Parker*, 313 S.C. 482, 487, 443 S.E.2d 388, 391 (S.C. 1994).

## Argument

### I. Defendants waived their right to compel arbitration.

#### A. This Court must analyze waiver of the right to arbitrate on the same terms as waiver of other rights or defenses, in line with the Supreme Court's decision in *Morgan v. Sundance, Inc.*, 142 S. Ct. 1708 (2022).

In the past, attempting to implement a purported "strong policy favoring arbitration," South Carolina courts required "a showing of actual prejudice before finding waiver" of arbitration. *Rich v. Walsh*, 357 S.C. 64, 68–71, 590 S.E.2d 506, 508–10 (S.C. Ct. App. 2003). Generally, that showing was made by establishing that the party seeking to compel arbitration had waited a "significant period of time," often *years* before invoking arbitration, *id.* at 72, 590 S.E.2d at 510, and had already engaged in "extensive discovery" in the ongoing court litigation. *Toler's Cove Homeowners Assn. v. Trident Constr. Co.*, 355 S.C. 605, 612, 586 S.E.2d 581, 585 (S.C. 2003).

But the U.S. Supreme Court has abrogated any precedents applying arbitration-specific tests to determine whether a party has waived the right to arbitrate. *See Morgan v. Sundance, Inc.*, 142 S. Ct. 1708 (2022). In *Morgan*, the Supreme Court rejected the application of an arbitration-specific waiver test requiring a showing of prejudice. 142 S. Ct. at 1712–13. In doing so, the Court reaffirmed that the Federal Arbitration Act (FAA) requires that courts treat "arbitration contracts like all others—no more, no less." 142 S. Ct. at 1710. The Court explained that its prior references to a policy favoring arbitration was "merely an acknowledgement of the FAA's commitment to overrule the judiciary's longstanding refusal to enforce agreements to arbitrate and to place such agreements upon the same footing as other contracts." *Id.* (quotation marks omitted). The 'policy' of the FAA was thus "to make arbitration agreements as enforceable as other contracts, *but not more so*." *Id.* (quotation marks omitted). *Morgan* thus held that "a

court may not devise novel rules to favor arbitration over litigation," including a requirement that the party opposing forced arbitration establish prejudice. 142 S. Ct. at 1710

The Supreme Court of South Carolina has also now repeatedly recognized that there is "'no public policy—federal or state—'favoring' arbitration.'" *Sanders v. Savannah Highway Auto. Co.*, 440 S.C. 377, 382, 892 S.E.2d 112, 114 (S.C. 2023) (quoting *Palmetto Constr. Grp., LLC v. Restoration Specialists, LLC*, 432 S.C. 633, 639, 856 S.E.2d 150, 153 (2021)). Just as in *Morgan*, our State Supreme Court reasoned that Congress enacted the FAA simply "to place an arbitration agreement 'upon the same footing as other contracts," and that there is nothing in state or federal law that authorizes courts to "elevate a contractual right of arbitration above the procedural rules of the court or other contractual provisions." *Palmetto Constr. Grp.*, 432 S.C. at 636–37, 856 S.E.2d at 152 (quoting *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 219–20 (1985)). *Palmetto Construction* thus held that U.S. and South Carolina Supreme Court decisions concerning the FAA do not "supplant state procedural law," and for that reason rejected an arbitration-specific standard for appealing orders denying motions to set aside default judgments. *Palmetto Constr. Grp.*, 432 S.C. at 639, 856 S.E.2d at 153. Accordingly, any basis that previously existed for applying arbitration-specific waiver rules are now gone, and this Court must apply the same waiver rules that apply to other contractual rights or defenses.

The bottom line is that this Court should not apply its pre-*Morgan* precedent establishing an arbitration-specific waiver test that requires a showing of prejudice. Neither Starbucks nor Morris offer any reason to hold otherwise. Both rely on outdated case law advancing a purported "policy strongly favoring arbitration." Starbucks' Init. Br. at 8–9; Morris' Init. Br. at 10. Starbucks in fact admits that cases requiring a showing of prejudice are, to say the least,

"questionable" following the United States Supreme Court's decision in *Morgan*. Starbucks' Init. Br. at 17.

Nonetheless, Starbucks inexplicably goes on to rely on pre-*Morgan* precedents using factors that are now impermissible. Citing outdated decisions, Starbucks argues that it could not have waived arbitration because it did not engage in "extensive discovery" in the trial court or wait several years before invoking arbitration. Starbucks' Init. Br. at 16–20; Morris' Init. Br. at 20. However, in each of the cases cited by Starbucks, the court proceeded under the very framework rejected in *Morgan*, analyzing the existence of "substantial delay" and "extensive discovery" to determine whether a party opposing arbitration had suffered prejudice.[1] Because, as Starbucks concedes, this prejudice-focused approach is now inapplicable, this Court should not follow those now-abrogated precedents.

[1] *See Deloitte & Touche, LLP v. Unisys Corp.*, 358 S.C. 179, 184, 594 S.E.2d 523, 526 (S.C. Ct. App. 2004) (multi-year delay and extensive discovery established that party opposing arbitration "has been prejudiced"); *Liberty Builders, Inc. v. Horton*, 336 S.C. 658, 665, 521 S.E.2d 749, 753 (S.C. Ct. App. 1999) ("In order to establish waiver, a party must show prejudice through an undue burden caused by delay in demanding arbitration."); *Rhodes v. Benson Chrysler-Plymouth, Inc.*, 374 S.C. 122, 127, 647 S.E.2d 249, 251 (S.C. Ct. App. 2007) (noting that discovery analysis goes to "ascertain[ing] whether the non-moving party was prejudiced"); *Toler's Cove Homeowner Assn. v. Trident Constr. Co.*, 355 S.C. 605, 612, 586 S.E.2d 581, 585 (S.C. 2003) (analyzing extent of discovery and delay in context of establishing prejudice, in order to further the policy "favor[ing] arbitration of disputes"); *Rich v. Walsh*, 357 S.C. 64, 72–73, 590 S.E.2d 506, 510 (S.C. Ct. App. 2003) (noting that delay "should not be considered as a factor independent of the actual prejudice it occasions"); *Gen. Equip. & Supply Co. v. Keller Rigging & Constr., SC, Inc.*, 344 S.C. 553, 566, 544 S.E.2d 643, 645 (S.C. Ct. App. 2001) ("In order to establish waiver, a party must show prejudice through an undue burden caused by delay in demanding arbitration."); *Evans v. Accent Manufactured Homes, Inc.*, 352 S.C. 544, 551, 575 S.E.2d 74, 77 (S.C. Ct. App. 2003) (analyzing extent of discovery in context of evaluating prejudice); *Dean v. Heritage Healthcare of Ridgeway, LLC*, 408 S.C. 371, 388, 759 S.E.2d 727, 737 (S.C. 2014) (disregarding months-long delay in seeking arbitration for failure to show prejudice); *Carlson v. S.C. State Plastering, LLC*, 404 S.C. 250, 257–58, 743 S.E.2d 868, 872–73 (S.C. Ct. App. 2013) (disregarding delay caused by filing motion to dismiss as insufficient to establish prejudice).

Morris' only engagement with this argument, made in a footnote, is twofold. First, Morris attempts to minimize the Supreme Court's holding by saying that it only requires that "a court must hold a party to its arbitration contract just as the Court would to any other kind." *See* Morris' Init. Br. at 23–24, n.6. But that rule is precisely why the trial court was correct to find waiver here. The court was required to treat arbitration contracts on level footing with all others and thus could not apply the arbitration-specific procedural standards that Defendants rely on here. *See* Ord. Denying Mot. to Compel Arb. at 1–2.

Second, Morris argues that because South Carolina's appellate courts have not yet expressly adopted *Morgan*'s holding, it can have no effect on South Carolina's precedent requiring a showing of prejudice. *Id.* As an initial matter, Morris' claim that *Morgan* cannot apply because a South Carolina appellate court has yet to hold that it does is a strange argument to make to a South Carolina appellate court presented with this issue for the first time. Even setting that aside, it is clear that *Morgan* applies to the question at hand. Defendants sought to compel arbitration pursuant to the FAA, not any state law. *See* Starbucks' Mot. to Compel at 1; Morris' Mot. to Compel at 1 (incorporating Starbucks' arguments); *see also* Starbucks' Mot. to Compel, Ex. C at 2 (noting that the Arbitration Agreement is "subject to the Federal Arbitration Act"). South Carolina courts required a showing of prejudice based on their understanding that the FAA embodied a policy of favoring arbitration over litigation, a policy that the South Carolina courts then adopted. *See Palmetto Constr. Grp.*, 432 S.C. 637–39, 856 S.E.2d at 152–53 (tracing history of the apocryphal state policy favoring arbitration). But *Morgan* makes clear that the FAA contains no such policy. *Morgan*, 142 S. Ct. at 1713–14. And to the extent South Carolina courts derived their pro-arbitration policy from anywhere other than the FAA, the

Supreme Court of South Carolina has since repudiated any such policy. *See Sanders*, 440 S.C. at 382, 892 S.E.2d at 114; *Palmetto Constr. Grp.*, 432 S.C. at 639, 856 S.E.2d at 153.

In any event, because the FAA preempts the application of state law, "whether of legislative or judicial origin" that "takes its meaning precisely from the fact that a contract to arbitrate is at issue," the statute prohibits all arbitration-specific tests, whether they purport to be derived from the FAA or from state common law. *Perry v. Thomas*, 482 U.S. 483, 492 n.9 (1987). As the U.S. Supreme Court made clear in *Prima Paint*, to "immunize an arbitration agreement from judicial challenge" on grounds not applicable to other contracts would be to "elevate it over other forms of contract," which would be inconsistent with Section 2 of the FAA. *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 n.12 (1967). In line with the FAA's preemptive effect, other state courts have expressly held that their state-law precedents requiring a showing of prejudice have been overruled. *See Kingery Constr. Co. v. 6135 O St. Car Wash, LLC*, 312 Neb. 502, 508–09, 979 N.W. 2d 762, 770 (Neb. 2022) ("In light of the U.S. Supreme Court's decision in *Morgan*, we overrule our earlier decision in *LaRue Distributing* and cases relying on it to the extent they can be read to hold that prejudice is required for a waiver based on litigation-related conduct."); *Lopez v. GMT Auto Sales*, 656 S.W.3d 315, 333 (Mo. App. E.D. 2022) ("Under the dictates of *Morgan*, we are not to consider prejudice—or the lack thereof—to the parties.").

### B. Under long-established waiver principles, Defendants have waived their right to compel arbitration.

Significantly, neither Defendant even attempts to argue that they should prevail under South Carolina's ordinary waiver principles. Accordingly, they have waived any such argument. *Bochette v. Bochette*, 300 S.C. 109, 112, 386 S.E.2d 475, 477 (S.C. Ct. App. 1989) ("An appellant may not use either oral argument or the reply brief as a vehicle to argue issues not

argued in the appellant's brief."). Nonetheless, it is clear that Defendants' conduct in this case amounts to waiver under South Carolin's ordinary waiver principles.

As explained above, courts must analyze waiver of the right to arbitrate on the same terms as waiver of other rights or defenses. *See Morgan*, 142 S. Ct. at 1713–14. As *Morgan* recognized, waiver is the "intentional relinquishment or abandonment of a known right," and to determine whether waiver has occurred "for a contractual right, as for any other," courts focus "on the actions of the person who held the right." 142 S. Ct. at 1713. South Carolina's long-established waiver rules for rights and defenses outside of the arbitration context are consistent with *Morgan*: if a party "'shall make any speech or perform any act from which a reasonable inference may be drawn that the company does not stand upon its right, then waiver may be inferred.'" *Lawrimore v. Am. Health & Life Ins. Co.*, 276 S.C. 112, 118, 276 S.E.2d 296, 299 (S.C. 1981) (quoting *Williams v. Phila. Life Ins. Co.*, 112 S.C. 436, 447, 100 S.E. 157, 160 (S.C. 1919)). Waiver by implication results when a party has "knowledge of all of the facts" related to a waivable right or defense, but takes "any action or inaction manifestly inconsistent with an intention to insist on" the defense. *City of N. Myrtle Beach v. Lewis-Davis*, 360 S.C. 225, 235, 599 S.E.2d 462, 467 (S.C. Ct. App. 2004) (quotation marks omitted).

Here, Defendants' significant delay in seeking to compel arbitration, along with their decisions to move to dismiss (on non-arbitration related grounds) and transfer the case to Business Court, are inconsistent with the intention to assert the right to arbitrate. Starbucks filed its motion to compel arbitration on the day that its discovery responses were due to Plaintiffs; Morris filed a motion to compel arbitration nearly two months later, once Morris' discovery responses were significantly late. Defendants do not claim (nor could they) that their delay in seeking arbitration was caused by a need to discover facts relevant to asserting that right. Nor do

Defendants cite any reason why the issue they raised in their first motions to dismiss, whether the NLRA preempts Plaintiffs' state common law claims, could not be decided by an arbitrator. Moreover, Defendants made no reference to arbitration in their motions to dismiss or in the motion to transfer the case to the Business Court.

Furthermore, there would be no reason to seek to litigate this case in the Business Court, only to then force Plaintiffs into arbitration. Significantly, any claim that Defendants delayed filing a motion to compel arbitration because they did not believe Plaintiffs' claims should be heard in any forum rings hollow for this very reason. Why seek transfer to one forum—the Business Court—but not to an arbitrator? By moving for the case to be heard by the Business Court, Defendants were specifically requesting for a division of the Circuit Court to hear the case. This motion was directly at odds with their current argument that the Circuit Court was not a proper venue due to the arbitration agreement. Making matters worse, Starbucks premised its Business Court motion on the notion that this case involved out-of-state attorneys and "complex issues and legal doctrines," which is inconsistent with Starbucks' current argument that no court (including the Business Court) should hear the case at all. *See* Starbucks' Mot. to Transfer to Bus. Ct. at 3–4.

As a number of courts have recognized, submitting an issue to a court that could have been decided by an arbitrator is "not consistent with a desire to arbitrate" and is therefore sufficient to waive arbitration. *St. Mary's Med. Ctr. of Evansville, Inc. v. Disco Aluminum Prods. Co.*, 969 F.2d 585, 589–90 (7th Cir. 1992). Courts are especially suspect of attempts to compel arbitration after losing a motion that could have resolved the case, noting that this attempt to "play heads I win, tails you lose" is "the worst possible reason for failing to move for arbitration" before filing a dispositive motion to dismiss. *Hooper v. Advance Am.*, 589 F.3d 917, 922 (8th Cir.

2009) (quotation marks omitted); *see, e.g.*, *SanDisk Corp. v. SK Hynix, Inc.*, 84 F. Supp. 3d 1021, 1033 (N.D. Cal. 2015) (noting, where party seeking to compel arbitration waited until after a preliminary injunction was granted against it, that "in general courts take a 'dim view of litigants who seek arbitration after an unfavorable result in litigation'" (quoting *Riverside Publ'g Co. v. Mercer Publ'g LLC*, 829 F. Supp. 2d 1017, 1022 (W.D. Wash. 2011)); *see id*. at 1033–34 (collecting cases).[2] Here, Defendants sought arbitration only after losing their first motion to dismiss and motion to transfer the case to business court. The trial court correctly denied them a third bite at the apple.

Furthermore, Defendants' significant delay in seeking to compel arbitration, and their decision to file dispositive motions raising issues that an arbitrator could have decided, are inconsistent with their attempt to compel use of an alternative dispute mechanism designed to enhance efficiency. "Arbitration laws are passed in order to expedite the settlement of disputes and should not be used as a means of furthering and extending delays'" *Evans v. Accent Manufactured Homes*, 352 S.C. 544, 550, 575 S.E.2d 74, 76 (S.C. Ct. App. 2004) (quoting 4 Am.

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[2] Starbucks points to pre-*Morgan* decisions it says support the notion that a prior motion to dismiss does not establish waiver. *See* Starbucks' Init. Br. at 21. Those cases all analyze the prior litigation conduct of the party seeking to compel arbitration only in the context of evaluating whether the party opposing arbitration had suffered prejudice caused by undue delay. *See Carlson v. S.C. State Plastering, LLC*, 404 S.C. 250, 257, 743 S.E.2d 868, 872 (S.C. Ct. App. 2013) (noting that the court was considering "whether the non-moving party was prejudiced by the delay in seeking arbitration"); *Gen. Equip. & Supply Co. v. Keller Rigging & Constr.*, *SC, Inc*., 344 S.C. 553, 557, 544 S.E.2d 643 (S.C. Ct. App. 2001) (noting that consent to referring case to Master-in-Equity eight days prior to moving to compel arbitration did not satisfy the "burden of showing prejudice"); *Rich v. Walsh*, 357 S.C. 64, 72, 590 S.E.2d 506, 510 (S.C. Ct. App. 2003) (finding that the record in that case "does not contain sufficient evidence demonstrating . . . prejudice"); *Toler's Cove*, 355 S.C. at 612, 586 S.E.2d at 585 (evaluating procedural motion to determine whether the party opposing arbitration was "prejudice[d] through an undue burden caused by delay in demanding arbitration"). For the reasons explained above, because prejudice is no longer a permissible factor for adjudicating waiver, these precedents are no longer good law on those points. *Supra* at 7–11.

Jur. 2d Alternative Dispute Resolution § 131 (1995)). Indeed, Congress's "unmistakably clear congressional purpose" in passing the FAA, as the U.S. Supreme Court has long recognized, is that "the arbitration procedure, when selected by the parties to a contract, be speedy and not subject to delay and obstruction in the courts." *Prima Paint*, 388 U.S. at 404. Defendants should not be permitted to take advantage of the court's processes for months and then attempt to force the parties into arbitration when they are not satisfied with the trial court's rulings, thereby further delaying resolution of the claims in this case. Based on the foregoing facts, the trial court correctly concluded that Defendants' conduct amounted to waiver. *See* Ord. Denying Mot. to Compel at 1–2. This Court should affirm that factual determination. *See Parker*, 313 S.C. at 487, 443 S.E.2d at 391 ("Waiver is a question of fact for the finder of fact.").

Besides arguing that their actions did not sufficiently prejudice Plaintiffs, which, as explained above, is inconsistent with recent United States and South Carolina Supreme Court decisions, the only other argument Defendants raise is that Starbucks (though not Morris) listed arbitration as a defense in its answer, which it filed after its motion to dismiss on NLRA preemption grounds and motion to transfer to Business Court. But that does not change the fact that Defendants' conduct amounted to waiver of that defense. On the contrary, Starbucks' answer confirms that the company had "knowledge of all the facts" related to its arbitration defense at the time it filed its answer, yet proceeded to take action inconsistent with its claimed right to compel arbitration: namely, litigating the case in the trial court for several months. *City of N. Myrtle Beach v. Lewis-Davis*, 360 S.C. 225, 235, 599 S.E.2d 462, 467 (S.C. Ct. App. 2004). Importantly, the relevant question is not whether Starbucks engaged in any conduct consistent with the assertion of arbitration, but whether it took "any action or inaction manifestly

inconsistent with an intention to insist on" arbitration. *City of N. Myrtle Beach*, 360 S.C. at 235, 599 S.E.2d at 467 (quotation marks omitted) (emphasis added). That standard is met here.

## II. Even if waiver does not apply, the claims in this lawsuit are not arbitrable under the agreement.

The claims in this case are not arbitrable for two reasons. First, they fall outside the plain terms of the agreement. Second, they are subject to the outrageous tort exception[3] as recognized by the South Carolina Supreme Court.

### A. Plaintiffs' claims are not covered by the arbitration agreement.

First, Plaintiffs did not agree to arbitrate the claims at issue in this case. The arbitration agreement between Plaintiffs and Starbucks applies only to "Covered Claims," which are defined as claims "relating to my employment, including those concerning any element of compensation, harassment, discrimination, retaliation, recovery of bonus or relocation benefits, leaves of absence, accommodations, or termination of employment." *See* Starbucks' Ex. C to Mot. to Compel at 2.

Each of the enumerated Covered Claims in the agreement involves terms and conditions of employment (e.g., compensation, benefits, termination, etc.). Neither defamation nor abuse of process are mentioned, nor are any class of claims that would suggest the parties agreed to arbitrate matters falling outside the ordinary realm of employment claims. In interpreting a contract, "[w]hen words of particular and specific meaning are followed by general words, the general words are construed to embrace only persons or things of the same general kind or class

[3] Starbucks does not address the outrageous tort exception in its initial brief, even though the trial court relied on it in its order denying Defendants' motions. *See* Ord. Denying Mots. to Compel at 2. Accordingly, it has waived any argument concerning that issue. *Bochette*, 300 S.C. at 112, 386 S.E.2d at 477 ("An appellant may not use either oral argument or the reply brief as a vehicle to argue issues not argued in the appellant's brief.").

as those enumerated." *Ellis v. Taylor*, 316 S.C. 245, 248, 449 S.E.2d 487, 488 (S.C. 1994). Therefore, the Court should conclude that Plaintiffs did not agree to arbitrate non-employment claims. *See Lampo v. Amedisys Holding, LLC*, 437 S.C. 236, 242, 437 S.C. 486, 489 (S.C. Ct. App. 2022) ("Because arbitration under the FAA rests entirely upon consent, it is always up to the court to determine if the parties have an agreement to arbitrate."); *Oyekan v. Educ. Corp. of Am.*, Case No. 4:18-cv-01785-RBH, 2019 BL 68013, at *4 (D.S.C. Feb. 28, 2019) ("The courts decide in the first instance whether a dispute is to be resolved through arbitration" including whether "the specific dispute falls within the scope of the agreement to arbitrate").

As the South Carolina Court of Appeals has held, just because a claim involves a dispute between an employee and employer, that does not mean that it is covered by even the most broadly worded arbitration agreements. In *Davis v. ISCO Industries, Inc.*, this Court held that an agreement to arbitrate "any and all claims, disputes or controversies arising out of or relating to [an employee's] candidacy for employment, employment and/or cessation of employment" did not cover the employee's negligence claim against the employer for damage resulting from a data theft hack of the employer. 434 S.C. 488, 492, 498–99, 864 S.E.2d 391, 393, 396–97 (S.C. Ct. App. 2021). Even though the employer only had the plaintiff's data "due to his previous employment" with the company, that was not enough for the broad arbitration agreement to apply, because "the grounds for his negligence claim—the human resources employee disclosing his information to hackers—do not truly relate to his employment." *Davis*, 434 S.C. at 498–99, 864 S.E. 2d at 396–97.

Similarly here, Plaintiffs' claims of defamation and abuse of process do not truly relate to their employment. To succeed on their malicious defamation claim, Plaintiffs need only show that Defendants published defamatory statements "with knowledge of their falsity or with

reckless disregard of whether they were true or false," and as a result Plaintiffs suffered harm, such as "general injury to reputation, [and] consequent mental suffering." *Linn v. Plant Guard Workers*, 383 U.S. 53, 65 (1966). In order succeed on the abuse of process claim, Plaintiffs need only show "(1) an ulterior purpose, and (2) a willful act in the use of the process that is not proper in the regular conduct of the proceedings." *Pallares v. Seinar*, 407 S.C. 359, 370, 756 S.E.2d 128, 133 (S.C. 2014).

Plaintiffs' claims do not arise from any termination or failure to provide benefits. To succeed on their two state common law claims, Plaintiffs are not required to make any showing about their employment status, their working conditions, pay, or benefits, or anything else "relating" to their employment. By way of illustration, had Plaintiffs been non-employee customers at Starbucks who were falsely accused of kidnapping by Defendants, their claims and the proof required to support those claims would be exactly the same as in the present case. Thus, nothing about the fact that they were employees relates to their claims. Nor did the unlawful action taken by Defendants even occur in the workplace—Defendants' false statements were made to police and published during a time when Starbucks had closed the store. *See* Compl. ¶¶ 27, 36.

Defendants insist that Plaintiffs' claims are covered because the alleged tortious conduct related to an incident that took place at work and in the course of a discussion about Plaintiffs' working conditions. Morris' Init. Br. at 14–16, 24–26; Starbucks' Init. Bri. At 9–10. But that in no way distinguishes this case from *Davis.* Just as in *Davis*, it may be true that Plaintiffs' employment made them susceptible to the tortious conduct. But that is simply not enough for Plaintiffs' claims to be covered by the arbitration agreement. In *Davis*, the plaintiff suffered harm at the hands of his employer "only due to his previous employment with it," but that did not

make his claims related to his employment in any meaningful sense. *Davis*, 434 S.C. at 498–99, 864 S.E.2d at 396–97. The same is true here.

In a footnote, Starbucks cites two South Carolina cases and one Central District of California Case in which defamation or other tort claims were held to be covered by arbitration clauses. *See* Starbucks' Init. Br. at 10, n.3. Those cases are distinguishable. In *Landers v. FDIC*, the plaintiff claimed that the slander and intentional infliction of emotional distress he experienced, which related to statements about his work performance, led to his constructive termination. *Landers v. FDIC*, 402 S.C. 100, 111–12, 739 S.E.2d 209, 214–15 (S.C. 2013). *Landers* specifically noted that the allegedly defamatory statements "directly related to Landers' ability to perform his duties," as opposed to "the employee's general character." *Id.* Indeed, *Davis* distinguished *Landers* on this basis. *See Davis*, 434 S.C. at 499, 864 S.E.2d at 397. Similarly here, the defamatory statements and false police report accusing Plaintiffs' of assault and kidnapping do not relate to Plaintiffs' ability to make coffee or run a cash register; they unquestionably go to their "general character." *Id.*

Furthermore, *Landers* involved tort claims that, as pled, appeared to be employment claims disguised as torts. The former employee brought claims for slander and intentional infliction of emotional distress based on statements made in the course of his termination, in addition to claims for breach of contract and constructive discharge. In order to hold the employer liable for these claims, the court would have had to find that the employee had been improperly discharged. *Landers*, 402 S.C. at 114, 739 S.E.2d at 216. In this case, adjudicating Plaintiffs' defamation and abuse of process claims will not involve consideration of any employment claims. The court need not decide any issue related to hiring and firing, the provision of benefits, workplace discrimination, or any similar issue.

The other two cases cited by Starbucks also involved defamation claims closely related to employment claims. Further, in neither case did the plaintiff make any argument about the scope of the arbitration agreement. *Lampo v. Amesisys Holding* involved a defamation claim arising out of an employee's termination in which the plaintiff made no argument about the scope of the arbitration agreement, meaning that it provides no precedent or even any guidance concerning what types of claims "relate to" a person's employment. *Lampo v. Amedisys Holding, LLC*, 437 S.C. 236, 239, 877 S.E.2d 486, 488 (S.C. Ct. App. 2022). *Sabouhi v. Starbucks Corporation*, an unpublished opinion from the Central District of California, involved *seventeen* causes of action arising out of apparent discrimination that the plaintiff experienced, sixteen of which were traditional employment claims, and the final of which was defamation. *Sabouhi v. Starbucks Corp.*, Case No. 2:21-cv04446 MEMF (PLAx), 2022 BL 208974 at *1 (C.D. Cal. Mar. 14, 2022). And again, in that case the plaintiff "made no argument here that any of her claims are beyond the scope of the Arbitration Agreement." *Id.* at *5. Accordingly, it is of no persuasive value.

Morris cites an additional case, *Towles v. United HealthCare Corp.*, but that case is easily distinguishable because the arbitration clause at issue specifically listed "defamation . . . or any other tort theory" as subject to arbitration. 338 S.C. 29, 42, 524 S.E.2d 839, 846 (S.C. Ct. App. 1999). Starbucks' arbitration agreement contains no reference to defamation or any other torts.

### B. Plaintiffs' claims fall within South Carolina's outrageous tort exception to arbitration.

Plaintiffs' claims also fall within South Carolina's outrageous tort exception to arbitration. The South Carolina Supreme Court has held that arbitration agreements do not apply to "outrageous torts" that a party to the agreement "could not possibly have foreseen" in the course of "normal business dealings." *Aiken v. World Fin. Corp. of S.C.*, 373 S.C. 144, 151, 644

S.E.2d 705, 709 (S.C. 2007). In *Aiken*, the Court applied that exception to find that an agreement to arbitrate "ALL DISPUTES, CONTROVERSIES OR CLAIMS OF ANY KIND AND NATURE BETWEEN LENDER AND BORROWER ARISING OUT OF OR IN CONNECTION WITH THE LOAN AGREEMENT, OR ARISING OUT OF ANY PRIOR OR FUTURE DEALINGS BETWEEN LENDER AND BORROWER" did not apply to the borrower's state common law claims against the borrower arising out of misuse of personal information, because the borrower "could not possibly have been agreeing to provide an alternative forum for settling claims arising from this wholly unexpected tortious conduct." *Aiken*, 373 S.C. at 147, 151, 644 S.E.2d at 707, 708–09; *see also Partain v. Upstate Auto. Grp*., 386 S.C. 488, 494, 689 S.E.2d 602, 605 (S.C. 2010) (car buyer could not "be held to have contemplated that, in signing the arbitration clause, he was agreeing to arbitrate claims arising from allegedly fraudulent conduct" of selling him a different car from what he agreed to purchase).

The Supreme Court of South Carolina has applied *Aiken*'s holding to a defamation claim. In *Chassereau v. Globa-Sun Pools, Inc.*, the Supreme Court held that a buyer who stopped making payments for a pool "would not have foreseen and would not have expected" the acts the seller engaged in to collect its debt, including making "false and defamatory statements" about the buyer. 373 S.C. 168, 170, 171–72, 644 S.E.2d 718, 719, 720 (S.C. 2007). This was despite the fact that that the buyer "certainly knew that she would be required to make payments on the pool she purchased" and "must have expected that" the seller "would contact her and request that she make payments on the pool if she ceased doing so." *Chassereau*, 373 S.C. at 172, 644 S.E.2d at 720.

Similarly here, when they started working at Starbucks, Plaintiffs could not possibly have foreseen that their manager and the company would call the police, seek an arrest warrant, and make public statements falsely accusing them of criminal assault and kidnapping. *See* Compl. ¶¶ 28, 29, 36, 43. Indeed, there is an even stronger basis for the outrageous tort exception in this case than in *Aiken*, because the arbitration agreement is decidedly narrower than the agreement at issue in that case. The agreement in this case is limited to claims "relating to [Plaintiffs'] employment," *see* Starbucks' Ex. C to Mot. to Compel, in contrast to the nominally all-encompassing agreement in *Aiken*, purporting to cover all present, prior, and future claims between the parties, *see* 373 S.C. at 147, 644 S.E.2d at 707. And similarly to *Chassereau*, although Plaintiffs might have expected to have discussions at work concerning the conditions of their employment, that does not mean that they could reasonably have expected that their employer's response would be to file a false police report and publicize false statements accusing them of kidnapping and criminal assault. *Chassereau*, 373 S.C. at 172, 644 S.E.2d at 720.

The Court should reject Morris' arguments that the outrageous tort exception does not apply because the tortious conduct is related to the workplace. Morris' Init. Br. at 26.[4] In *Aiken*, the Supreme Court of South Carolina specifically rejected the argument that because the underlying loan contract was a but-for cause of the tortious conduct, it was covered by the broadly-worded arbitration agreement. *Aiken*, 373 S.C. at 147, 149–50, 644 S.E.2d at 707, 709. As the Supreme Court put it, "[a]pplying what amounts to a 'but-for' causation standard essentially includes every dispute imaginable between the parties," and "[s]uch a result is illogical and unconscionable." *Aiken*, 373 S.C. at 147, 150, 644 S.E.2d at 708. Similarly here, the

[4] Morris also argues that *Aiken* is distinguishable because it does not involve an employment contract. But that is a distinction without a difference. Nothing about *Aiken*'s reasoning suggests that it should only apply to a particular type of contract.

fact that Plaintiffs' employment relationship with Starbucks made them susceptible to the tortious conduct does not change the fact that the Plaintiffs "could not possibly have foreseen" the tortious conduct for which they seek relief in this case. *Aiken*, 373 S.C. at 147, 151, 644 S.E.2d at 707, 708–09.

## III. The trial court properly considered waiver and the scope of the arbitration agreement.

Defendants argue that the questions of whether they waived arbitration and whether Plaintiffs can be forced to arbitrate their claims at all are gateway issues that must be decided by an arbitrator, pursuant to a delegation clause that appears in the arbitration agreement. That argument is wrong for three reasons. First, Defendants failed to raise the delegation issue in a timely and appropriate manner before the trial court, and therefore waived any reliance on it. Second, the delegation clause does not meet the high standard of establishing "clear and unmistakable" evidence that Plaintiffs agreed to delegate any gateway issues to the arbitrator in the course of a motion to compel arbitration. *See Sanders*, 440 S.C. at 384, 892 S.E.2d at 115. Finally, at the very least, the delegation clause does not apply to the question whether Defendants waived arbitration through their litigation conduct. We address each argument in turn.

### A. Starbucks and Morris waived reliance on the delegation clause.

#### 1. Starbucks and Morris did not raise the delegation issue in a timely and appropriate manner.

Defendants waived any reliance on the delegation clause by failing to raise it in a timely and appropriate manner. Morris, who did not file a reply brief, did not raise the delegation clause before the trial court's ruling *at all*. Accordingly, Morris should not be permitted to rely on an argument raised for the first time in the motion to reconsider. *See RRR, Inc. v. Toggas*, 378 S.C. 174, 185, 662 S.E.2d 438, 443 (S.C. Ct. App. 2008) ("[A] party cannot use a motion to

reconsider, alter or amend a judgment to present an issue that could have been raised prior to the judgment but was not.") (citing *Dixon v. Dixon*, 362 S.C. 388, 399, 608 S.E.2d 849, 854 (S.C. 2005)).

Starbucks failed to raise this issue until its reply brief filed the night before the hearing, some two months after it filed its motion to compel arbitration.[5] Ord. Denying Mot. to Compel at 3. Compounding Starbucks' significant delay in raising this issue is the fact that the argument that an arbitrator should decide gateway issues is *completely inconsistent* with the arguments it raised in its motion. The company specifically asked the trial court to decide the gateway arbitrability question in its motion to compel, devoting a significant portion of its opening brief to the argument that Plaintiffs claims are covered by the agreement. Starbucks' Mot. to Compel Arb. at 11–14. It was only after Plaintiffs filed their brief opposing the motion that Starbucks decided it did not want the trial court to decide that question after all, belatedly invoking the delegation clause.

This is exactly the type of bait-and-switch that the rule against raising issues for the first time in reply is designed to prevent. Starbucks chides the trial court for citing this Court's opinion in *Bochette v. Bochette*, 300 S.C. 109, 386 S.E.2d 475 (S.C. Ct. App. 1989) in support of its finding that Starbucks waived reliance on the delegation clause. But the same reasoning that supports this rule in the appellate court supports application in the trial court: it deprives the

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[5] Morris, though not Starbucks, points to Starbucks' citation to the delegation clause in the background section of its motion to compel arbitration as a reason to find that they did not waive a delegation argument. Morris' Init. Br. at 19. But not only did Starbucks fail to raise this in the argument section of their brief, as explained above, its substantive arguments were inconsistent with an attempt to invoke the delegation clause, as they made an argument about the gateway issue of the scope of the arbitration agreement. Starbucks' Mot. to Compel at 11–14. This standalone citation in the background section does not excuse Starbucks' failure to make any argument about delegation before its reply brief.

opposing party of a full and fair opportunity to respond. That is why, for example, the South Carolina federal district court is one of many federal trial courts to apply the exact same rule. *See Chesher v. 3M Co.*, 234 F. Supp. 3d 693, 715 (D.S.C. 2017) ("The ordinary rule in federal courts is that an argument raised for the first time in a reply brief or memorandum will not be considered.") (quotation marks omitted); *see*, *CPT Med., Inc. v. 3M Co.*, Ca/A No. 6:21-cv-00845-DCC, 2022 BL 476672 at *4 n.2 (D.S.C. June 6, 2022) ("As this argument was raised for the first time in the reply with no opportunity for Plaintiff to respond, the Court declines to consider this argument.").

Starbucks says that its delegation clause argument was "fairly and properly raised to the lower court" because its reply brief was filed "prior to the Court's final ruling." Starbucks' Init. Br. at 14. But the cases Starbucks relies on do not support that proposition. Instead, they address distinct questions: whether a litigant waives an issue by raising it for the first time on a motion to reconsider, *see Dixon v. Dixon*, 362 S.C. 388, 399, 608 S.E.2d 849, 854 (S.C. 2005);[6] whether a litigant must file a motion for a new trial to preserve objections made at trial, *Hubbard v. Rowe*, 192 S.C. 12, 19, 5 S.E.2d 187, 189 (S.C. 1939); and whether a Form 4 order, by denying "all requested relief," could be said to have denied a request for attorneys fees, *see Sloan v. S.C. Dep't of Revenue*, 409 S.C. 551, 555 n.4, 762 S.E.2d 687, 690 n.4 (S.C. 2014). None address the relevant issue here: when a litigant fails to raise an argument in its motion, and then attempts to rely on it in their reply brief—particularly where the late-raised argument is inconsistent with the arguments raised in the motion. Because, as explained above, such a bait-and-switch deprives the

[6] *Dixon* does not stand for the proposition that this is the *only* situation in which a party waives an argument before the trial court, as Starbucks seems to suggest. Rather, it addresses only whether raising an argument for the first time in a Rule 59 motion is preserved for review.

other party of a full and fair opportunity to respond to such late-raised argument, such argument cannot be said to have been "fairly and properly raised to the lower court."

**2. Plaintiffs raise a specific challenge to the delegation clause.**

Remarkably, while asking this Court to find that they did not waive their late-raised argument about the delegation clause, Defendants argue that Plaintiffs have failed to specifically challenge the delegation clause. *See* Starbucks' Init. Br. at 12–13; Morris' Init. Br. at 17. Defendants both rely on a single sentence in *Doe v. TCSC, LLC*,[7] but that sentence has nothing to do with Plaintiffs' challenge to the delegation clause here.

*Doe v. TCSC, LLC* states that, even when an arbitration agreement contains a delegation clause, "the court still retains the right and duty to determine whether the delegation is valid and enforceable as long as the party resisting arbitration has made a direct and discrete challenge to the validity and enforceability of the delegation clause specifically, rather than the arbitration agreement as a whole." 430 S.C. 602, 608, 836 S.E.2d 874, 877 (S.C. Ct. App. 2020). That case, in turn, cited to *Rent-A-Center, W., Inc. v. Jackson*, which dealt with a litigant's unconscionability challenge to an arbitration agreement as a whole. 561 U.S. 63, 72–73 (2010). In that case, the litigant's argument made no distinction between the unconscionability of the agreement to arbitrate certain claims and the unconscionability of the delegation clause. *Id.* In other words, by deciding that the delegation clause was unconscionable, the court would be deciding that the entire arbitration agreement was unconscionable. Because there was no distinct challenge to the delegation clause, the Supreme Court held that the litigant's challenge to it had to be arbitrated, along with the rest of the arbitration agreement. *Id.* at 73–74.

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[7] Curiously, both defendants miscite this case as "*Doe v. TSCS, LLC*." *See* Starbucks' Init. Br. at 11, 12; Morris' Init. Br. at 17.

That holding does not extend to Plaintiffs' challenge to the delegation clause in the instant case. Plaintiffs' arguments about the delegation clause are not co-extensive with their challenge to the arbitration agreement. Unlike the unconscionability argument advanced in *Rent-A-Center*, Plaintiffs' arguments that Defendants' waived delegation, that the delegation clause does not clearly and unmistakably apply to motions to compel arbitration, and that it does not encompass waiver through litigation, are all specific to the delegation clause. The outcome of those arguments does not depend on the invalidity of the arbitration agreement as a whole. Because Plaintiffs have specifically challenged the delegation clause, the trial court properly adjudicated that challenge.

Defendants suggest that Plaintiffs failed to challenge the delegation clause, *see* Starbucks' Init. Br. at 12; Morris' Init. Br. at 17, but that assertion is misleading. Plaintiffs made a specific challenge to the delegation clause as soon as Starbucks invoked that clause in support of its argument. After Starbucks filed its reply brief, the night before the hearing on its motion to compel, Plaintiffs' counsel prepared an argument which they then presented during the hearing the next morning. Transcript, at 23–24, 28. In contrast, in *Rent-A-Center*, the litigant seeking to compel arbitration specifically argued *in its motion to compel* that any dispute as to the scope of the arbitration agreement was covered by the delegation clause, to which the other party's only response was that the arbitration agreement as a whole was unconscionable. *Rent-A-Ctr.*, 561 U.S. at 65–66.[8] *Rent-A-Center* addressed the content of a party's challenge to a delegation clause, not the timing of that challenge. Here, Plaintiffs can hardly be faulted for failing to

[8] *See* Mot. to Dismiss Proceedings and Compel Arb. at 4–6, *Jackson v. Rent-A-Ctr., W., Inc.,* Case No. 3:07-cv-00050 (D. Nev. Feb. 1, 2007) ECF No. 6 (arguing in the motion to compel arbitration that any challenge to the enforceability or applicability of the arbitration agreement had been delegated to the arbitrator).

address an argument in their response brief that Defendants did not make in their motions, and that would in fact be inconsistent with the arguments raised in their motions.

### B. The delegation clause does not "clearly and unmistakably" delegate gateway questions of arbitrability to an arbitrator in the present action.

Under the FAA, gateway questions of arbitrability, such as whether an arbitration provision "applies to a particular dispute," are presumptively for a court, not the arbitrator, to decide. *Sanders*, 440 S.C. at 384, 897 S.E.2d at 115. While the parties can overcome this presumption and delegate such questions to the arbitrator, there must be "'clear and unmistakable' evidence" that the parties intended to do so. *Id.* (quoting *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 530 (2019)).

The provision that Defendants rely on does not meet that high standard. In the arbitration agreement, under "Mutual Agreement to Arbitrate," it states that an arbitrator "shall have exclusive authority to resolve any dispute regarding the formation, interpretation, applicability, enforceability, or implementation of this Agreement." Exhibit C to Starbucks' Mot. to Compel Arb. at 2. But then, under "Claims Not Covered by this Agreement," it states that "actions to enforce this Agreement, compel arbitration, or enforce or vacate an arbitrator's award under this Agreement are not subject to mandatory arbitration." *Id.* As at least one other court has held, these two clauses contradict one another and "create ambiguity pertaining to whether the parties agreed to submit initial questions of arbitrability, including questions of applicability and enforceability of the arbitration clause, to the arbitrator." *Wilson v. Starbucks Corp.*, 385 F. Supp.

3d 557, 561 (E.D. Ky. 2019).[9] In other words, the claim exclusion provision expressly excludes actions to enforce the arbitration agreement.

As *Wilson* held, a motion to compel arbitration is an "action[] to enforce this Agreement, [or] compel arbitration," according to the definition of "action" provided in Black's Law Dictionary, namely a civil judicial proceeding. *Wilson*, 385 F. Supp. 3d at 561. In turn, Black's defines the term "proceeding" as including "all acts and events between the time of commencement and the entry of judgment." *Proceeding*, Black's Law Dictionary (11th ed. 2019). Accordingly, *Wilson* held that a motion to compel arbitration that Starbucks filed in the course of a lawsuit an employee filed against it constituted an "action" that is excluded from the "Claims Not Covered by this Agreement" provision of the company's arbitration agreement. *Wilson*, 385 F. Supp. 3d at 561. The same reasoning applies here. Indeed, Defendants' decision to raise a gateway arbitrability argument in their motions to compel is consistent with the conclusion that the delegation clause does not apply to the motions.

### C. The parties did not agree to delegate waiver through litigation to an arbitrator.

Even if this Court is convinced that the delegation clause applies to the scope of the arbitration agreement, it does not apply to the question of waiver by litigation. Assuming that waiver by litigation can be delegated to an arbitrator,[10] numerous federal and state courts across

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[9] In one sentence and without citing anything, Starbucks claims that the question whether the delegation clause clearly and mistakably manifested the parties' intent to let the arbitrator decide gateway issues is "also a gateway issue for the arbitrator to decide." Starbucks' Init. Br. at 13. That is false. Indeed, the sole sentence in *Doe v. TCSC* that Defendants rely on makes that clear: so long as there is a challenge to the delegation clause that is distinct from the challenge to the arbitration agreement as a whole, the court "retains the right *and duty* to determine whether the delegation is valid and enforceable." *Doe v. TCSC, LLC*, 430 S.C. at 608, 846 S.E. 2d at 877 (emphasis added).

[10] *But see Dandhi-Kapoor v. Hone Cap.* LLC, No. 2022-0881, 2023 BL 427620, at *15 (Del. Ch. Nov. 22, 2023) (holding that waiver by litigation cannot be delegated to an arbitrator);

the country have held that delegation clauses that make "no references to waiver of arbitration" do not cover waiver by litigation. *Marie v. Allied Home Mortg. Corp.*, 402 F.3d 1, 15 (1st Cir. 2005); *Ehleiter v. Grapetree Shores, Inc.*, 482 F.3d 207, 222 (3d Cir. 2007); *Int'l Energy Ventures Mgmt., LLC v. United Energy Grp., Ltd.*, 999 F.3d 257, 264–65 (5th Cir. 2021) (same), *cert. denied*, 142 S. Ct. 2752 (2022); *Principal Invs., Inc. v. Harrison*, 132 Nev. 9, 20, 366 P.3d 688, 696 (Nev. 2016) ("Absent an explicit delegation, litigation-conduct waiver remains a matter for the court to resolve."); *Good Samaritan Coffee Co. v. LaRue Distributing, Inc.*, 275 Neb. 674, 681–84, 748 N.W. 2d 367, 73–75 (Neb. 2008) (similar), *overruled on other grounds by Kingery Constr.*, 312 Neb. at 508–09; *Radil v. Nat'l Union Fire Ins. Co. of Pittsburg*, 233 P.3d 688, 695 (Colo. 2010) (to deprive a court of the authority to decide the question, a delegation clause must "expressly include . . . litigation-based waiver, within the scope of their arbitration agreement"); *Ford Motor Credit Co. v. Cornfield*, 395 Ill. App. 3d 896, 911 (Ill. App. 2d Dist. 2009) (general delegation clause "does not include the question of the effect of a party's prior litigation, which the trial court is better qualified to determine than the arbitrator"); *Kettle Black of MA, LLC v. Commonwealth Pain Mgmt. Connection, LLC*, 101 Mass. App. Ct. 109, 117–18, 189 N.E.3d 1257, 1264–65 (Mass. App. Ct. 2022) (broadly worded delegation clause "did not evince a clear and unmistakable intent to submit waiver of arbitrability by litigation to an arbitrator"); *GFS, II, LLC v. Carson*, Case No. WD86185, 2023 BL 449639 at *11 (Mo. App. W.D. Dec. 12, 2023) ("[C]laims of waiver-by-litigation are properly decided by the [trial] court, despite the fact that

*Westlake Servs., LLC v. Chandler*, 2023-Ohio-2714, 2023 BL 362643, *10 (App. 8th Dist. 2023) (questioning whether "waiver by litigation conduct could be properly delegated to an arbitrator" at all).

an arbitration agreement generally submits issues of 'enforceability' or 'arbitrability' to the arbitrator.").

In so holding, these courts have reasoned that waiver by litigation is fundamentally different from other "gateway" issues such that a reasonable party would not expect it to be covered by even the most broadly worded delegation clauses that make no specific reference to waiver. First, a reasonable party would ordinarily expect courts to decide this issue based on their power to control their own proceedings. "Where the alleged waiver arises out of conduct within the very same litigation in which the party attempts to compel arbitration or stay proceedings, then the . . . court has power to control the course of proceedings before it and to correct abuses of those proceedings." *Marie*, 402 F.3d at 13; *Macomber v. MacQuinn-Tweedie*, 2003 ME 131, 834 A.2d 131, 137 (Me. 2003) ("Courts are better suited to determine the legal consequences of prior judicial proceedings and are reposed with inherent authority to control their dockets and promote judicial economy.").

Second, the court has an obvious comparative advantage in deciding waiver by litigation because the issue "depends on the conduct of the parties before the . . . court, and the court, not the arbitrator, is in the best position to decide whether the conduct amounts to a waiver under applicable law." *Tristar Fin. Ins. Agency, Inc. v. Equicredit Corp. of Am.*, 97 Fed. Appx 462, 464 (5th Cir. 2004). That is because the "inquiry heavily implicates *judicial* procedures," *Marie*, 402 F. 3d at 13 (quotation marks omitted), which courts are more familiar with. Indeed, in this case, the trial court relied in part on the fact that the Defendants sought to use specialized procedures: moving to transfer the case to the Business Court. Ord. Denying Mot. to Compel at 1–2. Furthermore, "having been directly involved in the entire course of the legal proceedings, [the

court] is better positioned to determine whether the belated request for arbitration is a thinly veiled attempt to forum shop." *Ehleiter*, 482 F.3d at 218.

Third, having the court decide waiver promotes both judicial economy and the "primary purpose of the FAA, which is to permit speedy resolution of disputes." *Good Samaritan Coffee Co.*, 275 Neb. at 683, 748 N.W. at 375; *see Marie*, 402 F. 3d at 13 ("[S]ending waiver claims to the arbitrator would be exceptionally inefficient."). Otherwise, if the arbitrator determined that the defendant "had waived its right to arbitrate, then the cases would inevitably return to the court from which they began, without any process having been made toward resolution of the underlying claims." *Good Samaritan Coffee Co.*, 275 Neb. at 683, 748 N.W. at 374.

For all these reasons, absent a specific reference to waiver through litigation, even the most broadly worded delegation clause does not provide "clear and unmistakable evidence" that the parties agreed to delegate that question to an arbitrator when they make no reference to waiver. *Sanders*, 440 S.C. at 384, 897 S.E.2d at 115. Here, the delegation clause makes no such reference. *See* Starbucks' Mot. to Compel, Ex. C at 2. Accordingly, the trial court properly adjudicated this question.

Defendants offer no reason to hold otherwise. Morris does not address this point at all. Starbucks' only argument on this point is to chastise the trial court for citing an unpublished South Carolina Court of Appeals decision, which joined the above-described cases in holding that absent a specific reference to waiver by litigation, a delegation clause does not cover that issue. Starbucks' Init. Br. at 15. In *Samuel v. Schumacher Homes of S.C.*, this Court found that a broadly worded delegation clause, covering "all issues regarding the arbitrability of the dispute," did not cover waiver by delegation. No. 2022-UP-148, 2022 BL 99863, *1 (S.C. Ct. App. Mar. 23, 2022). Plaintiffs submit that, in the absence of binding precedent addressing a question that a

trial court is presented with, citing to a recent unpublished opinion by the appellate court with jurisdiction over that same trial court for its persuasive weight is reasonable. But even if such citation were improper, that is no reason to reverse the trial court, because this Court's conclusion in *Samuel*, the same one reached by federal and state courts across the country, is correct, and thus caused Starbucks no harm. *See Hodge v. Unihealth Post-Acute Care of Bamber, LLC*, 442 S.C. 544, 555, 813 S.E.2d 292, 298–99 (S.C. Ct. App. 2018) (holding that trial court's citation of an unpublished opinion was not reversible error because it was not "material and prejudicial to the substantial rights of the appellant").

## Conclusion

For the foregoing reasons, the trial court's order should be affirmed, and the case should be remanded for further proceedings.

Respectfully Submitted,

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/s/Matthew R. Ozment
Matthew R. Ozment, S.C. Bar No. 80072
Grove Ozment LLC
100 Williams Street
Greenville, SC 29601
(864) 516-2222
Matt@go-lawyers.com

Mary Joyce Carlson (*Appearing Pro Hac Vice)*
1629 K St. NW, Suite 1050
Washington, DC 20006
(202) 230-4096
carlsonmjj@yahoo.com

Daniel M. Rosenthal (*Appearing Pro Hac Vice)*
Michael P. Ellement (*Appearing Pro Hac Vice)*
Charlotte H. Schwartz (*Pro Hac Vice pending)*
James & Hoffman, P.C.
1629 K St. NW, Suite 1050
Washington, DC 20006

(202) 496-0500
dmrosenthal@jamhoff.com
mpellement@jamhoff.com
chschwartz@jamhoff.com

Richard P. Rouco (*Appearing Pro Hac Vice)*
Quinn, Connor, Weaver, Davies & Rouco LLP
2 – 20 Street North, Suite 930
Birmingham, AL 35203
(205) 870-9989
rrouco@qcwdr.com