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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 Foster..... Respondent,

v.

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

of which

Airbnb, Inc., is the Appellant.

and

Rhett Riviere is a Respondent.

**RECORD ON APPEAL
VOLUME III**

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	SECOND JUDICIAL CIRCUIT
COUNTY OF AIKEN	)	
Julianne Foster,	)	Civil Action No. 2021-CP-02-00889
	)	
Plaintiff,	)	
	)	
vs.	)	Airbnb, Inc.’s Motion to Reconsider
	)	and to Stay Enforcement
Rhett Riviere, Katherine A. Thomas,	)	
Chase Enterprises, LLC of South	)	
Carolina, and Airbnb, Inc.	)	
	)	
Defendants.	)	
	)	

On May 25, 2023, the Court issued a Form 4 order granting Plaintiff’s January 18, 2023 Motion to Compel (RFPs 45–48), and her February 10, 2023 Motion to Compel (RFPs 16–44) (the “Order”). The Order requires Defendant Airbnb, Inc. (“Airbnb”) to produce responsive documents.

On April 5, 2023, the Court held a hearing on the above-referenced motions to compel. After that hearing, the undersigned counsel Messrs. Harpootlian and Brown made notices of appearance for Airbnb and, in letters filed on May 15 and May 16, 2023, informed the Court that Airbnb was moving to compel arbitration; that there had not been any written order as yet on the motions to compel; and there were issues with production related to the motions to compel involving the privacy rights belonging to non-parties. A status conference was requested with the Court regarding those issues so that they could be fully addressed prior to a written order. (*See* Exhibit A, Brown Ltr.to Hon. Jocelyn Newman.) Subsequent to this correspondence, on May 23, 2023, third-party Defendant Riviere also moved to compel arbitration.

The motions to compel arbitration, and a related motion to stay further judicial proceedings (filed by Airbnb) have been set for a hearing on June 13, 2023, before Judge Cordell Maddox, Jr.

Without waiving its arbitration rights, and due to error-preservation requirements and rules deadlines, pursuant to South Carolina Rules of Civil Procedure Rule 59(e), Airbnb moves that this Court reconsider the Order, emphasizing¹ two narrow sets of records:

- (1) 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 out of a list of 82 offenses (RFP 48).

This information consists of the type of records that *Hollman v. Woolfson*, 384 S.C. 571, 577–78, 683 S.E.2d 495, 498–99 (2009) directly prohibits a party from being compelled to produce.

Airbnb also moves the Court to stay enforcement of two narrow aspects of the Order as set forth herein.² A stay of enforcement by this Court is appropriate at this time because: (1) the motions to compel arbitration and motion to stay judicial proceedings are pending and due to be heard by Judge Maddox on June 13, 2023; (2) enforcing the motion to compel Order, in part, moots Airbnb’s motion to stay judicial proceedings before that motion is even heard by Judge Maddox; and (3) Airbnb has now filed this motion to reconsider.

¹ Airbnb also moves to reconsider on all grounds and arguments about relevance and burdensomeness, etc. previously made to the Court, and those arguments and grounds are incorporated herein, again expressly not waiving Airbnb’s motion to compel arbitration and related stay motion

² Despite requesting this stay of enforcement and making this motion for reconsideration as required by South Carolina court rules, today, Airbnb is producing documents in compliance with the Order that do not relate to the narrow set of records to which Airbnb seeks reconsideration, though doing so expressly without waving its arbitration or any other rights.

Argument

I. Airbnb makes this motion without waiving its arbitration rights because the motion is required to preserve issues for appellate review.

Without waiving, and indeed expressly reserving its arbitration rights, Airbnb makes this motion as it is required to do under the court rules and circumstances of the case. *See Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004) (finding that a party may move to reconsider “when [it] believes the court has misunderstood, failed to fully consider, or perhaps failed to rule on an argument or issue, and the party wishes for the court to reconsider or rule on it.”); *see also Home Med. Sys., Inc. v. S.C. Dep't of Revenue*, 382 S.C. 556, 562, 677 S.E.2d 582, 586 (2009) (finding “this type of motion is often required for issue preservation purposes”). Such a motion is required to “enable the lower court to rule properly after it has considered all relevant facts, law, and arguments.” *I’On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000).

Rule 59(e) requires Airbnb to move to reconsider within ten days of the Court’s entry of the Order. SCRCP Rule 59(e). The ten-day deadline arrives before the scheduled June 13, 2023 hearing on the motions to compel arbitration and to stay further judicial proceedings.

As a result, Airbnb is required to seek both a stay and reconsideration of the Court’s ruling, though it does so without waiving its arbitration rights.

II. A stay and reconsideration are appropriate because, inter alia, the Court has failed to fully consider or has misapprehended the Supreme Court’s opinion in *Hollman*.

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 which compelled 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 Court reasoned that the information from the non-parties would not advance any of the plaintiff's claims, including his South Carolina Unfair Trade Practices Act claim. *Id.* at 580, 683 S.E.2d at 500. 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.

Similar to the *Hollman* non-parties, the non-parties guests here have valid privacy interests and would suffer particularized harm if their contact information were produced. This is especially true as the Court has not determined whether these third parties are entitled to notice before the production, and has not weighed Plaintiff's need for the information. Even with the Confidentiality Order in place, “no protective device can limit the invasion of the [non-party guests'] privacy once contact with them is permitted.” *Id.* at 578, 683 S.E.2d at 498–99. That is, Airbnb and these non-parties have no recourse from the trial court once this information is turned over—producing the information about the non-parties and allowing Plaintiff's counsel to contact these non-parties could likely moot any arguments Airbnb “could raise on appeal that the discovery was erroneously allowed.” *Id.* at 577, 683 S.E.2d at 498; *see also Graham v. Graham*, 301 S.C. 128, 130, 390 S.E.2d 469, 470 (1990) (permitting court to stay its order pending appeal “to preserve to appellant the fruits of a meritorious appeal where they might otherwise be lost to him.”). As a result, the Court should stay enforcement of and reconsider its Order requiring production of non-party guests contact information.

Further, the court has not considered the privacy interests of hosts in having their criminal convictions (some of which may have been expunged or otherwise made non-public) raised in a civil matter for which they are a non-party. Simply because a conviction may at one time have been public does not eliminate the privacy interests involved with further disclosure and publication of that information to a third party. The confidentiality agreement does not obviate potential notice obligations to those whose personal information is being ordered disclosed. Plaintiff failed to make a showing of the need for the specific identities and conviction information of these non-parties regarding the broad list of offenses unrelated to the instant matter. Hence, the Court should, for this additional reason, reconsider ordering disclosure of this information.

III. The Court has not expressly ruled on the rights of non-parties and whether Plaintiff may use the information to contact the non-parties.

The Order does not expressly address the privacy rights of non-parties raised in Airbnb's briefing, at oral argument, or in counsel's aforementioned correspondence to the Court. *See Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004) (requiring reconsideration when the court has failed to fully consider, or perhaps failed to rule on an argument or issue). On this basis alone, the Court should stay enforcement of and reconsider its Order.

The South Carolina Supreme Court has confirmed that the South Carolina Constitution protects individual privacy rights in both the criminal and civil contexts. *State v. Forrester*, 343 S.C. 637, 644, 541 S.E.2d 837, 841 (2001) (holding that the constitutional provision includes "a distinct privacy right that applies both within and outside the search and seizure context."); *Planned Parenthood S. Atl. v. State*, 438 S.C. 188, 199, 882 S.E.2d 770, 776 (2023), *reh'g denied* (Feb. 8, 2023) ("stated differently, the right protects from both unreasonable government invasions of privacy in citizens' persons, houses, papers, and effects and against unreasonable government searches and seizures of citizens' persons, houses, papers, and effects."). The scope of discovery

runs directly into the teeth of this constitutional protection when a plaintiff seeks a broad swath of records about non-parties to the litigation with no showing of exceptional need, and the Court does not conduct a balancing test to confirm whether such an intrusion into the non-parties' private lives is "unreasonable." S.C. Const., art I, § 10 ("The right of the people to be secure in their persons, houses, papers, and effects against . . . *unreasonable* invasions of privacy shall not be violated[.]"). This is especially true because the Court has not resolved the question about whether these non-parties are entitled to notice before their private information is produced, and because Airbnb raised this notice issue to the Court before the Court entered its Order. *See Elam*, 361 S.C. at 24, 602 S.E.2d at 780 (permitting reconsideration of argument not addressed by the court); *see also* Privacy Policy for the United States, *Airbnb.com* (Jan. 25, 2023) (discussing notice to "Members," defined to include both "hosts" and "Guests"), *available at* <https://bit.ly/3OQZLHP>.

Although Airbnb noted the privacy rights of these non-parties, especially in relation to Plaintiff's unsubstantiated desire for the discovery, the Court did not analyze this issue in its Order. The Court also did not weigh the "relevance and necessity" of the information for Plaintiff to present her *case*. *Hollman*, 384 S.C. at 578, 683 S.E.2d at 498 (quoting *Laffitte*, 381 S.C. at 476, 674 S.E.2d at 163.). Thus, the Court should stay enforcement of and reconsider its Order.

The Court has also not addressed what Plaintiff or her counsel may do with the identities or contact information they receive from the production. The Court recognized the danger of allowing Plaintiff's counsel to use the information to contact these non-parties. At the hearing, the Court asked: "So they could mark it confidential and give you names and addresses, but the only reason you want names and addresses is to reach out to those people as potential -- either potential witnesses or potential plaintiffs. So are you trying to get more clients?" (Hr'g Tr. 78:10–14, April 5, 2023.) The Court, however, did not receive a direct answer—Plaintiff's counsel instead

referenced the “other side benefits” to receiving the information. (*Id.* 78:21–22.) That Plaintiff and her counsel have not committed to refrain from “trying to get more clients” with the information is not a good reason for the production of the information.

Non-party contact certainly concerned the Supreme Court in *Hollman*. See *Hollman*, 384 S.C. at 578, 683 S.E.2d at 498–99. This Court has not addressed how Plaintiff’s contact of these non-parties would necessarily advance any interest Plaintiff may have, much less be “specifically relevant to the issues involved in the litigation, not merely relevant to the subject matter of the litigation.” *Id.* at 579, 683 S.E.2d at 499; *Oncology & Hematology Assocs. of S.C., LLC v. S.C. Dep’t of Health & Env’t Control*, 387 S.C. 380, 388, 692 S.E.2d 920, 924 (2010) (“While discovery serves as an important tool in the truth-seeking function of our legal system, we are concerned that ‘discovery practice’ has become a cottage industry and the merits of a claim are being relegated to a secondary status.”). Accordingly, the Court should stay enforcement of and reconsider its Order so that it may rule on the grounds raised in opposition to Plaintiff’s overbroad and intrusive to non-party discovery requests.

Conclusion

As our Supreme Court has explained, “[a]lthough the scope of discovery is broad, requests must show a reasonable expectation of obtaining information that will aid the dispute’s resolution.” *Oncology & Hematology Assocs.*, 387 S.C. at 388, 692 S.E.2d at 924 (quoting *In re CSX Corp.*, 124 S.W.3d at 152). The requests for non-party information here do no such thing. Based on this and the other points addressed here, the Court should preserve the status quo by staying enforcement of its Order on the motions to compel. Further, the Court should stay such enforcement pending disposition by Judge Maddox of the motions to compel arbitration and

related motion to stay judicial proceedings, and pending this Court's reconsideration of its Order per this motion to reconsider.

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June 5, 2023

Exhibit A

Brown Ltr.to Hon. Jocelyn Newman
May 15, 2023

May 15, 2023

Via E-Filing

The Honorable Jocelyn Newman
1701 Main Street, Room 223
Post Office Box 192
Columbia, SC 29202-0192

RE: Foster v. Riviere, et al. (Aiken County, SC)
Case No. 2021-CP-02-00889
Our File No. 057915.01500

Judge Newman:

Dick Harpootlian and I have been retained to represent Airbnb, Inc. in this matter as additional counsel. This matter came before you for a hearing on a motion to dismiss and two motions to compel production on April 5, 2023.

The Court has not yet issued a written order on the motions.¹ Nevertheless, and while not waiving any of its rights or positions, Airbnb has taken steps to produce documents the Court found responsive and discoverable to 13 requests for production (“RFPs”) at issue (attached).

Airbnb’s production will be made under the Court’s September 16, 2021 Confidentiality Order, although there are some issues respecting that Confidentiality Order and disputes regarding it, which were addressed in correspondence to Your Honor by Mr. Ashmore on April 20.

Some guest and host identity/contact information was requested via RFPs 34, 45–47, and 48. Disclosing guests’ contact information would allow Plaintiff to contact each of these non-party guests, even though they have not been given notice and a chance to object to the disclosure. Disclosing the identities of hosts unrelated to this case would also allow Plaintiff to expose criminal backgrounds, no matter how stale the conviction or irrelevant those hosts or convictions are to the claims. These non-parties have privacy and Due Process rights. An open issue exists

¹ See *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); *First Union Nat. Bank of S.C. v. Hitman, Inc.*, 306 S.C. 327, 329, 411 S.E.2d 681, 682 (Ct. App. 1991), *aff’d*, 308 S.C. 421, 418 S.E.2d 545 (1992).

Request for Clarification
May 15, 2023
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regarding whether non-parties are entitled to notice and an opportunity to object before such a production of their identities/contact information, or whether the Court will order the production without notice to the non-parties.

Similar privacy interests were at issue in *Hollman v. Woolfson*, 384 S.C. 571, 577–78, 683 S.E.2d 495, 498–99 (2009). There, our Supreme Court granted two extraordinary writs of certiorari and reversed and vacated discovery orders which compelled production of non-party contact information and allowed the plaintiff's counsel to contact those non-parties. *Id.* 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 Court reasoned that the information obtained from the non-parties would not advance any of the plaintiff's claims, including his South Carolina Unfair Trade Practices Act claim. *Id.* at 580, 683 S.E.2d at 500.

Similar to the *Hollman* non-parties, the non-parties here have valid privacy interests and would suffer particularized harm if their identification/contact information were produced without notice, even with the Confidentiality Order in place, as “no protective device can limit the invasion of the [non-party guests] privacy once contact with them is permitted.” *Id.* at 578, 683 S.E.2d at 498–99. As a result, Airbnb requests the Court hold a status conference—in person or remotely—on this aspect of the productions at its earliest convenience.

Airbnb has separately filed a Motion to Compel Arbitration contemporaneously with this letter. Airbnb will also be moving to dismiss and/or stay further judicial proceedings. Airbnb has not waived its rights to compel arbitration of the Amended Complaint (which, among other things asserts new causes of action), nor does it waive those rights in seeking clarification from the Court and a written order respecting the privacy rights of non-parties, should the motion to compel arbitration be denied.

Respectfully,



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Request for Clarification
May 15, 2023
Page 3

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Requests for Production at Issue

Subject of February 10, 2023 Motion to Compel:

16. “All documents reflecting the organizational, leadership and management of Airbnb from January 1, 2019 through the present.”
17. “All non-privileged information of Airbnb regarding the factual allegations in the case of *Foster v. Riviere, et al* – 2021-CP-02-00889.”
19. “All records, reports, documents, correspondence, handwritten notes or otherwise, materials of any kind that concern, reference or relate to any of the following: Rhett Riviere, Chase Enterprises, LLC of South Carolina, Katherine Thomas and/or Julianne Foster.”
27. “All documents related to Airbnb’s governance of their privacy policies as they relate to disclosed or concealed monitoring devices in AIRBNB properties including data supporting removal, reinstatement, and appeals of hosts who violate the policy.”
28. “All documents related to Airbnb and its hosts’ compliance with state statutes concerning real estate property management licensure to hosts and potential hosts.”
29. “All communications between ‘Michele’ and Defendant Katherine Thomas via Airbnb’s online booking program since April 12, 2019.”
31. “All Protocols, manuals, memoranda, or other written standards of care or instructions that reference or concern the vetting of hosts by Airbnb during the time period of December 1, 2013 through the present.”
33. “All Protocols, manuals, memoranda, or other written standards of care or instructions that reference or concern the use of video cameras by Airbnb hosts during the time period of December 1, 2013 through the present.”
34. “All reports and/or complaints made to Airbnb of guests being secretly videotaped between December 1, 2013, through the present.”

Subject of January 18, 2023 Motion to Compel:

45. “Provide all contact information in the possession of Airbnb for each and every Guest associated with the reservation id number [related to the property at issue].”
46. “Provide all contact information in the possession or control of Airbnb for each and every Guest(s) associated with the confirmation code [related to the property at issue].”
47. Provide all contact information in the possession of Airbnb for each and every Guest associated with the id product [related to the property at issue].”
48. “Provide all documents which identify any individual who has been an Airbnb Host during the time period of December 1, 2013 until the present who has been convicted of any of the [offenses from Airbnb background check policy].”



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June 5, 2023

Via E-Filing and USPS

The Honorable Jocelyn Newman
1701 Main Street
Room 223
Columbia, SC 29202

RE: Foster v. Riviere, et al. (Aiken County, SC)
Case No. 2021-CP-02-00889
Our File No. 057915.01500

Judge Newman:

As required by Rule 59(g), SCRPC, enclosed please find a courtesy copy of Airbnb, Inc.'s Motion to Reconsider and to Stay Enforcement that was filed earlier today. Airbnb makes this motion as it is required to do under the court rules and circumstances of the case without waiving, and indeed expressly reserving its arbitration rights asserted in its motion to compel arbitration, due to be heard June 13.

Please feel free to contact me or Mr. Harpootlian should you need anything regarding this motion.

Very truly yours,

C. Mitchell Brown

Enclosure

cc: Counsel of Record (via ECF)

ELECTRONICALLY FILED - 2023 Jun 05 10:24 AM - AIKEN - COMMON PLEAS - CASE#2021CP0200889

STATE OF SOUTH CAROLINA
COUNTY OF AIKEN

IN THE COURT OF COMMON PLEAS
SECOND JUDICIAL CIRCUIT

JULIANNE FOSTER,

Plaintiff,

v.

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

Defendants.

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

**PLAINTIFF'S RESPONSE OPPOSING
DEFENDANT AIRBNB'S MOTION
TO RECONSIDER AND TO
STAY ENFORCEMENT**

Plaintiff Julianne Foster, by and through her undersigned attorneys, files this response opposing Defendant Airbnb Inc.'s ("Airbnb") Motion to Reconsider and to Stay Enforcement ("Motion") filed June 5, 2023. Airbnb has not, and cannot, show that the Court erred in its Order. Airbnb is merely unhappy with the Court's ruling, which is an insufficient ground for relief under Rule 59(e). Moreover, a stay now would further delay the production of discovery, which Airbnb has acknowledged is responsive, (Ex. A, June 5, 2023 Letter from Airbnb) ("Airbnb is withholding production of documents responsive to these requests at this time"), and the resolution of Plaintiff's claims.

On April 5, 2023, the Court granted Plaintiff's Motion to Compel and ordered Airbnb to produce responsive materials to Plaintiff's Requests to Produce ("RTP") within 60 days. Airbnb now seeks to have the Court reconsider its Order concentrating on the production: (1) the contact information for non-party guests (RTP 45, 46, and 47); and (2) the identity and related information of non-party hosts with any criminal convictions (RTP 48). (Mot. at 2). Airbnb states that this information would violate the privacy rights of nonparties.

Specifically, Airbnb argues that the Court failed to fully consider or has misapprehended the holding in *Hollman v. Woolfson*, 384S.C. 571, 683 S.E.2d 495 (2009). However, the holding in *Hollman* is inapplicable for two reasons: it involved a motion for a protective order and not a motion to compel and the information sought was medical records—which are more sensitive than the benign contact or public records information sought here. Moreover, Airbnb is not raising new caselaw or some other perhaps justifiable reason for reconsideration; it is raising the same arguments it raised in its responses and at the hearing, which the Court considered and rejected.

Airbnb also moves to stay the enforcement of the Order because: (1) its Motion to Compel Arbitration is pending (and a hearing is scheduled for June 13, 2023, before Judge Cordell Maddox, Jr.); (2) enforcing the Motions to Compel partially moots Airbnb’s Motion to Stay this entire action, also pending before Judge Maddox; and (3) Airbnb has filed this Motion for Reconsideration. (Mot. at 2). The Court should deny Airbnb’s Motion as the information sought is relevant to the subject matter involved in this litigation and discoverable under South Carolina law. Plaintiff should not have to endure any more delays in obtaining the discovery to which she is entitled; she has waited long enough. As the Court noted at the hearing, this case should have been on a trial roster a year ago, and yet “we’re still talking about discovery and 60 more days to produce some discovery information.” (Ex. B, April 5, 2023 Hearing Tr. 109:17-19). The filing of these motions is simply a continuation of Airbnb’s stonewalling tactics and further evidence of its abuse of the discovery process.

I. LEGAL STANDARD

The South Carolina Supreme Court has recognized “two basic situations in which a party should consider filing a Rule 59(e)[SCRCP] motion.” *Elam v. S.C. Dep’t of Transp.*, 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004). First, “[a] party may wish to file such a motion when [he] believes

the court has misunderstood, failed to fully consider, or perhaps failed to rule on an argument or issue, and the party wishes for the court to reconsider or rule on it.” *Id.* Second, “[a] party must file such a motion when an issue or argument has been raised, but not ruled on, in order to preserve it for appellate review.” *Id.*

A court’s power to stay proceedings is incidental to the inherent power to control the disposition of its cases in the interests of efficiency and fairness to the court, counsel, and litigants. *See Landis v. N. Am. Co.*, 299 U.S. 248, 254-55 (1936). The granting or refusing of a stay is discretionary and should be exercised with caution after balancing competing interests. *See Carolina Water Serv. Inc. v. Lexington Cty. Joint Mun. Water & Sewer Comm’n*, 367 SC 141, 153, 625 S.E.2d 227, 233 (Ct. App. 2006).

Rule 26, SCRPC, governs the scope of discovery:

Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

Rule 26(b)(1), SCRPC; *In re Mt. Hawley Ins. Co.*, 427 S.C. 159, 166–67, 829 S.E.2d 707, 712 (2019) (“The scope of discovery in South Carolina is generally broad. . . . As a result, parties may obtain discovery regarding any matter that is not privileged so long as it is relevant to the subject matter involved in the pending claim.”)

II. ARGUMENT

On November 1, 2022, Plaintiff served Airbnb Requests for Production Nos. 45-48 seeking the contact information for Guests who have stayed at the Airbnb properties managed by Defendant Katherine Thomas and may have also been video recorded. This information is critical

to defend against Mr. Riviere's claim that the video recording of Ms. Foster was an "accident." Plaintiff also sought all documents which identify any Airbnb Hosts from December 1, 2013, until the present who have been convicted of certain criminal offenses. This information is extremely relevant to Airbnb's false claim that "Safety is their number one priority."

Airbnb objected contending, inter alia, that these RTPs seek private information protected by South Carolina and California privacy laws and "any other applicable constitutional, statutory and/or common-law privacy rights . . . to the extent it calls for communications from third parties, or personally identifiable or otherwise sensitive information about third parties."¹ In its response to Plaintiff Motion to Compel, Airbnb cited to cases addressing a person's right to privacy and an expectation that their names and personal information would not be publicly disclosed. (Ex. C, Airbnb Resp. Opp. Mot. to Compel at 8-9). Airbnb also stated that Plaintiff already has the names of the other guests.

The Court granted Plaintiff's Motions to Compel finding the information sought was relevant and that the Confidentiality Order would provide any needed protection. (Ex. B, April 5, 2023 Hearing Tr.108:13-24; 110:13-15). Airbnb seeks reconsideration based on a case that does not apply and a suggested procedure to notify the third-parties that is not supported by any South Carolina caselaw. Accordingly, the Court should deny Airbnb's Motion for Reconsideration and for a Stay.

A. Reconsideration is inappropriate because the Court properly considered the issues raised by Airbnb and the Supreme Court's opinion in *Hollman* is inapplicable.

¹Plaintiff does not agree that California law applies. The Court, however, need not reach this issue because in the instant Motion, Airbnb argues only South Carolina law.

Airbnb relies heavily upon *Hollman v. Woolfson*, 384 S.C. 571, 683 S.E.2d 495. In *Hollman*, a medical malpractice case, the plaintiffs sought to contact the defendants' other patients and interview them about their medical treatment and records. 384 S.C. at 576, 683 S.E.2d at 497. Importantly, the defendants sought a protective order, and, pursuant to Rule 26(c), SCRPC, the Court first determined whether the defendants had shown a particularized harm would arise if the plaintiffs were allowed to contact and interview them about their medical treatment and records. *Id.* at 578, 683 S.E.2d at 498. The Court then reviewed the plaintiff's claims to determine if the information sought was relevant and necessary to the case. Relying on *Hollman*, Airbnb contends Plaintiff needs to show that the information she is requesting is relevant and necessary.

Hollman, however, is inapplicable for several reasons. First, and most importantly, *Hollman* addresses whether a protective order should be entered pursuant to Rule 26(c), SCRPC. Rule 26(c) provides that if the discovery process threatens to become abusive or create a particularized harm to a litigant or third party, the trial judge may issue an order "to protect a party or person from annoyance, embarrassment, oppression, or undue burden by expense." *Id.* at 577, 683 S.E.2d at 498 (citing Rule 26(c), SCRPC; *Hamm v. S.C. Pub. Serv. Comm'n*, 312 S.C. 238, 439 S.E.2d 852 (1994)). "If a person requesting a protective order shows a particularized harm which will be caused by allowing the discovery, the opposing party has the burden of showing the information sought is relevant and necessary to the case." *Id.* at 578, 683 S.E.2d at 498 (internal quotation marks and citations omitted). In determining whether a protective order is necessary, the trial judge is required to weigh the factors of whether the information sought is "relevant and necessary" evidence against any particularized harm the opposing party may suffer. *Id.*

Airbnb, however, has not moved for a protective order. In fact, the Court obviously aware of the different standards, specifically asked Airbnb at the hearing if it had ever moved for a

protective order on these discovery requests. (Ex. B, April 5, 2023 Hearing Tr. 108:14-109:2). After some evasive answers, Airbnb eventually acknowledged that it had not. *Id.* 109:11. This matter was before the Court on Plaintiff's Motions to Compel, which required only that Plaintiff show that the information sought is relevant. Rule 26, SCRPC.

Second, Airbnb misapprehends the holding in *Hollman*. The Court in *Hollman* addressed only the privacy rights of medical records of non-parties. In its motion, Airbnb's argument begins with a mischaracterization of the Court's holding *Hollman* when it states that the information Plaintiff seeks (contact information or public criminal records) is the "type of records that [*Hollman*] directly prohibits a party from being compelled to produce." (Mot. at 2). Likewise, at the hearing, Airbnb stated that the South Carolina Supreme Court has held "that contacting nonparties is an invasion of privacy." (Ex. B, April 5, 2023 Hearing Tr. 86:1-3). Neither of these statements accurately reflect the Court's holding in *Hollman*.

In *Hollman*, the Court's analysis is limited and addresses only the privacy rights that nonparty patients have over their medical records and information. *Id.* at 578, 683 S.E.2d at 499. Plaintiff is not seeking medical records and information, which are by nature contain sensitive information. One cannot reasonably equate the privacy rights a person has over his medical records with his contact information or public criminal records. Airbnb has failed to identify any serious privacy concerns at stake. Furthermore, in *Hollman*, the Court did not directly prohibit the production of a non-party's medical records; it held that there must be a balancing when determining whether to issue a protective order. Here, because the Court was not determining whether to issue a protective order, the holding in *Hollman* is simply inapplicable.

Airbnb also argues that the discovery of the requested information would infringe on the constitutional right to privacy of third parties. (Mot. at 5-6) (citing cases discussing governmental

intrusions into one's right of privacy). Rule 26, SCRPC, provides, unless otherwise limited by order of the court, "[p]arties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action . . . It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence." Rule 26(b)(1), SCRPC. Rule 26 allows for broad discovery. Furthermore, "[t]he Rules do not differentiate between information that is private or intimate and that to which no privacy interests attach. . . . Thus, the Rules often allow extensive intrusion into the affairs of both litigants and third parties.'" *Hamm v. South Carolina Public Serv. Com'n*, 312 S.C. 238, 241, 439 S.E.2d 852, 853 (1994) (citing *Seattle Times Co. v. Rhinehardt*, 467 U.S. 20, 30 (1984)). The information Plaintiff seeks is relevant and discoverable under Rule 26.

Finally, as to Airbnb's argument that the Court has not determined whether these nonparties are entitled to notice before the production (Mot. at 4), Airbnb has not cited to any caselaw requiring notice to non-parties, let alone to any South Carolina cases. There was no discussion or even mention of a notice requirement in *Hollman*, which Airbnb relies upon so heavily for its Motion. The Court should reject this argument as it is not supported by any case law in South Carolina.

Furthermore, Airbnb incorrectly argues that the Court did not "expressly" rule on the privacy rights of nonparties. (Mot. at 5-6). During the hearing, the Court expressly addressed Airbnb's privacy argument. The Court asked Plaintiff's counsel to address the privacy argument even before Airbnb began its argument – evidencing that she was prepared and had read the motions and responses. (Ex. B, April 5, 2023 Hearing Tr.74:13-17) ("[G]o ahead and address the privacy argument as to the nonparty civil litigation. I know I'm going to hear that, so if you could

just go ahead and speak on that on the front end.”). After hearing the arguments, the Court stated the privacy concerns raised by Airbnb could be addressed by the Confidentiality Order. *Id.* 108:13-17. Then, at the end of the hearing, Airbnb’s counsel asked about the Court’s ruling and its application to the privacy issues:

MS. TAYLOR: Does that apply to the motion about the privacy in -- the private information, contact information, for other users and criminal history information for individuals having nothing to do with this case?

THE COURT: Yes.

MS. TAYLOR: Yes? Okay.

THE COURT: It does. Yes. Whether that’s admissible at trial or, you know – that’s another matter for another day. But certainly seems to be reasonably calculated to be – to potentially lead to the discovery of relevant or admissible evidence that relates to the claims in this case.

Id. 110:5-15. The Court correctly determined that the discovery sought was relevant to the subject matter involved and recognized that Airbnb’s privacy argument perhaps concerned admissibility, but was not grounds to deny Plaintiff’s Motions to Compel. The Court also properly determined that Airbnb’s concerns about the privacy rights of nonparties could be addressed by the Confidentiality Order. *See, e.g., Babbitt v. Albertson’s, Inc.*, No. C–92–1883, 1992 WL 605652, *6 (N.D. Cal. 1992) (“Disclosure of [employee names] could be invasive of the privacy rights of nonparties” but “these concerns could be adequately addressed through a well-crafted protective order”). Based on the foregoing, the Court should deny Airbnb’s Motion for Reconsideration.

B. A stay of enforcement of the Court’s Order regarding this discovery is not warranted.

Airbnb contends that because the Court failed to “weigh the ‘relevance and necessity’ of the information for Plaintiff to present her case,” the Court should stay the enforcement and reconsider its Order. (Mot. at 6) (emphasis in original) (citing *Hollman*, 384 S.C. 578, 683 S.E.2d

at 498)). As noted above, the granting or refusing of a stay is discretionary and should be exercised with caution after balancing competing interests. *See Carolina Water Serv. Inc.*, 367 SC at 153, 625 S.E.2d at 233. Plaintiff has been attempting to obtain this information from Airbnb for quite some time, and Airbnb has declined to produce it – claiming privacy concerns of non-parties. Yet, Airbnb has failed to move for a protective order. Moreover, as discussed, the Court considered and addressed the non-parties’ privacy concerns at the hearing. The Court should deny Airbnb’s Motion to Stay Enforcement because Airbnb fails to assert any valid grounds to reconsider the Court’s Order. Further, Airbnb’s other pending Motion to Stay is based on an entirely different ground (its motion to Compel Arbitration) and Judge Maddox will rule on that when appropriate. If the Court grants Airbnb’s Stay of Enforcement of the discovery order, it will have effectively stayed the case.

C. Reconsideration is also inappropriate as to any other issues because the Court properly considered the issues raised by Airbnb and Airbnb has not set forth any argument on any particular issues.

In a footnote in its Motion, “Airbnb also moves to reconsider on all grounds and arguments about relevance and burdensomeness, etc. previously made to the Court, and those arguments and grounds are incorporated herein, again expressly not waiving Airbnb’s motion to compel arbitration and related stay motion.” (Mot. at 2 n.1). The Court should summarily deny Airbnb’s Motion to Reconsider the Court’s Order based on this footnote; Airbnb does not assert any grounds for reconsideration by merely incorporating all of the grounds and arguments it previously made.

D. The Court need not address whether by filing this motion, Airbnb has waived its arbitration rights.

In its Motion, Airbnb states it is not waiving its purported right to arbitration by filing this motion and reserves its purported right to compel arbitration. Airbnb has been litigating this matter

in court for over two years—answering the complaints, participating in extensive discovery and mediation, and filing numerous motions with court, including two dispositive motions, which the Court denied. However, whether Airbnb has waived its alleged right to arbitrate is addressed in another motion before Judge Maddox. The Court need not address this issue when resolving this Motion for Reconsideration.

III. CONCLUSION

For the reasons set out above, the Court should deny Airbnb’s Motion to Reconsider and to Stay and order Airbnb to fully comply with the Court’s prior Order granting Plaintiff’s Motions to Compel.

[signature on following page]

Respectfully submitted,

/s/Wesley D. Few

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June 5, 2023

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Re: *Foster v. Rhett Riviere, et al.* 2021-CP-02-00889

Dear Counsel:

I write on behalf of Airbnb, Inc. ("Airbnb") in the above-captioned matter. On May 25, 2023, the court issued a Form 4 order granting Plaintiff's January 18 and February 10, 2023, Motions to Compel, allowing Airbnb 60 days to respond. Airbnb is producing documents stamped AIRBNB-001354 to AIRBNB-423515 in password-protected zip files. The password will be sent in a separate email. Contemporaneous with this production, Airbnb is filing a motion for reconsideration and to stay enforcement with respect to Plaintiff's Request for Production Nos. 45, 46, 47 (Non-Party Guest Contact Information) and 48 (Non-Party Host Criminal Convictions). Consequently, Airbnb is withholding production of documents responsive to these requests at this time.

This production has been stamped with confidentiality designations and is being produced pursuant to the September 16, 2021, Confidentiality Order in this action. The production of these materials is not intended to, and does not, waive any applicable privilege or other legal basis under which this information may be protected from disclosure. Airbnb reserves all rights and privileges with respect to documents and information produced.

Further, on May 15, 2023, Airbnb filed a motion to compel arbitration and a motion to stay further judicial proceedings. A hearing on both motions is scheduled for June 13, 2023. This production should not be construed as, and is not, a waiver of the right to compel arbitration or a waiver of our motion to stay further judicial proceedings.

Sincerely,

/s/ Damali A. Taylor

Damali A. Taylor

Enclosures

cc: Beattie Ashmore, Esq.
Richard Harpootlian, Esq.
Mitch Brown, Esq.

State of South Carolina)
) Court of General Sessions
 County of Aiken) 2021CP0200889

Julianne Foster)
)
 vs.) Transcript of Record
)
 Airbnb, Inc. et al.)

April 5, 2023
 Aiken, South Carolina

B E F O R E:

The Honorable Jocelyn Newman, Judge.

A P P E A R A N C E S (All present by video or telephone):

Wesley Few, Esq.
 Attorney for the Plaintiff

Deborah B. Barbier
 Attorney for the Plaintiff

Beattie Ashmore, Esq.
 Attorney for the Defendant

Damali Taylor, Esq.
 Attorney for the Defendant

James Griffin, Esq.
 Attorney for the Defendant

Dave DeMasters, Esq.
 Attorney for the Defendant

Dena Farbman Page
 Proofreader

1 THE COURT: All right. And this is 2021CP0200889,
2 Julianne Foster v. Rhett Riviere. There are a number of
3 motions, and I don't even know where to begin. I don't know
4 if one of you all will tell me what you think is best. Who's
5 ready to take the lead on this?

6 Mr. Ashmore, you look like you're excited to; you're
7 chomping at the bit.

8 MR. ASHMORE: Tickled pink to be here this morning, Your
9 Honor. Beattie Ashmore from Greenville, Judge. And somehow,
10 I find myself speaking first. And there are clearly a number
11 of motions on the docket today, Judge. And unfortunately,
12 they're all still -- we need your assistance on all of them,
13 Judge, so.

14 And Judge, I don't necessarily know where to begin
15 either, but it would make sense that if you were to hear our
16 motion to dismiss, if you were to grant that, that would moot
17 everything else. And if it pleases the Court, that's where
18 I'll begin. Thank you, Judge.

19 So again, Beattie Ashmore on behalf of Airbnb, Judge,
20 from Greenville. And we appreciate your time this morning.

21 We do have a number of motions pending on the docket. We
22 had them set about a month ago in front of Judge Keesley.
23 They were all carried over until today, and now they are on
24 your desk. And we appreciate your time. And it sounds like
25 you certainly have had a chance to dive into this case, and

1 that's very helpful. And so I'll try and keep it at a 30,000-
2 foot level. And so if I could start by sort of doing that,
3 setting the stage a little bit, just to make sure that we are
4 all on the same page here.

5 So the plaintiff, Julianne Foster, was in a tennis
6 tournament. She went to Aiken, and she stayed at home owned
7 by Rhett Riviere. Rhett Riviere had a, I'll call her a
8 girlfriend, Katherine Thomas. And Ms. Thomas was what we call
9 a host on the Airbnb platform. And I'm sure you're familiar
10 with Airbnb, Judge. So you got a host, you got a guest, and
11 Airbnb is just a webpage, and it puts the host in touch with
12 the guest.

13 And so there was this tennis tournament. And so what is
14 crucially important to understand right off the bat, Judge, is
15 that the guest that entered the Airbnb webpage, that platform,
16 was Michelle Jain, J-A-I-N. Michelle Jain and Julianne Foster
17 played on the same tennis team. They were friends.

18 And so Julianne Foster, the plaintiff, had no
19 relationship whatsoever with Airbnb, Judge. We took her
20 deposition, and she admitted to that very fact.

21 What happened is they were staying there at the house
22 owned by Mr. Riviere, but again, the host was Katherine
23 Thomas. Mr. Riviere was -- according to SLED, he had hidden
24 cameras and he was filming people at this house and a number
25 of other locations. He's a multimillionaire in Aiken. He's

1 got a boat. They got the film off the boat there. I think
2 there's some 23,000 videos dating back to the year 2000 that
3 exist.

4 I know Mr. Griffin is on the line, and Mr. Griffin
5 represents Mr. Riviere in this case and in the criminal
6 proceedings. He's been arrested twice so far. So Mr. Riviere
7 has got that set of problems.

8 But he was allegedly, and it looks pretty certain, he was
9 filming people without their knowledge. He had hidden cameras
10 in this particular house that we're talking about.

11 So it's important, again, to note, Judge, that as they go
12 to this tennis tournament, it was Michelle Jain that actually
13 dealt with Airbnb. When Julianne Foster was contacted by
14 SLED, she actually thought they rented the house through Vrbo,
15 a competitor of Airbnb. And so for them to allege that she
16 somehow relied on any representations of Airbnb, Judge, it's
17 totally without merit. And so given that, Your Honor, that
18 sort of the high-level factual situation that we're dealing
19 with.

20 And Judge, I don't want to take up too much of your time
21 this morning, but they started with an 88-page complaint, and
22 they amended. They now have eight causes of action, and I
23 think it's 254 paragraphs. I might have said pages, but 88
24 paragraphs to 254 paragraphs, eight causes of action.

25 I'm not sure if Mr. Few is talking. I see his mouth

1 moving.

2 MR. FEW: I'm so sorry. I was talking to my staff
3 people, and I muted myself. Sorry, Beattie.

4 MR. ASHMORE: If you can keep your mute on all day, Mr.
5 Few, we would appreciate that.

6 So Judge, if I may, just, and stop me if I'm taking up
7 too much of your time, but I'd like to get through these
8 causes of action, Judge.

9 The first one, Judge, is the negligence cause of action.
10 We think that particular cause of action certainly should be
11 dismissed because they have got to show that we owed a duty of
12 care to the plaintiff. Judge, again, she had no relationship
13 whatsoever with Airbnb. And since they filed their first
14 complaint, there have been a number of decisions across the
15 country that have found this very cause of action to be
16 without merit. There is no duty of care on behalf of Airbnb
17 owed to the plaintiff, Julianne Foster.

18 And contained within our memos, Judge, we cite these
19 cases from Arkansas, California, a couple of federal cases.
20 There's a case out of Louisiana. And they all essentially are
21 dismissing the negligence claim against Airbnb because they
22 found no duty to the host or guest because the relationship
23 does not involve the direct control and corresponding
24 responsibility to the plaintiff.

25 And Judge, the next -- are you speaking to me, Judge?

1 THE COURT: I was not. I was actually speaking to my
2 father, who was bothering me while I'm trying to listen to
3 these motions and wants me to let Mr. Harte know that -- and
4 I'm so sorry to interrupt you, but, you know, since you
5 asked -- wants me to let Mr. Harte know that whatever motion
6 for reconsideration he filed in some action in Aiken that Dad
7 needs to hear, he supposed to give him a hearing, and Mr.
8 Harte's has been asking for a hearing that he will hear you
9 Thursday, next Thursday, a week from tomorrow, Thursday at
10 noon. So clear your schedule. That's what he just told me to
11 tell Mr. Harte. That's what I was -- so I believe Mr. Harte
12 heard me, and I'm sorry to interrupt you, Mr. Ashmore, but --

13 MR. ASHMORE: That's quite all right, Judge.

14 THE COURT: -- we've been moved to another part of the
15 office so that I would not be interrupted because Dad was
16 arrogance and stuff, but it didn't work, so --

17 MR. ASHMORE: On behalf of all of us on the Webex this
18 morning, please tell your father what a fine job he did, and
19 how proud we are of him in a fairly high-profile case recently
20 that he presided over. I don't know if you're familiar with
21 it, but --

22 THE COURT: I heard something about it. Are you sure
23 it's on behalf of everyone? Not to, you know, names or
24 anything. But did you get Mr. Griffin's --

25 MR. ASHMORE: Mr. Griffin and I go way back, Judge.

1 Quite a catch --

2 THE COURT: Right.

3 MR. ASHMORE: -- but he did an outstanding job, and we
4 all salute him.

5 MR. GRIFFIN: I do join in to that one, Mr. Ashmore.

6 THE COURT: Yes, sir.

7 MR. ASHMORE: For the record.

8 MR. GRIFFIN: For the record, yeah, just let it be known.

9 THE COURT: Yes sir, absolutely. All right.

10 Mr. Ashmore, go ahead.

11 MR. ASHMORE: Your Honor, back to the basics here.

12 Another cause of action, Judge, they assert employment based
13 and vicarious liability claims, negligent hiring retention and
14 supervision claims. Judge, they're claiming that Riviere and
15 Thomas are Airbnb employees. Judge, that's ludicrous; that's
16 preposterous. That is not factually correct. They are not
17 employees of Airbnb. And so I don't have much more to say
18 about those or that particular cause of action.

19 The premises liability claim, again, Judge, we don't own
20 the property. We are just -- we are a webpage. There's a
21 host and a guest. Mr. Riviere, yeah, that's his property.
22 Any premises liability claim would rest with him, certainly
23 not with Airbnb.

24 Again, the misrepresentation, the plaintiff's
25 constructive role in South Carolina Unfair Trade Practice Act

1 claims, they failed because they can't point to any
2 affirmative representation that we made that we didn't honor.
3 We made no representations to her whatsoever. Again, she
4 thought her friend represented -- or rented this through Vrbo.

5 And I will point out Michelle Jain rightfully sued Mr.
6 Riviere and settled that case. Notably, she was represented
7 by the Strom firm, who knows a good plaintiff's case, and they
8 didn't name Airbnb, and I think that's essential.

9 Another essential fact, Judge, is they've settled with
10 Mr. Riviere, all right. They brought -- he's a
11 multimillionaire. They've settled with him. He's facing
12 criminal charges. And here's Airbnb; what have we done? What
13 have we done? Nothing, Judge. We are a billion-dollar
14 company.

15 And so they've settled with the multimillionaire. They
16 get a free swing at us, Judge, and that's where we are here
17 today. And Judge, I'm asking you to end this.

18 They've got claims based on the real estate licensing
19 statute, Judge. What is that? That's for individuals, Judge.
20 They even admit that. It doesn't apply to corporations. The
21 real estate licensing statute does not apply to Airbnb.

22 And for all of these reasons that I've outlined, the same
23 holds true for punitive damages, Judge. There is no willful,
24 wanton, or reckless disregard of the plaintiff's rights here,
25 Judge. I don't want to belabor that point.

1 We've certainly thoroughly grieved all this. I've got
2 supporting case law to support all of these arguments. Unless
3 you'd like to hear anything further from me on this particular
4 motion, Judge, I think I've covered, again, the 30,000-foot
5 level.

6 THE COURT: Okay. No, I think I'm good. Let me hear
7 from plaintiff's counsel.

8 MS. BARBIER: Good morning, Your Honor.

9 THE COURT: Good morning.

10 MS. BARBIER: I'll be speaking on behalf of of Ms. Foster
11 with respect to the motion to dismiss. Your Honor, the only
12 thing that I think I can agree with wholeheartedly with my
13 friend, Mr. Ashmore, is that your Dad did a great job in the
14 Murdaugh trial, and we are very proud of him. So I'll start
15 with that.

16 But Your Honor, I also appreciate the fact that you had
17 the opportunity to review all of our pleadings and motions
18 before today. I know that was a lot to read. And first, I
19 apologize for that. And I'll explain, I think, through the
20 course of the other arguments in this case why we felt it was
21 necessary to file the motions that we filed.

22 But Your Honor, I think the motion to dismiss is a fairly
23 simple one for Your Honor to decide because in December 2021,
24 Judge Benjamin looked at these same exact issues, almost.

25 Airbnb filed a motion to dismiss the first complaint,

1 which was far less detailed than the current complaint, the
2 first amended complaint, and she issued an order and denied
3 that motion to dismiss. And we have -- I believe Your Honor
4 has a copy of that order. If not, I'll be happy to provide
5 it.

6 But she considered many -- all of the same arguments that
7 Mr. Ashmore just made. And after considering those arguments,
8 issued a well-reasoned order applying South Carolina law. And
9 I think what (indiscernible) that is blatantly obvious from
10 Airbnb's motion is that they cite law from lots of different
11 jurisdictions.

12 And they generally, I think, Your Honor, want you to do
13 what Mr. Harte wanted you to do, which is grant summary
14 judgment. They want you to consider things outside of the
15 pleadings, which is not the standard in a motion to dismiss at
16 this stage. The standard, as you know, is to review the
17 sufficiency of the allegations in the complaint and whether or
18 not we have correctly alleged the causes of action that we've
19 alleged and stated, you know, a factual -- a sufficient
20 factual basis for that. And Your Honor, I think without
21 question we have.

22 We have -- Your Honor, I could go through each of the
23 causes of action. But I can summarize for you instead by
24 saying that the -- you know, essentially Airbnb's argument is
25 that they had no duty or no responsibility to Ms. Foster. And

1 it's interesting argument coming from company, a company that
2 made 1.89 billion dollars in 2022. And they made that with
3 the -- using the marketing to the general public that they
4 are -- that safety is their number one priority and that their
5 guests and their hosts are a trusted community.

6 And that's their -- that's what they tell people who are
7 staying in Airbnbs, and that's what Ms. Foster and her friends
8 that stayed there for the tennis tournament were under the
9 impression of, that it was a safe place and that people who
10 were being hosts on Airbnbs were properly vetted and properly,
11 you know -- their backgrounds were properly reviewed before
12 they would be allowed to be hosts.

13 And we believe that Airbnb has utterly failed in the duty
14 they undertook to protect the plaintiff, and that is, Your
15 Honor, one of the specific findings in Judge Benjamin's order
16 is that in under South Carolina law that although there is no
17 general duty, there are four exceptions to that. And she
18 found that two of those exceptions applied.

19 First, that if there is an undertaking of that duty, and
20 second, if there's a special relationship. And plaintiff, as
21 Your Honor knows, was a guest in an Airbnb rental. And our
22 position is that they undertook a duty to keep her safe and
23 her friend safe while she was staying there.

24 Because of the inactions of Airbnb, Ms. Foster has videos
25 out there on the World Wide Web of her undressing and nude.

1 And she has suffered a lot of damages from that.

2 Your Honor, we also have sufficiently alleged the
3 relationship between Airbnb and Mr. Riviere and Ms. Thomas.
4 We have alleged, you know, the facts that Mr. Riviere is the
5 owner of the property. Anybody who did any due diligence
6 would know that Ms. Thomas didn't even have the legal right to
7 have people enter that property. She didn't own it. She's
8 simply the person who signed up.

9 But there are references throughout the commentary and
10 the reviews on Airbnb about Mr. Riviere. Airbnb was perfectly
11 aware that he was co-managing the rental of this property.

12 We've also alleged, Your Honor, that the criminal
13 misconduct that occurred in the Airbnb rental was clearly
14 foreseeable to everyone, but especially Airbnb. Airbnb has
15 been on notice that people have been placing hidden cameras in
16 their rental properties since at least 2013, and we'll get to
17 that, Your Honor, in more detail in one of our motions to
18 compel.

19 But there have been in excess, according to Airbnb, and
20 we think this number is extremely understated, but according
21 to even Airbnb, there have been at least 35,000 complaints
22 about surveillance devices in their properties. And so, you
23 know, that's a recent bit of discovery.

24 But there are clearly allegations in the complaint. We
25 cite to a number of different examples all over the country of

1 people who were surreptitiously video recorded in Airbnbs, in
2 bedrooms and bathrooms and places that people are entitled to
3 privacy. And so and based on those instances, Your Honor, we
4 have alleged that a -- sufficiently pled a claim for gross
5 negligence as well.

6 With respect to the vicarious liability and the
7 employment-based claims, Your Honor, we have cited to South
8 Carolina law, which supports the pleading of these causes of
9 action, Watkins v. Hall and Armstrong v. Food Lion, and
10 they're all in our brief. I'm not going to, you know, take
11 you through our brief, but we relied on South Carolina law as
12 opposed to Airbnb, who cited a lot of law from a lot of
13 different jurisdictions.

14 With respect to the premises liability claim, Your Honor,
15 we have sufficiently alleged that Airbnb had sufficient
16 control over this property. In contrast to what Mr. Ashmore
17 said, Airbnb is not just an electronic platform that puts a
18 host in touch with a guest. Airbnb controls the entire
19 transaction. They control the payment. They control the
20 terms. They don't even tell a guest who they're renting from
21 until after the transaction is placed, and then after that,
22 they control refunds. They can control all of the terms of
23 the rental Airbnb is in control of. And we have sufficiently
24 alleged all of that.

25 We've also sufficiently alleged a claim for constructive

1 fraud in violations of the South Carolina Unfair Trade
2 Practices Act.

3 And I think it's important to note, Your Honor, with
4 respect to the South Carolina Unfair Trade Practices Act,
5 that's an ongoing fraud that we've alleged, and we've actually
6 in our complaint asked the Attorney General to look at this
7 issue because we believe it affects, you know, millions of
8 South Carolina consumers. Airbnb is a very -- has a very
9 prominent role in this state in terms of the number of Airbnb
10 rental units that exist. And so we believe it represents a
11 consumer fraud to South Carolinians and a danger that needs to
12 be investigated.

13 With respect to South Carolina's real estate laws, we do
14 not concede that it doesn't apply to Airbnb. It absolutely
15 applies to them. And the people that are using Airbnb are
16 also subject to it. They are absolutely circumventing this
17 law. They are acting as real estate brokers and property
18 managers, and they are not complying with one, one provision
19 of those real estate laws.

20 And this is not something new to Airbnb. Jurisdictions
21 and cities and municipalities all over the country are making
22 the same claims against Airbnb. So there's no reason for them
23 to feign surprise here.

24 They are attempting to be unregulated in this state and
25 every other state and every other country that they operate

1 in, and I believe those days are going to come to an end. But
2 the way that these things come to an end is through
3 litigation, as we know that.

4 And we've also pled sufficient facts to support a claim
5 for punitive damages. I understand that Airbnb believes that
6 they have no duties, no obligations, and no responsibilities
7 to Ms. Foster. But we believe that a jury is going to
8 disagree, and we think that Judge Benjamin was absolutely
9 correct in denying the first motion to dismiss. And we would
10 ask that Your Honor to do the same.

11 I'll be happy to answer any questions, if you have any.

12 THE COURT: I don't of you.

13 Back to Mr. Ashmore, and I probably should have asked
14 this at the outset, but sometimes my brain vacillates between
15 dismissal and summary judgment without realizing that I've
16 done that.

17 What say you with respect to a motion to dismiss based
18 solely on the allegations in the face of the complaint, and
19 whether there's any theory under which claims could prevail
20 without the Court considering, you know, depositions,
21 affidavits, et cetera, et cetera?

22 MR. ASHMORE: Well, I understand certainly the standard
23 involved, Your Honor. But you know, again, for them to, for
24 instance, say that -- that Riviere and Thomas are employees of
25 Airbnb, they've got to -- they've got to come forward with

1 some -- some evidence, and that evidence simply doesn't exist.

2 A number of these causes of action, Judge --

3 THE COURT: But do they have to come forward with some
4 evidence at this stage? Obviously, counsel has, you know, a
5 responsibility. This sort of goes back to the last motions
6 that I heard. Yeah, there are ethical responsibilities, Rule
7 11, all those things. But do they actually have to have
8 evidence at this -- outside of that personal responsibility?

9 MR. ASHMORE: Well, it's like the duty, Your Honor. And
10 again, the five cases, what's important, as Ms. Barbier
11 discussed Judge Benjamin's order, the five cases that we cite
12 are -- have been handed down since her order. And there
13 are -- Judge, those are cases where motions to dismiss are
14 granted because there's no duty owed by Airbnb to the
15 plaintiff. There is not, Judge. We don't owe this plaintiff
16 a duty.

17 And she testified, Judge, that she had no relationship
18 whatsoever with Airbnb. They've got to be able to come
19 forward and, again, remembering that it was Michelle Jain that
20 interacted with Airbnb and not this plaintiff. Judge, I think
21 that kills their case.

22 She could not have relied on any statements or
23 representations from Airbnb because she didn't know who they
24 were. Until her deposition, she still didn't know who they
25 were. And she admitted that at her deposition, Your Honor.

1 And so again, you know, there's just not enough there at
2 this -- in their pleas. And for those --

3 THE COURT: But do I not have to presume that everything
4 she says in the complaint is true?

5 MR. ASHMORE: Well, Your Honor, let me say this. Even
6 assuming that, Judge, there's no duty that we owe this
7 plaintiff. I mean, that's clear. And our memo is full of
8 arguments and cases that establish that very point.

9 THE COURT: But no South Carolina cases, which I think is
10 important.

11 MR. ASHMORE: Well, Your Honor, you know, no South
12 Carolina case, Judge. But I, you know, look, this is -- there
13 are federal cases. There are cases from across the country
14 that have, again, held that Airbnb owes no duty to a plaintiff
15 under this exact set of circumstances. I think that's
16 compelling.

17 THE COURT: (Indiscernible) South Carolina weren't
18 consistently a minority jurisdiction, that would be a much
19 more compelling argument. But we take a minority position on
20 so many things. I don't know. I don't know if maybe that's
21 neither here nor there.

22 I just think that if I start digging into which part of
23 these allegations are true and which part is not true, that
24 goes beyond a motion to dismiss, and Wes' brother is going to
25 say, hey, you shouldn't have done that. That's my feeling,

1 and I mean, and that's really sort of black letter standard
2 motions to dismiss in South Carolina, at least.

3 And I'm not prepared today to find that there is
4 absolutely no duty based on decisions from other jurisdictions
5 that may be eventually where we get to, but I'm not prepared
6 to make that finding today, certainly not on a motion to
7 dismiss.

8 My approach is to assume the truth of the allegations in
9 the complaint and determine whether there's any theory under
10 which the plaintiff could prevail. And with those exceptions,
11 and without clear South Carolina law, I think there may be a
12 theory, and I've got to deny the motion to dismiss the
13 complaint. You may get it on summary judgment. I don't know.

14 MR. ASHMORE: Thank you, Judge. Understood.

15 THE COURT: Yeah, not as a dismissal.

16 So then, let's move on to -- well, maybe I'll ask Mr.
17 Ashmore if you want to talk about amending your answer next.
18 Is that --

19 MR. ASHMORE: Sure, Judge. I don't think there have been
20 any objections to that, Your Honor, and I just ask you to
21 grant that motion.

22 THE COURT: Is there any objection to Airbnb's motion to
23 amend its answer, insert a crossclaim?

24 MR. GRIFFIN: Your Honor, this is Jim Griffin. We don't
25 have an objection to his amendment provided -- you know,

1 pretty sure no one would disagree that we aren't prejudiced,
2 moved to dismiss, saying that it's served upon us. We don't
3 think it's a mandatory crossclaim.

4 Airbnb objected to dismissing Mr. Riviere from the
5 plaintiff's complaint, and that's because of this motion to
6 amend. We have settled with the plaintiff. We filed a
7 stipulation of dismissal from the plaintiff's complaint, and
8 they've objected.

9 So procedurally, I'm not sure if it's in the right
10 posture. I think we should be dismissed from the plaintiff's
11 complaint, and then Airbnb should then file a third-party
12 action against Mr. Riviere alleging the things that they're
13 alleging. But that's -- that's sort of a procedural issue.
14 But does that make sense?

15 MR. ASHMORE: Judge, it --

16 THE COURT: It does. I'm wondering why that wouldn't
17 happen.

18 Mr. Ashmore.

19 MR. ASHMORE: Well, Judge, what happened is they settled
20 with Mr. Riviere, and which is fine. But we didn't sign off
21 on that settlement because we didn't know about it. And so
22 there are only two instances we make that settlement could be
23 upheld, and that is if all parties sign off on it or by order
24 of the court. And they obtained neither one of those.

25 So if you grant our motion to amend and name Mr. Riviere

1 and Ms. Thomas, then that moots that objection to their
2 settlement.

3 THE COURT: Right. I guess I'm trying to determine the
4 tactical advantage or procedural advantage that's gained by
5 not allowing the dismissal. The only party with an existing
6 claim against Mr. Riviere has resolved that claim prior to
7 today, and I've still not ruled on this motion. So all
8 existing claims, this has been resolved, so it seems like Mr.
9 Riviere should, in fact, be dismissed from the case, and this
10 would have to then be a third-party action to bring him back
11 in.

12 MR. GRIFFIN: Well, they -- that's our position, Your
13 Honor. That's our position.

14 MR. ASHMORE: Yeah. Well, Judge, they again, they need
15 an order from the court to do that, to approve that
16 settlement. That's what the rule says, Judge, either all
17 parties sign off on it or there's an order from the court.
18 Neither one of those elements have been met.

19 MR. GRIFFIN: So Your Honor --

20 THE COURT: (Indiscernible) needs to be reworded because
21 it should be all parties with an interest in it.

22 MR. GRIFFIN: Right. Right. Your Honor, so we would
23 request that -- and we did file a stipulation of dismissal.
24 They didn't sign off on it. We didn't think they needed to
25 sign off on it. We would request the Court to dismiss Mr.

1 Riviere based on the settlement from the plaintiff's
2 complaint. And then they can file a third party
3 indemnification claim. We don't think it has any merit
4 because there is no -- Mr. Riviere never signed any agreement
5 with Airbnb. But be that as it may, we'll litigate that down
6 the road. But procedurally, that's how we think it should
7 proceed.

8 THE COURT: I agree, actually, with Mr. Griffin. So Mr.
9 Riviere should be dismissed pursuant to that settlement,
10 stipulation of dismissal. Then I'm going to --

11 MR. DEMASTERS: Your Honor --

12 THE COURT: Yes. Who's talking?

13 MR. DEMASTERS: Yes, good morning. I apologize. I
14 wanted to jump in. I'm here on behalf of defendant Catherine
15 Thomas, Your Honor. And just for the record, I wanted to
16 object to the amendment to allow counterclaims against Ms.
17 Thomas. But we understand, you know, liberal amendments to
18 pleadings, no -- I don't think Ms. Thomas will suffer any
19 prejudice. But just for the record, we do want to object to
20 it. And then we would request that the amendment occur, you
21 know, sometime after the ruling on the motion to dismiss.

22 THE COURT: Okay.

23 MR. DEMASTERS: Or at least the filing of the written --
24 it's our understanding, Your Honor is going to deny Airbnb's
25 motion.

1 THE COURT: Well, I forgot that Ms. Thomas was a part of
2 it, honestly. So I was going --

3 MR. DEMASTERS: I (indiscernible) too, Your Honor.

4 THE COURT: I was denying it as to Mr. Riviere because
5 now that he's dismissed, there is no -- I mean, it's really
6 sort of moot, I guess, now that I'm determining that Mr.
7 Riviere needs to be dismissed. So there is no crossclaim to
8 assert. It would have to now be a third-party complaint.
9 What specific objection is there as to Ms. Thomas? What legal
10 objection, I'm sorry?

11 MR. DEMASTERS: You know, we just object. But we think
12 that the allegation against Ms. Thomas, you know, are -- you
13 know, we think they should be denied. It's just an objection
14 for the record, Your Honor. I don't want to agree to
15 (indiscernible).

16 THE COURT: Understood. Okay.

17 MR. ASHMORE: So just to complicate matters, Judge --

18 THE COURT: Yes.

19 MR. ASHMORE: -- that means -- that means I'll have a
20 cross -- she hadn't settled, right?

21 THE COURT: Right.

22 MR. ASHMORE: So that means Airbnb as a crossclaim
23 against her, correct?

24 THE COURT: Yes, sir.

25 MR. ASHMORE: That's your ruling, Your Honor, yes.

1 THE COURT: Yes, sir. Yes, sir. And we'll have to file
2 a third-party complaint to get Mr. Riviere back into the case.

3 MR. ASHMORE: Understood, Your Honor.

4 THE COURT: So the motion is denied as to Mr. Riviere
5 because it's moot, and granted as to Ms. Thomas. Make sense?

6 MR. ASHMORE: Thank you, Your Honor.

7 THE COURT: I know that procedurally kind of maybe
8 complicates things on your end, Mr. Ashmore. But I think that
9 that's technically the correct way to do this.

10 MR. ASHMORE: Thank you, Your Honor.

11 MR. DEMASTERS: Thank you, Your Honor.

12 THE COURT: All right. Now, next motion. These are
13 discovery. Well, they're also -- actually, it does not matter
14 which order the rest of these go in.

15 MR. ASHMORE: Your Honor, if it helps the Court, we do
16 believe or I believe that motions number 3 and 6 are fairly
17 closely related. And I was going to argue those. They don't
18 have to go now. They probably should come last. But I would
19 think that we would argue those together. They're both
20 motions to compel with respect to request for production. But
21 it's probably better for the Court to get as much information
22 as they can on these other motions to quash that would inform
23 them, would inform Your Honor about the status of discovery in
24 the case. That's my --

25 THE COURT: Okay.

1 MR. ASHMORE: -- opinion that I'd offer.

2 THE COURT: We'll do it that way.

3 MR. ASHMORE: But I just wanted to let you know --

4 MS. BARBIER: Judge, too, I don't want to interrupt, but
5 I'm just a little confused. Ms. Foster has -- I mean, Ms.
6 Thomas has had different counsel, and I'm happy to see Mr.
7 McMasters (sic), but I just don't know who he is, and I didn't
8 know that he was in this case or he filed a notice of
9 appearance or anything.

10 MR. DEMASTERS: I apologize. I should have said it. I'm
11 here for Damon Wlodarczyk. I work at his firm.

12 MS. BARBIER: Oh, okay.

13 MR. DEMASTERS: And he had a conflict with the hearing
14 this morning. So that's why I'm here. I apologize.

15 MS. BARBIER: Well, happy to have you. I just didn't
16 know who you --

17 MR. DEMASTERS: Oh, this probably is my only appearance.

18 THE COURT: And I'm sorry. I just knew that. So you
19 know, that probably should have been put --

20 MR. DEMASTERS: I apologize.

21 THE COURT: -- on the record, but I'm just familiar with
22 Mr. DeMasters and Mr. Wlodarczyk, so.

23 UNIDENTIFIED SPEAKER: I googled him. That's how I knew
24 who he was.

25 THE COURT: Easy enough.

1 Mr. Ashmore, let's go back to you on these motions to
2 quash, I guess.

3 MR. ASHMORE: Protective orders, yes, Judge. And we can
4 loosely talk about two at once. So Rich Baer, B-A-E-R, and
5 Tara Bunch, those are two Airbnb employees, and we're moving
6 for a protective order on those, Judge.

7 So I'll start with Rich Baer, Judge. He's the number one
8 lawyer at Airbnb. He's the top of the pyramid, Judge. He is
9 overseeing this case. He's overseeing every single case. And
10 there's nothing they can ask him, Judge, that would not
11 involve the attorney-client privilege. I mean, he's making
12 strategic legal decisions regarding every lawsuit that Airbnb
13 has, Judge. He's very smart, very busy. But he's the top of
14 the pyramid, judge.

15 And we've cited case after case that -- I mean, it's
16 inappropriate to depose any of our lawyers, but particularly
17 the head lawyer of Airbnb, Judge. And I guess they just
18 googled to find out who's the head lawyer at Airbnb, and they
19 just thought they would take it from there, Judge. But this
20 is as inappropriate as can be, Judge, and we strongly object,
21 Judge, to any notion that our head -- head of our legal
22 department can be deposed.

23 THE COURT: All right. Who's handling this? Mr. Few,
24 Ms. Barbier?

25 MS. BARBIER: I'll respond to that, Your Honor. First of

1 all, Your Honor, we are not seeking to ask him any questions
2 about this litigation in terms of legal strategy,
3 communications he's had about this litigation. That is not at
4 all what we want to ask him about.

5 We went to ask him about compliance issues. We want to
6 ask him about Airbnb's policies and procedures. We want to
7 ask him about things that relate to their compliance in other
8 jurisdictions with real estate laws, their policies and
9 procedures on hidden cameras, and steps that they take once
10 they receive these complaints.

11 I'm not at all convinced, Your Honor, that Mr. Baer is
12 practicing law in California. And as their chief counsel,
13 which is what he's represented to the bars of two states that
14 he's doing -- he's not licensed in California. He's not
15 registered as their general counsel. And if he is engaged in
16 the practice of law there, he's engaged in the unauthorized
17 practice of law.

18 You can't have it both ways. You can't say that you are
19 their chief legal officer and that you're giving them legal
20 advice and that your office is in San Francisco, but then not
21 be licensed to practice law there and not be registered as
22 their general counsel there. That just doesn't make any
23 sense.

24 And so where he is licensed to practice law, which is New
25 York and Colorado, he has told them that his office is in San

1 Francisco, and that's where he's practicing. So I'm not --
2 and, you know, his title is not general counsel. His title is
3 chief legal officer. And as Your Honor knows, there are many
4 officers within corporations that act as both.

5 And so what I would say is I would only be deposing him
6 in his capacity as a -- not about what legal advice he's
7 giving Airbnb, okay. I will be deposing him as a corporate
8 officer who also makes decisions and guides policy and has
9 factual information about cases that are very similar to the
10 case at hand.

11 And as Your Honor knows, discovery is not limited to
12 people who have actual facts about the plaintiff in that
13 particular suit. I'm not suggesting that he's intimately
14 familiar with the facts of Julianne Foster and what happened
15 at her Airbnb. And that would be a complete misread of Rule
16 26.

17 Rule 26 allows us, as the scope of discovery, to discover
18 things that are related to issues in the case. It's a very
19 broad standard, as Your Honor knows. And we are entitled to
20 take depositions of people who have, you know, general
21 knowledge about the issues that are listed in our complaint.

22 We would imagine that he would also be acting in a
23 compliance capacity, be acting in a -- know, have information
24 about Airbnb's compliance with real estate laws, and that is a
25 very crucial aspect of our case. It is a cause of action that

1 has been in the case since the beginning that was not
2 dismissed, specifically not dismissed by Judge Benjamin, and
3 she allowed us to go forward on it.

4 And essentially, what Airbnb is doing, Your Honor, is
5 they are not allowing us to take any discovery in this case.
6 We have disposed a 30(b)(6) witness, and that happened after
7 nine months of litigation on that issue. There were 24
8 topics. They objected to every single topic. There was a
9 hearing on that. Their motion for protective order on that
10 deposition was denied as to every topic. They then moved to
11 reconsider. That motion to reconsider was denied.

12 One of the topics is the organizational structure of
13 Airbnb. They have yet to provide us with an organizational
14 chart. The 30(b)(6) witness named certain people that were
15 involved in the organizational structure of Airbnb, and that
16 is how we came to find some of the names of the people that we
17 are seeking to depose.

18 But they have objected to every single request for
19 production, every single interrogatory. They objected to us
20 taking every deposition we've asked them to take. We've given
21 them a list of about 15 people, objected to every single one,
22 and they said they don't have any knowledge about the case.

23 We are not limited to people who -- you know, there may
24 be somebody who spoke to Michelle Jain on the customer service
25 line at Airbnb. But we're not limited to depose somebody who

1 spoke with Michelle Jain. We are allowed to take discovery of
2 their employees, and on the general practices and policies and
3 the issues that are outlined in our complaint. An Airbnb has
4 just fought us at every turn about that, and this is just one
5 more example.

6 THE COURT: Let me ask. Why isn't -- why was this not
7 noticed as a 30(b)(6) as to these topics, and let them tell
8 you who has knowledge regarding those specific topics if
9 that's what you're looking for?

10 MS. BARBIER: Right. That's a good question, Your Honor.
11 And the answer is we did notice a 30(b)(6) deposition on all
12 of these topics. And that is going to be heard in a later
13 motion today because after nine months of litigating the
14 30(b)(6) issue, they produced a witness who had essentially no
15 knowledge on the topics that were listed. Her responses were
16 evasive. They were nonresponsive. She refused to answer
17 questions. She had not educated herself on the topics.

18 It was absolutely astounding, so much so that during
19 the -- after the first hour of the deposition, it became
20 apparent she just wasn't going to answer the questions, which
21 was, in my opinion, unbelievable in light of the fact that we
22 had spent so much time litigating these topics, and the judge
23 had expressly said, you have to answer the questions on these
24 topics.

25 They produced a witness who then claims to have no

1 information about these topics or wants to limit her testimony
2 to her personal knowledge, which is not the purpose of a
3 30(b)(6). So we tried to -- you know, to depose a 30(b)(6)
4 witness on these topics. That has been -- they just have
5 blatantly refused to answer the questions on these topics.

6 And so now we have started narrowing down to okay, well,
7 who would deal with that at Airbnb. And the only way that we
8 can -- we have been able to discern who might have knowledge
9 of these topics is by the few names that were mentioned at the
10 30(b)(6) deposition by the witness, and then going on public
11 websites that have, you know, certain officers listed. And
12 that's how -- to this juncture, and we've had specific
13 interrogatories, Your Honor, about who has knowledge of these
14 issues. And they have refused to answer those questions.

15 And so, you know, if they didn't want to produce Mr. Baer
16 on this topic, they had plenty of time to say, you know, if
17 you want to ask us about real estate licensing compliance,
18 this is the person that you need to depose. They haven't done
19 that. If you want to ask us about compliance with other, you
20 know, different, you know, real estate and premise liability
21 laws in other jurisdiction, this is the person to depose.
22 They haven't done that. Their response has been to object and
23 to stonewall at every turn.

24 And you know, Your Honor, I think this issue with respect
25 to Mr. Baer and his whether or not he's even practicing law at

1 Airbnb is a very legitimate question. I mean, if he is
2 practicing law, why in California, why isn't he registered
3 there, and why isn't he license there? They haven't responded
4 to that in their pleadings.

5 I find that highly unusual that somebody who would be at
6 that level of a corporation of that size would not have dotted
7 his i's and crossed his t's with respect to making sure that
8 he's properly licensed in the jurisdiction in which he's
9 practicing. But they haven't responded to that. They've
10 simply said, of course he's licensed.

11 Well, that's not how it works. I mean, I can't put on my
12 website that I have an office in California and hold myself
13 out to the general public as a, you know, general counsel of a
14 California corporation and not be licensed there. I mean,
15 that's the unauthorized practice of law. And so until -- I
16 don't accept that he even has any privilege with Airbnb or any
17 right to an attorney-client privilege with them until they put
18 forth some evidence that he is validly licensed in the State
19 of California.

20 THE COURT: They may be trying to avoid giving evidence
21 towards his prosecution for the unauthorized practice. I have
22 no idea. I mean --

23 MS. BARBIER: That very well may be, Your Honor. And you
24 know, that would be in keeping with how (indiscernible) this
25 company has been. This is their second set of lawyers, Your

1 Honor. This is their second set.

2 THE COURT: And I don't know that. It was a joke, and a
3 half serious joke, but a joke. I know nothing about Mr. Baer.
4 I'm not suggesting that he's committing any crime, but to the
5 extent that it's alleged that he has, and that Airbnb won't
6 give up the deets on him breaking the law, you know, I would
7 kind of understand that.

8 MS. BARBIER: Yes.

9 THE COURT: Let's talk about, then, Mr. Ashmore, the
10 30(b)(6) notice. I don't know that I've seen the 30(b)(6)
11 notice. Was -- I know there was a 30(b)(6) deposition, but
12 were there multiple designees for different topics? Let's
13 talk about that.

14 MR. ASHMORE: Your Honor, we produced one witness. She
15 sat on two separate occasions for about 16 hours, Judge. It's
16 a 600-page transcript.

17 They had a motion for sanctions drafted, I think, before
18 we began the 30(b)(6). They're just unhappy with her answers.
19 I disagree with virtually everything that Ms. Barbier said.
20 This is a big, sophisticated company, and we are doing our
21 best to and have fully complied with discovery.

22 And so an hour into that deposition, they were unhappy
23 with the answers that she was giving. They got Judge Keesley
24 on the line, and he said what in the other judge said, y'all
25 do your best and get through the day and answer the questions,

1 and that's what we did, Judge.

2 At not a single point did we direct her to not answer a
3 question. She outlined names of employees, departments that
4 handle particular areas, and there were 24 extraordinarily
5 broad topics. And she was prepared and did answer those
6 fully, Judge.

7 I know that she was prepared. I participated in some of
8 those prep sessions, and she did her best. She frankly,
9 Judge, she was threatened 12 times with sanctions during the
10 course of her deposition, which sometimes causes a deponent to
11 sort of fall within a shell.

12 So other than that, Your Honor, you know, she did her
13 best under very trying circumstances.

14 And Judge, I don't know if I'm supposed to talk about
15 this California bar thing or not. I don't think any of us on
16 this line know anything about the California bar. And so
17 they've done some googling, apparently, but Mr. Baer has filed
18 a declaration and he's a licensed attorney. He's a chief
19 legal officer. And again, he's overseeing this and every
20 other lawsuit that Airbnb has. And I can't imagine that he
21 would be allowed to be deposed.

22 Judge, I do have a district of South Carolina case on
23 that. It's Judge Anderson's case, Pure Fishing, that says you
24 can only depose attorneys in limited circumstances. No other
25 means exist to obtain the info, the information is irrelevant

1 and non-privileged, and the information is crucial to the
2 preparation of the case. They can get information from other
3 sources, but Mr. Baer, Your Honor, is simply off limits.

4 THE COURT: Well, and I asked about multiple designees
5 and why wasn't it a 30(b)(6), et cetera, et cetera because I
6 mean, I want to help plaintiffs get the information, and from
7 the appropriate person. So yeah, maybe they can get it from
8 someone else, but how do they know who that someone else is?
9 Why weren't there, you know, if there are 24 broad topics and
10 the deponent could only speak to X number of them or only
11 based on personal experience, I mean, there can be more than
12 one 30(b)(6) designee.

13 So if what we're talking about is legal compliance, I
14 mean, there's got to be a compliance officer somewhere in this
15 very large company, right. So if what they want to know is
16 about compliance, why hasn't a compliance officer or whatever
17 that title is within that company been designated as a
18 30(b)(6) deponent so that they don't have to bother Mr. Baer?

19 MR. ASHMORE: Understood, Your Honor. And at my
20 invitation, we recently received more interrogatories from the
21 plaintiffs in order to get them -- we've asked for a more
22 targeted -- you know, exactly what do you want from us. And
23 we're trying to get there, Judge, and we've gotten some
24 interrogatories from them a week or ten days ago. And we're
25 getting there, Judge. We will get them -- get these

1 individuals. We'll get them these answers to these
2 interrogatories, and we'll get them the deponents now that we
3 have a better understanding of exactly what it is that they
4 want, Judge. And we've asked them for that.

5 For instance, on Mr. Baer, you know, what do you want
6 from Mr. Baer. And I know, as Ms. Barbier responded just now,
7 her response back then was we want to talk to him about
8 nonprivileged information. Well, what is that? And he can't
9 talk about it. He doesn't have any nonprivileged information,
10 Judge.

11 And so we're getting there. We'll get down -- we'll get
12 them information; we'll get them names of deponents if they
13 would just tell us with a little more specificity what exactly
14 it is they're looking for. You know, Mr. Baer didn't join
15 Airbnb until almost a year after this particular incident even
16 happened. So he would have had no knowledge of policies and
17 procedures that are relevant in this case.

18 MS. TAYLOR: Your Honor, may I be heard on this topic
19 briefly? Damali Taylor, also on behalf of Airbnb.

20 I appreciate your patience, Your Honor, and I appreciate
21 you letting me speak. So just a couple of things. Just so
22 the record is clear here, the 30(b)(6) witness did sit for two
23 days. And she was there for 16 hours, she flew to Aiken and
24 we were there until seven in the evening, and then we offered
25 a second full day.

1 She answered every single question they asked of her,
2 including questions about the real estate license statute.
3 They didn't like her answer, but she answered them. She let
4 them know there is no person knowledgeable about this statute
5 because this is not a statute that applies to Airbnb. There's
6 no one in the company poring over the statute because on the
7 plain face of the statute itself, as they responded to in
8 their interrogatories, it doesn't apply to corporations. They
9 didn't like that answer, but she gave an answer. There was no
10 point within any of those 16 hours that that witness did not
11 answer the question that was asked of her.

12 And so they did have 24 very broad topics. We have been
13 trying to meet and confer with them on each of those topics
14 for many months now, trying to get some specificity as to what
15 they're asking for. We finally just, you know, a few weeks
16 ago got them to agree to meet and confer with us to try to
17 whittle down and try to focus us on what exactly they're
18 looking for.

19 They've issued interrogatories. We are in the process of
20 finding witnesses to respond to those interrogatories. But
21 they have taken deposition, including the deposition of the
22 30(b)(6) witness and another witness.

23 There is no reason that I can imagine that they would
24 need to go to the chief legal officer of this company, who is,
25 you know, the chief legal officer of the company as their

1 opening salvo in a deposition about a real estate license that
2 does not apply to Airbnb.

3 And so, you know, this whole business about whether or
4 not he's properly licensed and an attorney, that's a red
5 herring, and we addressed that in our brief, Your Honor. We
6 talked about the standard that actually applies here under
7 South Carolina law and California law. I'm a California
8 attorney and a New York attorney, and that's just -- I mean,
9 I've never heard anything like that. And so I can respond to
10 it if Your Honor would like, but it is a red herring.

11 And the standard here is whether or not there is an
12 attorney-client privilege relationship, right. Whether or not
13 Mr. Baer is an attorney for the Corporation or that the
14 Corporation sees Mr. Baer as its attorney -- there is no
15 question that is the case. Anything else, I don't know why
16 plaintiffs are attacking this poor man, saying that he's not
17 licensed, he's not an attorney; that is just false.

18 But we really -- more than any other kind of issue, we
19 really object to deposing general counsel. That would set a
20 dangerous precedent in all sorts of cases. And so we ask that
21 Your Honor grant our motion in that regard.

22 THE COURT: Well, and I'm asking all of these questions
23 because, as I said, I want plaintiffs to be able to get the
24 information. I'd even be willing to or would consider denying
25 the motion to quash, but Ms. Barbier, what I don't want to do

1 is -- first off, I don't want to set some, you know, dangerous
2 precedents, a slippery slope, et cetera, et cetera. But also,
3 I don't want to allow the deposition only for Mr. Baer to
4 respond by asserting a privilege to each and every question.
5 That's just a waste of everybody's time.

6 If you're going to ask him things that are not subject to
7 that privilege, maybe he has the answers, maybe not. Maybe he
8 sees them all as privileged. And then you're back in court
9 with a motion for a protective order, motion to compel, you
10 know, et cetera, et cetera. But if there is a compliance
11 officer, for example, let's identify that person and just go
12 straight to that person rather than wasting the time with Mr.
13 Baer. And I don't know what he'd say or not say, but counsel
14 seems to suggest that he probably not answer any of your
15 questions, which may be fine, but it might be spinning
16 everyone's wheels and wasting time and money.

17 MS. BARBIER: I agree, and we don't want to do that. I
18 mean, we have already spun a lot of wheels and wasted a lot of
19 time because the interrogatories we sent them ten days ago or
20 so at the request of Airbnb were absolutely unnecessary.
21 We've already asked them for these witnesses two years ago. I
22 mean, this case has been going on now, as Your Honor knows, a
23 long time. And we have asked all the basic interrogatories.

24 They know exactly what we're looking for. They can read.
25 They're very smart people. And so there was no need for those

1 interrogatories, but out of -- in the spirit of trying to
2 cooperate and trying to come to some consensus, we agreed to
3 send them some additional interrogatories.

4 But I have absolutely zero confidence, particularly since
5 Ms. Taylor just said that there is nobody at Airbnb who has
6 not -- that's what the 30(b)(6) designee said. She said there
7 is nobody with any knowledge of any compliance with real
8 estate laws in South Carolina. I don't believe that, Your
9 Honor. There are jurisdictions all over this country where
10 they are being accused of a very similar allegations. And I
11 find it very difficult to believe that they don't have -- we
12 don't know who a compliance officer is. They have never
13 identified one. They have yet to produce one email between
14 anybody at Airbnb. There is no internal email communications
15 that have been produced.

16 There's not one email. There's not one text message.
17 They have given us 1345 pages of documents, which is minuscule
18 as we know in the -- in the stream of these things. This is a
19 billion-dollar corporation that operates globally, and 500 or
20 so of those pages is a publicly filed SEC document, which
21 means they've really produced about six or 700 documents.

22 And those are some that are screenshots from their
23 website, which are also publicly available, and there's a
24 couple of other, you know, policy manuals and whatnot. But
25 Your Honor, they have produced -- if they had produced

1 documents, obviously, we could review the documents and get
2 names from email addresses and names from documents that were
3 relevant to the issues and depose those people.

4 But they have -- even when our last motion to compel was
5 granted, and it was granted -- I think it was Judge Dennis
6 that granted it, if I -- there's been so many judges involved
7 in this case I can't recall.

8 But a year ago, and I have the transcript right in front
9 of me, May 31st of 2022, Judge Dennis said,

10 "You've made a motion, and I said it's very simple.
11 If you find something that after they've given you an
12 affidavit that says this is" -- he's talking about the
13 discovery of documents.

14 "If we find out they haven't produced something that
15 we've asked for, then we're talking about some serious
16 sanctions, and I don't think the lawyers want to be going
17 to the Office of Disciplinary Counsel, nor do I think the
18 companies want to be penalized" -- the companies, talking
19 about Airbnb -- "but the bottom line is that's going to
20 happen, folks, so let's quit playing games, and let's do
21 something."

22 And that is May 31st of 2022. And you know, Judge
23 Dennis, very much to his credit, saw exactly what was
24 happening, and he saw that there were games being played, and
25 he said stop playing games. And what happened after that was

1 that Airbnb removed their lawyers. Okay? They hired a
2 different set of lawyers.

3 And anytime -- and based on the track record here,
4 they're asked to comply with discovery or produce discovery or
5 produce a witness. You know, they go back to MO, which is
6 okay, you've ordered me to answer these topics, I'm just going
7 to produce a witness who says, I don't know or I'm not sure
8 about that. I didn't ask anybody.

9 Yes, you can say that for 16 hours. If you read the
10 transcripts of those two days of depositions -- and one was in
11 October and the other one was in January -- and the reason
12 they were spread out is because we wanted to give Airbnb the
13 benefit of the doubt.

14 We said, okay, your witness was clearly not prepared.
15 She's clearly unwilling to answer these questions, even though
16 she's been ordered to, both before the deposition and during
17 the deposition. She's been ordered to do it, but we're going
18 to give you one more chance. So we're going to give you a
19 couple months to prepare her and to let her know she's got to
20 answer these questions.

21 We came back in January. We got the same business: I
22 don't know, I didn't ask anybody, I can tell you what
23 happened. Then I worked in that department, I talked to one
24 person. I mean, the same kind of stuff, Your Honor. You can
25 actually -- and now I know for certain, you can spend 16 hours

1 saying I don't know or I'm not sure or I didn't ask somebody,
2 as unbelievable as that sounds.

3 And you know, Your Honor, it's difficult on a 30(b)(6) --
4 on our motion for sanctions, you know, it does require
5 somebody to read the transcript, and I know that's a lot to
6 ask, but it -- we have put excerpts in our motion for
7 sanctions for some of her answers, which are characteristic of
8 all of her answers, but she was one designee.

9 She did not have knowledge on all the topics, not even
10 close. She was -- I don't know how old she was, but it
11 appeared to me that she was very inexperienced. She had never
12 testified on these topics before.

13 I'm not sure that Airbnb had ever given a 30(b)(6) on
14 these topics, which based on our dealings with them doesn't
15 surprise me. This is the first time they've ever been forced
16 to do it. But her answers was -- you know, it was
17 just -- they were just evasive and nonresponsive. And we're
18 getting absolutely nowhere in discovery, and that is -- you
19 know, this is two years into it, and it is very frustrating.

20 And so I apologize that Your Honor has all these motions
21 in front of you, but there's really -- we have done everything
22 that we can do to try to, you know, work with their counsel to
23 get the answers we're looking for, and we're not having any
24 luck.

25 MS. TAYLOR: You know, on that point, the first time

1 plaintiffs have ever met -- sat and met and conferred with
2 us -- and we've asked for it for a very long time -- on
3 witnesses, on these topics was, I want to say, about two weeks
4 ago because I was about to go on vacation. And it was right
5 before, and we had a call with them, just to try to figure out
6 what it is that they want so that we could go back and find
7 the correct witnesses. We have been trying to do that
8 forever.

9 They finally did it about a week and a half ago. They
10 gave us interrogatories with more specificity, with the
11 specificity that we've been asking for. Just yesterday we
12 told them, we're looking -- we're trying to find the right
13 witnesses. We will get back to you with those witnesses so
14 that we can arrange these depositions.

15 And so you know, respectfully, I just disagree with the
16 characterization that's been made to the Court. We have email
17 after email of us asking them, hey, can we set up a call to
18 talk about this? And them saying no. And finally they have,
19 and we appreciate that. This is how most litigation occurs.
20 You talk about what you actually want, and then the company or
21 the defendant, you go back and you try to find the right
22 witnesses.

23 We are finally in that process after a very long time of
24 them saying, you know what you did, you know what we want.
25 Right? So we're finally in the process of actually having

1 those conversations, and the company, as we speak, is trying
2 to find the right witnesses.

3 The idea that your opening salvo is to ask to depose the
4 chief legal officer or the CEO or the founder of the company.
5 I mean, that's what they've done here. That's just not -- I
6 have never seen that, and that's not the way these things
7 should be done.

8 And so we're in the process now. We're locating the
9 witnesses that they've asked for now that we have clarity on
10 what they want. and we will provide them with names, and we've
11 told them that.

12 MS. BARBIER: Your Honor, I know Ms. Taylor hasn't been
13 involved in this case the entire time that it's been
14 impending. We've been consulting with Airbnb's lawyers for
15 two years, and so I understand that she thinks that two weeks
16 ago was the first time we consulted, but she hasn't been in
17 this from the beginning, and we have, and this is -- it is not
18 difficult to identify witnesses.

19 It is not difficult to tell us who the compliance officer
20 is of a company. It is not difficult to tell us who has
21 knowledge of these topics. It is very simple, and this is not
22 a game.

23 You know, our client has been injured, and she's entitled
24 to discovery on these issues. and so I don't -- if Your Honor
25 is inclined to not allow us to depose Mr. Baer, I would ask

1 that you take it under advisement, and I would ask that you
2 give them a deadline of five days or something that the Court
3 believes is reasonable.

4 I don't think it should take five days. I think they
5 should already have the answer for us at -- should have had it
6 for us years ago. But the topics and the things that we
7 wanted to depose Mr. Baer on, who can address them other than
8 a legal officer.

9 We'd like the name of that person, and then we would
10 consider withdrawing our motion to depose Mr. Baer if they
11 provided it. But thus far, they haven't done that, and I
12 don't know that they can give you a good reason. There is no
13 good reason. It's very -- it's not complicated, and both
14 of -- all of the lawyers on the other side of this are very
15 smart people. So I don't know what their explanation is for
16 the delay.

17 THE COURT: I want to stick with the Baer/ And let me
18 hear about Ms. Bunch, Mr. Ashmore.

19 MR. ASHMORE: Well, Your Honor, same thing. She's in the
20 same category. She's head of global operations, Judge. That
21 title alone, why do they -- I mean. what relevance does global
22 operations have to this case. And she's got 3500 employees
23 beneath her, extraordinarily busy.

24 And again, Judge, she's at the top of the pyramid, and
25 you know, we, again, it sounds like we're finally after two

1 years starting to target exactly what it is. You know when,
2 you know -- when Ms. Barbier says, you know, we want a witness
3 to address this particular topic, we just need to know exactly
4 what it is that they're looking for, Judge, and I think that
5 this last round of interrogatories will help us in that
6 regard.

7 And picking up on Ms. Barbier's suggestion, Your Honor,
8 maybe that's not such a bad idea to consider carrying over
9 Bunch and Baer. And I yield to my leader, Ms. Taylor, on
10 this, and I failed to recognize her, Your Honor. Damali
11 Taylor is an outstanding lawyer with O'Melveny & Myers, and
12 she knows more about the California bar than the rest of us, I
13 can tell you that, because she lives out there, and she's a
14 friend of mine, Judge.

15 But maybe carry that over -- if Ms. Barbier mentioned
16 five days, we're a big company, Judge, we need more than five
17 days to do much of anything, but if we could carry these two
18 over for X until your next term of court or whenever and just
19 fashion some kind of schedule here such that hopefully we can
20 make some progress.

21 THE COURT: That's really what I want to do as to the
22 motion -- both motions to quash and, really, sort of the
23 motion for sanctions. I don't know that I want to keep them
24 necessarily, and I don't -- but I also don't know that I want
25 to rule on them, which sounds crazy.

1 What I want is -- or what should happen, I think, is to
2 have a specific 30(b)(6) list of topics with some specificity
3 that helps Airbnb -- and I don't know whether that's been done
4 already or not. But Airbnb needs to go through those 30(b)(6)
5 topics and say this person can testify about this, this person
6 can testify about that.

7 Like I said, you can have multiple 30(b)(6) designees.
8 Not one person has to know everything about everything, but
9 those depositions have to be taken, and whether that's two
10 different people, three different people, however many people,
11 you got to get the right people to offer testimony as to all
12 of the topics.

13 And I know I've done this before. I know it happens,
14 practically speaking, where you get a list of ten topics and
15 you have a witness who can testify about eight of them, and
16 then you just kind of pretend the other two weren't there and
17 don't know if the opposing party will even follow up on those
18 other two topics. You just kind of get the majority of them
19 addressed, but that's not the appropriate way to do it. The
20 appropriate way to is to find someone to testify about all of
21 them, and it does not have to be the same person.

22 So I kind of want to send you all back to the drawing
23 board with a 30(b)(6) deposition notice, and so -- and maybe
24 Tara Bunch is an appropriate designee for some of those
25 topics, maybe Rich Baer is an appropriate designee for some of

1 those topics, but I think Airbnb needs to tell you that if
2 they designate Rich Baer as 30(b)(6) designee for compliance,
3 maybe.

4 But I mean, my clerk has just done a quick Google search,
5 and it's not difficult to find out who the senior compliance
6 officer from -- for Airbnb is, at least according to LinkedIn.
7 I don't know if she's lied on LinkedIn or not, but Jessica
8 Tseng, T-S-E-N-G. That's what LinkedIn says. I don't know.

9 I mean, these aren't difficult things to figure out,
10 right? If what you want to know is compliance, let's talk
11 about compliance. I'm just trying to figure out procedurally
12 the most appropriate thing to do with the motions because I
13 want to give you all a deadline to get those designations, but
14 also we need to get through the depositions to make sure that
15 those people actually give testimony and don't just say, I
16 don't know, I don't know, I don't know. Right?

17 MS. BARBIER: Judge?

18 THE COURT: Yes.

19 MS. BARBIER: May I make a distinction between Mr. Baer
20 and Ms. Bunch? You know, I understand their arguments about
21 attorney-client privilege, and you know, the -- and Your
22 Honor's point about how frustrating it would be to actually
23 take his deposition and then just object every question. And
24 so I understand that, but -- so let's put Mr. Baer over there
25 in that category.

1 But Ms. Bunch -- I mean, their argument with respect to
2 Ms. Bunch is, she's really busy, she's really busy making
3 \$1.89 billion last year. I'm sorry. You know, they're doing
4 business at this stage, and they've availed themselves to the
5 jurisdiction of this Court, and they have an obligation to
6 participate in discovery.

7 And we're all really busy. I know Your Honor's busy, and
8 I'm busy, and all these lawyers on this call are busy, and we
9 all represent clients who have busy schedules. That's not a
10 reason to not take a Webex, you know, or a Zoom deposition.

11 Ms. Bunch can sit for deposition, and head of global
12 operations is a very important aspect of our case because if
13 you read our amended complaint, one of the things that we
14 allege is that their operations in and of themselves -- I
15 mean, they're operating a business, which is inherently
16 unsafe, in our opinion, and inherently unsafe that resulted in
17 damage to our client, and she's in charge of that.

18 So we have some very specific questions for her, not just
19 as a 30(b)(6) designee, but for her in her capacity as head of
20 global operations. So we want to take Ms. Bunch's deposition
21 regardless of whether or not they designate her as 30(b)(6)
22 designee, and we have the right to do that.

23 I think Your Honor's idea about having them go back and
24 redesignate, you know, designees for each topic is a great one
25 because what they produced to us was a -- and I don't mean

1 this in any demeaning or condescending way, but was a lower-
2 level employee who had no knowledge of these topics and who
3 thought -- and they thought -- they could get away with just
4 presenting her and her saying, oh, well, you know, I don't
5 know, and I didn't ask anybody, and you know, I'm not -- you
6 know, I'm not sure or I don't -- you know, I don't have any
7 knowledge of that.

8 I mean, that's not what the purpose of a 30(b)(6) is.
9 They have to produce people who have knowledge of those
10 topics, and those 24 topics, Your Honor, have been the subject
11 of much debate and litigation.

12 And in fact, Judge Keesley, when he ruled on our
13 motion -- their motion for protective order required us to go
14 back and make a few of the topics more specific, and we did
15 that. And once we did that, he denied their motion for
16 protective order, and he issued an order requiring them to
17 testify as to the 24 topics as they were amended.

18 So the 24 topics have been out there and have been
19 litigated and have been debated ad nauseam. We don't need to
20 come up with another list of topics. What we need are people
21 within their organization who are capable and willing and
22 prepared to testify about them, and that's what we would ask.

23 So we -- if Your Honor would take Mr. Baer's, you know,
24 motion under advisement until they name somebody else who
25 could testify as to those issues and then allow us to depose

1 Ms. Bunch and allow us then to take a -- retake the 30(b)(6)
2 on the topics with people who are well-educated on them, that
3 would be what the plaintiffs would respectfully submit would
4 be the appropriate remedy here.

5 MS. TAYLOR: May I make a suggestion, Your Honor? So
6 just as to Ms. Bunch, the idea that we're -- we don't want her
7 to be opposed because she's too busy, that's not the case.
8 Ms. Bunch joined the company a year after this incident. She
9 has no involvement, no knowledge. She submitted declarations
10 to that effect.

11 We did have two days of 30(b)(6) testimony, and despite
12 the representations, I would not ask the Court to read 600
13 pages of deposition testimony, but if you would like to know,
14 I would invite you to do so because the witness has been at
15 the company for a decade. She is more knowledgeable than most
16 people about the operations and the works of the company. And
17 she almost never said, I don't know.

18 Again, the fact that plaintiffs didn't like her answer
19 does not mean that she did not answer. That was not, you
20 know, two days of I-don't-know testimony. It was two days of
21 testimony that maybe wasn't what they were looking for because
22 they didn't get the specific answers that they wanted, but she
23 provided answers to every topic. She never refused to answer.
24 She was never instructed not to answer, and this was not an
25 I-don't-know deposition.

1 We finally, after much asking, last Sunday, we got them
2 to issue new interrogatories with specificity as to the topics
3 and the witnesses that they want. We finally got it. We got
4 it last Sunday, and we are working on it as we speak. The
5 company is literally trying to find the right people.

6 You can imagine Airbnb is a very big company. They are
7 trying to find the right people as we speak now that we have
8 the information that we need to provide to them to submit for
9 deposition, and we expect that that will happen soon.

10 And so we finally have the direction that we have been
11 asking for, certainly since I've been on this case, and yes,
12 there was another attorney before Mr. Ashmore. But you know,
13 we have the records that plaintiff doesn't.

14 And I've seen emails asking to meet and confer. And I
15 know that I've made requests to meet and confer, and Mr.
16 Ashmore made requests to meet and confer. And we've finally
17 done it. We think we're in a good place. We're headed to the
18 right place, and we will provide them with witnesses that they
19 need.

20 MR. FEW: Your Honor, this is Wes. I think it's an
21 important data point for the Court to consider that we took a
22 second deposition of an Airbnb employee, a young lady named
23 Vicki Ballagh. She's a UVA grad, about 30 years old, and her
24 title was director of global crisis management. And she
25 testified -- they told us that she didn't know anything. We

1 got her name either from the 30(b) -- I think we got her name
2 from the 30(b)(6) witness.

3 She prepped for her deposition for 15 hours, given that
4 she knew nothing about the case. Her testimony -- and I would
5 challenge any plaintiff's lawyer in the country to read that
6 transcript and tell me one useful piece of information that we
7 learned about the company from her deposition.

8 At the conclusion of her deposition, she reluctantly
9 admitted that everything that she does is directed by legal.
10 Never gave me the name of who the person is. Maybe she did.
11 If she did, it's in the record.

12 The deposition was unbelievably frustrating, as I've
13 already mentioned. But that's what we're getting, and that's
14 why we've done what we've done. The 30(b)(6) did not work
15 before, and so if we're going to circle back and address the
16 30(b)(6), I would ask that Your Honor keep jurisdiction over
17 the matter so that we don't have to inform another person of
18 what's been going on, but I have reservations about whether or
19 not we're not going to get more of the same because if the
20 30(b)(6) rules had been complied with, we would have gotten
21 the information or some more of the information that we were
22 seeking.

23 I'm taking notes here, and one of the things that jumped
24 out at me is that there were 24 incredibly broad topics, but
25 yet one person sat for every single one of them. That just

1 speaks volumes, Your Honor. And that's exactly what I dealt
2 with this Vicki Ballagh.

3 At one point in time, I had to ask her if she had a white
4 board sitting across from her because she kept giving me this
5 answer that she manages the cross-functional coordination of
6 investigations of matters that are escalated to her, and
7 everything is done by legal.

8 And she -- then she testified, Your Honor, that
9 everything she does is marked privileged and confidential. I
10 mean, this is very troubling, and we get nothing from them.
11 So apparently, Airbnb, from my estimation at this point,
12 creates a black hole of privileged documents and then says you
13 can't have any of that, and you've just heard that with
14 respect to Mr. Baer. And then it's the same story with
15 respect to the other lady, Bunch.

16 So respectfully, Your Honor, Ms. Barbier and I are trying
17 to do things as surgically as we possibly can. We just need
18 answers, and we haven't been getting them.

19 And one other point that I think bears consideration for
20 the Court, when we argued the motion to compel before Judge
21 Dennis in person on May the 31st of 2022, I pointed out to
22 Judge Dennis that Airbnb at that time had not identified a
23 single witness.

24 The lawyer that they had representing them stood up and
25 he said, oh, yes, we have. And I said, well, let's take a

1 look at your interrogatory responses and see. And he said,
2 right here, we've identified the plaintiff and the defendants.
3 That was over one year into the case. They had yet to give us
4 the name of one single person at Airbnb that knew anything
5 about this case.

6 That's where we were then, and we haven't made a whole
7 lot of progress since despite three days of depositions, two
8 by Ms. Barbier on the 30(b)(6), and one by myself of Vicki
9 Ballagh, who for UVA grad making over quarter of a million
10 dollars a year, she really didn't seem to know what her job
11 was. So that's what we're dealing with.

12 THE COURT: Shots fired. All right. Look, this is what
13 we're going to do. With some now having had some additional
14 instruction and guidance from the Court, we're going to circle
15 back to that 30(b)(6) with additional designees. So -- but
16 the motion to quash the deposition notice to Rich Baer is
17 granted. I'm not going to get into his licensure issue, but
18 if he is the chief legal officer, yeah, chances are he doesn't
19 have much to tell you. I think that information, it sounds
20 like, can be gotten from another source, which is where we're
21 going to get it from with different 30(b)(6) designees.

22 And so 30(b)(6) shall continue at, you know, whatever
23 dates and times to address all 26 topics, however many
24 designees that takes. The motion for protective order, motion
25 to quash as to Tara Bunch is denied. She may be very busy,

1 but she doesn't have the same privilege issue.

2 The deposition can take place virtually, and maybe she
3 says, I don't know, I don't know, I don't know, or I defer to
4 Jane Doe or John Roe or whoever, but she may have some
5 pertinent information.

6 The motion for sanctions as to Airbnb, with respect to
7 the 30(b)(6) designation, is denied at this time with leave to
8 refile it. I think what you're really getting at -- or I
9 think -- yeah, it seems that you just need the information and
10 you're mad that you don't have the information because they
11 only had the one 30(b)(6) designee. They can fix that. I'm
12 ordering them to fix that with additional 30(b)(6) designees.

13 And so I'm not prepared to find today that that one
14 designee's deposition was a waste of time, that you got
15 nothing from it. I just need -- think it needs to be
16 supplemented with other 30(b)(6) designees now if you. Now,
17 if you depose all the designees and still get nothing from any
18 of them, then maybe you come back on a motion for sanctions,
19 which is why I'm allowing leave to refile that motion.

20 That takes care of the deposition == well, not completely
21 because there's some confidentiality, motions to seal, et
22 cetera, et cetera. Let's talk about those now. There's --

23 MR. FEW: Your Honor, I think one of the motions == and
24 the other counsel can correct me if I'm wrong, but one of the
25 motions was heard by Judge Keesley on an emergency basis, and

1 I -- that may be the one that you were just referring to.

2 THE COURT: I don't know. Help me.

3 MR. ASHMORE: There was a motion for sanctions I filed,
4 Your Honor, that was taken under advisement by Judge Keesley.
5 And that one --

6 MS. TAYLOR: Your Honor, that's Judge -- that's number
7 nine on our list. That motion was heard on an emergency
8 basis, and Judge Keesley hasn't ruled on it.

9 THE COURT: Okay. Got you, but there's still -- there is
10 still Airbnb's motion to seal excerpts. So it's the 30(b)(6)
11 deposition transcript that was filed on February 24th?

12 MR. ASHMORE: That's correct, Your Honor.

13 MS. TAYLOR: Yeah, I think it -- is it -- there
14 might -- there's two motions to seal, and I think they both
15 relate to the 30(b)(6). I'm not sure. Okay. Yeah. I know
16 they want everything under seal, so I just can't keep it
17 under -- I can't keep it straight.

18 MR. ASHMORE: And Judge, so these were filed out of an
19 abundance of caution. Judge Keesley issued an order saying
20 that everything from the 30(b)(6) was not to be -- it was --
21 anything we deemed confidential couldn't be released without
22 further order of the Court.

23 We made those confidential designations, so we're simply
24 asking for that, for that ruling. If they object to
25 the -- which they do. They think nothing in the 600 pages --

1 that nowhere in the 600-page deposition is there confidential
2 information.

3 So one of these days, we'll have to argue over that,
4 Judge, but for now, we're simply asking that we get a ruling.
5 Again, I think it's out of an abundance of caution that that
6 needs to be deemed confidential for now.

7 THE COURT: Is there any objection to the motion?

8 MS. BARBIER: There is -- there is, Your Honor.
9 Basically, Your Honor, what Airbnb is seeking to do is they
10 have -- they stamp everything confidential, and they designate
11 everything confidential, and what it will require us to
12 do -- let me tell you why we object.

13 First of all, logistically, as Your Honor knows, it's a
14 nightmare to file motions with everything under seal because
15 then everything's under seal. The motion has to be under
16 seal, the exhibits have to be under seal, and we're talking
17 about a case, Your Honor, that is -- involves -- you know,
18 we've alleged violations of the South Carolina Unfair Trade
19 Practices Act. We've alleged constructive fraud.

20 There's a very important public safety issue here, and
21 you know, they want to conduct this litigation under seal, and
22 the court system is first and foremost supposed to be
23 transparent and open to the public. And the public has every
24 right to know the, you know, statements and the issues that
25 are being litigated here.

1 There's nothing confidential about the 30(b)(6)
2 deposition. There -- you know, basically we got little to no
3 information, so I can't imagine why they've designated some of
4 the things they have.

5 I mean, you know, I'll give you an example, Your Honor.
6 They have actually marked -- they have designated things like
7 my question to the 30(b)(6) designee as confidential. Now,
8 how is my -- that's on page 91, line 7 through 13. How would
9 my question be confidential? I mean, it doesn't make any
10 sense.

11 I also asked them questions about articles that appeared
12 on the internet. They want to designate that as confidential.
13 You know, I've asked them questions about public statements
14 that their CEO has made about safety and about guest safety
15 and safety being the number one priority and how everybody's a
16 trusted community at Airbnb, and all these things he gets out
17 there on Twitter and on the Today Show and says, I've asked
18 him about his representations to the public, and they want to
19 designate that as confidential.

20 I mean, it's absurd. These things aren't confidential.
21 You know, if there was a personal identifier of somebody in a
22 document that is attached to a deposition, I have no problem
23 with that being redacted, but there are no personal
24 identifiers that I'm aware of, and I just think that they're
25 abusing the confidentiality order in this case.

1 That's not what confidentiality orders are for. It is
2 not so that we can litigate under seal and hide these issues
3 from the public because they're embarrassing to Airbnb or
4 because it might hurt their public relations. That's just not
5 the purpose of a confidentiality order, and it's an abuse of
6 the process.

7 And so I think, Your Honor, you know, as soon as you do
8 that and as soon as we have -- you know, this case gets ready
9 for trial, I mean, I'm sure they'll be -- it'll be of interest
10 to the press because Mr. Riviere's prosecution already has
11 been of interest to the press, and I think you know will get a
12 lot of questions about why everything's under seal.

13 And I don't think there's any purpose for it. I think
14 it's simply because Airbnb is trying to bury these issues like
15 they buried all of them with respect to hidden cameras, and
16 it's inappropriate. So we object.

17 MR. ASHMORE: Just briefly, Your Honor. So the way it
18 works is we designate items as confidential, and then they
19 object, and then we dump in the judge's lap if we can't
20 resolve it. So that's -- this is a bit premature, Judge.
21 Again, this is a belt-and-suspenders approach that the orders,
22 I think, cover us with here's why we're doing this, Judge.

23 I filed for the first time in my 35 years a motion for
24 sanctions because, as we speak, there is confidential,
25 proprietary information on the public system in Aiken County

1 that they filed in spite of the very clear order from Judge
2 Keesley.

3 He didn't deny that motion, Judge. It's under
4 advisement. So we've had problems in this case with our
5 confidential information being posted, and again, as we speak,
6 it's posted. They filed confidential -- they filed items that
7 we designated as confidential on the on the public filing
8 system in Aiken, and it's still there.

9 That motion's under advisement. That's why we're so
10 sensitive about this particular issue, Judge, and that's why,
11 again, out of an abundance of caution we're filing these
12 particular motions.

13 MS. TAYLOR: And Your Honor, if I may be heard just
14 briefly. The idea that we designated everything confidential
15 is just wrong. There is not a single public statement,
16 contrary to what you just heard, that we have designated
17 confidential. We were extremely limited in what we designated
18 confidential. We're talking about private business data,
19 trade secret. For example, vendor information, the specific
20 trade secret processes our vendors use to conduct background
21 checks. That's the sort of thing that we designated
22 confidential, Your Honor. It was very limited.

23 So I know that a representation was just made to you that
24 we just stamped the whole thing. That is just completely
25 false, and so we were very careful. And Mr. Ashmore's right,

1 we've been burned on this because before the period even
2 lapsed under Judge Keesley's order about, you know, the
3 confidentiality designation, they posted in the public docket
4 confidential information about customer complaints and
5 customer service tickets. Things that were clearly
6 confidential business information, they put out there before
7 the full protective order period had even lapsed.

8 And so we're not just doing this out of an abundance of
9 caution, we're doing it because the information is
10 confidential and because they've done this before.

11 MS. BARBIER: Your Honor, if I could clarify, the first
12 round of the 30(b)(6) deposition, the defendant submitted
13 designations that they wanted -- they were seeking to have
14 confidential. We objected to those designations, and the
15 order says that until those are ruled upon, they have to be
16 treated as confidential.

17 The second round of the 30(b)(6) deposition, they had
18 seven days to object -- to designate their confidential
19 designations. They didn't produce any objections within seven
20 days. Instead we got -- about six days later, we got in the
21 mail -- six days after the deadline had passed, we got in the
22 mail a list of designations of things they wanted to, you
23 know, designate as confidential.

24 We had already filed a motion related to the 30(b)(6) and
25 had excerpts from that deposition in it and attached to the

1 deposition for that purpose. We can't honor designations we
2 didn't receive, and that was -- well, that's the motion that's
3 in front of Judge Keesley. If you want to use the order that
4 is in place, the confidentiality, you have to adhere to the
5 deadlines, and they didn't do that.

6 And so the first set of designations, we agreed were made
7 timely, and we have sealed any portions of those deposition
8 excerpts. The second set of designations were not made
9 timely, and that is why those are on the public record.

10 And Mr. -- I'm sorry, Judge Keesley heard that motion,
11 and even though it was deemed an emergency, he still hasn't
12 ruled on it, and so -- and he knows it's on the public docket,
13 so I'm not sure that he agreed it was an emergency. But
14 that's the situation with respect to those designations, Your
15 Honor.

16 And I can give you specific examples of things that they
17 designated as confidential. I have a list, and we have all
18 said, Your Honor --

19 THE COURT: I don't even think that's necessary.

20 MS. BARBIER: Okay.

21 THE COURT: Let me back up and make sure that I'm looking
22 at the right motion. I thought that I was, but there is a
23 motion that was filed February 24th, and there was one filed
24 February 28th. What I understood is that the February 28th
25 motion is the one that Judge Keesley heard and took under

1 advisement. Yes?

2 Someone help me.

3 MR. ASHMORE: What's the caption of that one, please,
4 Your Honor?

5 THE COURT: Defendant Airbnb's motion to confirm
6 confidentiality designations of portions of its Rule 30(b)(6)
7 deposition transcripts.

8 MR. ASHMORE: That is before you, Your Honor. That is
9 not the one --

10 THE COURT: Absolutely.

11 MR. ASHMORE: -- that was Judge Keesley's ruling on.

12 THE COURT: Okay. So I've got them mixed up. So Judge
13 Keesley heard the February 24th motion?

14 MR. ASHMORE: Motion for sanctions, for disclosure of
15 confidential information.

16 THE COURT: Okay, he did not hear the February 24th
17 motion to seal excerpts of the 30(b)(6) deposition transcript?

18 MR. ASHMORE: Correct, Your Honor.

19 THE COURT: So both of those are before me and -- okay.
20 All right. Just making sure. Well -- and so I'll also say, I
21 don't know that I need examples because there were
22 designations here, right? What I need is the deposition
23 transcript for me to look at And decide whether they should be
24 deemed confidential. Yes?

25 MR. ASHMORE: Your Honor, if I may --

1 MS. TAYLOR: If you can see this, Your Honor.

2 MR. ASHMORE: So I -- are we -- are you taking up the
3 matter of whether or not they're objecting to each and every
4 one of our confidential designations? I just -- I don't -- I
5 think that's a hearing for a later date. I don't think we're
6 there quite yet. Are they objecting to every single one of
7 our designations, Your Honor? Because I believe that they
8 are.

9 MS. BARBIER: Your Honor, we have sent them
10 correspondence, and we have objected to their designations,
11 and I don't think it's for a later date. I think it's for
12 Your Honor's consideration.

13 We're happy to send you both transcripts, and Your Honor,
14 if you look at the excerpts that they have -- we have
15 out -- let me say this to Your Honor. We have invited them to
16 tell us and justify each designation as the order requires
17 them to do, and the only thing they have said is that it's all
18 proprietary. And when you read the excerpts, you will be
19 asking yourself the same questions that we asked, which is how
20 in the world is my question to them proprietary?

21 How in the world is something -- their vendor that does
22 their background checks is online, easily found by Google, and
23 they've designated that as confidential. They have -- I asked
24 them a question about what happens to negative reviews
25 that -- you know how when you go on an Airbnb, you can review

1 the property afterwards?

2 And what we have found through discovery from other
3 sources is that if there's a negative review on a property,
4 those are sometimes removed so that the public can't read what
5 may negatively have happened to somebody at that property.

6 We asked them about that. That comes from an article on
7 the internet, and they have -- designation number 1, page 31,
8 line 10 through 18, and their response to my question about
9 what happens to them, they've designated as confidential.

10 I'm sure they don't want people to know why they
11 review -- why they remove negative reviews, but that's not
12 confidential. That's just hiding information from the public,
13 and this is what they want to continue to do. So yes, we
14 object to their designations, and we will be glad to send Your
15 Honor the transcripts.

16 THE COURT: Do you object --

17 MR. ASHMORE: Your Honor, if I may --

18 THE COURT: Hold on. Do you object to all of them, Ms.
19 Barbier --

20 MS. BARBIER: Yes.

21 THE COURT: -- or are (indiscernible) that you agree to?

22 MS. BARBIER: Wes, you can jump in here if I'm missing
23 something. I think -- we agree that if there's a personal
24 identifier of somebody, of something that would identify a
25 particular person not involved in this lawsuit, and that means

1 by their date of birth or social security number or
2 their -- you know, something like that, that we would agree to
3 that, but I didn't see any of that.

4 THE COURT: Well, okay. But they've given page and line
5 numbers, and what I want to know is which of those pages and
6 line numbers are actually disputed?

7 MR. FEW: Your Honor, we've disputed all of them, and
8 we've complied, as Ms. Barbier said, with the first set of
9 designations. She's been handling that when the issue came up
10 that we were alleged to have violated the order. I prepared a
11 spreadsheet and sent it to opposing counsel that recapitulated
12 all of their designations and asked them to tell us why those
13 are confidential.

14 So they, I think, had 15 days to respond, but I think the
15 burden would be in their court to come back to us. I'm not
16 saying we couldn't be persuaded that something was
17 confidential because we don't always understand the context of
18 anything, but we absolutely dispute that any of this
19 information would be useful to anybody as being confidential,
20 a competitor or otherwise, because it just doesn't tell
21 anything.

22 So the answer is yes, we do dispute, and if they had
23 something in context, if they wanted to say, hey, you know you
24 need to reconsider this, we could do that, but -- and I think
25 because Debbie's been handling this is the first half of the

1 30(b) (6) at issue here today or just the second?

2 MS. BARBIER: It's both.

3 MR. FEW: Okay.

4 MR. ASHMORE: Your Honor, that was going to be my
5 suggestion. Before we dump this in your lap, would you give
6 us 15 days to talk amongst ourselves, see what we can resolve.
7 They might agree to some, they -- we might fight over others,
8 but before we dump this in your lap, would you give us a
9 chance to -- for us to take a second look at it and for them
10 to take a second look at it. Give us 15 days, and then we
11 come back to you if we need your assistance.

12 MS. BARBIER: Yes, Your Honor --

13 MS. TAYLOR: Your Honor, if I may, just for context, we
14 did exactly what Judge Keesley's order required of us. And so
15 Your Honor knows, Judge Keesley anticipated and expected that
16 there would be confidential and proprietary and trade secret
17 data in the 30(b) (6) depo, and there was.

18 So for example, Airbnb's internal risk assessment
19 processes, the specific searches the vendors use that they
20 consider their trade secrets. Judge Keesley anticipated all
21 of this. The order says, and I quote, "that these kinds of
22 information, the confidential data, shall not be disseminated
23 absent further order from the Court."

24 So the default is that this is confidential, and so we
25 complied with that order. We -- all of the information that

1 we have designated confidential is, in fact, confidential.
2 And the fact that they are going scorched earth and objecting
3 to every single one of the few designations that we have made,
4 this was a very long deposition, a very long transcript, we
5 made very few designations.

6 And so we've complied with the order. I would have hoped
7 that they would have been more measured in their objections,
8 but they have not. We can do what Mr. Ashmore suggested and
9 try to work it out with them.

10 THE COURT: All right. I'll give you 15 days to resolve
11 it. I need to hear from you all in 15 days as to what has
12 been resolved and what is still contested. To the extent that
13 anything is still contested, I'll need copies of the
14 transcript so that the Court can make the determination.

15 MR. ASHMORE: Thank you, Your Honor.

16 THE COURT: Okay. That takes care of those. We still
17 have motions to compel regarding requests for production, an
18 amended request for productions, a motion to file exhibits
19 under seal. Let's take ten minutes before we get to those.
20 Yeah, we'll take just a ten-minute break.

21 MR. ASHMORE: All right, Judge.

22 MS. BARBIER: Thank you.

23 (Recess.)

24 MR. ASHMORE: You muted?

25 MR. FEW: I think she is.

1 MR. ASHMORE: Yeah. You muted, Judge.

2 THE COURT: Yes, I was talking to my clerk.

3 MR. ASHMORE: Oh, so sorry.

4 THE COURT: But I'm ready to get back to it if you all
5 are.

6 MR. ASHMORE: Mr. Griffin has had enough fun, Judge, and
7 he is longer with us.

8 THE COURT: Understand. Look, I'm ready to wrap it up,
9 too. I didn't think I'd still be here after noon, so we're
10 going to power through these, and I'm going to get on with the
11 rest of my day.

12 Motion to -- there are two motions to compel filed by
13 plaintiff to compel Airbnb to respond to some requests for
14 production filed on January 18 and February 2. Have those
15 been resolved in any way, shape or form?

16 MR. FEW: No, Your Honor.

17 THE COURT: Okay. Ms. Barbier, let me hear you -- or Mr.
18 Few. Sorry.

19 MR. FEW: I think I'm actually -- drew the ping-pong ball
20 out of the list for this. Your Honor, thank you so much for
21 your time and your consideration, and also your preparation
22 for today is greatly appreciated. And had you not done that,
23 then we probably would have been here until 2 or 3 p.m., and
24 also for allowing me to kind of push these motions to the back
25 because what we're dealing with here are two different motions

1 to compel for requests for production. And I'll take them in
2 order.

3 The first of which we filed on the latter served request
4 for production, numbers 45 and 48. I think all of this is of
5 record, Your Honor, but there was actually -- something came
6 up about something being -- and then we took it off of the
7 index, and then I don't -- I didn't see it yesterday, but I
8 don't know that it really matters.

9 For purposes of our motion, we took -- if you look at our
10 request for production, Your Honor, we've already gone over
11 the standards for -- and we have a pretty good brief that we
12 filed with the motion on the 18th, but we have -- the first
13 three are very similar, Your Honor. They're asking for the
14 contact information of the guest by reservation ID. So when
15 we get these spreadsheets of data that were produced to us,
16 each guest and each host, I believe, is assigned a unique
17 numerical number.

18 And for Katherine Thomas, Your Honor, who was the -- held
19 herself out to be the spouse but was never legally married to
20 Rhett Riviere, and she was the one that registered as a host,
21 as you have been told earlier in the hearing today. Her
22 unique number as a host was 86755971.

23 And so really borne out of frustration, we prepared these
24 requests to find out the identities of the other persons that
25 had rented from Airbnb because we couldn't get that

1 information. So we said, in effect, okay, on the limited
2 number of documents that you have given us, we need to know
3 the person that's associated with -- sorry, with the
4 reservation ID number listed in Exhibit A.

5 And what Exhibit A is is simply the list of the -- that
6 was produced by Airbnb that showed the three or four dozen
7 probably rentals of their unit, and some of them were
8 cancelled, so those wouldn't be there. Number 46 says we need
9 to the contact information for each and every guest associated
10 with a confirmation code.

11 At the time I don't think we really knew what those
12 things meant. We now know a little bit more about that, I
13 think, because Ms. Barbier has handled the 30(b)(6)
14 deposition. I was actually in a trial in Kingstree when the
15 second part of the trial -- of the 30(b)(6) was commenced, and
16 so I wasn't present for that.

17 And so 46 -- 45, 46, and 47 are asking for that
18 information, based on their own data. So they're very limited
19 and targeted requests for production. And what we got in
20 response is just a blanket objection, is the way I would
21 characterize it, and no documents produced at all.

22 With respect to number 48, it is a little bit different.
23 It asked them what documents do you have that you can produce
24 about people that were convicted of any of these crimes that
25 are set forth in your policy?

1 And essentially, what we're asking for there, Your Honor,
2 is you claim that you have this policy of monitoring your
3 hosts and running background checks and doing things to filter
4 out people that ought not be on the platform, and so we're
5 trying to figure out what are they doing to -- and what have
6 they actually done, if anything, to enforce that policy.

7 And Your Honor, that again is asking for conviction. So
8 that would be something that's of public record and is also
9 limited in scope.

10 With respect to the second request, the second motion
11 that we filed, Your Honor, I would probably reserve some time
12 to speak to that, but in effect, what it is comprised of is
13 the 30(b)(6) topics that were already approved by Judge
14 Keesley. We took those and converted them into a virtually,
15 substantially identical request for production so that we
16 would have the documents that related to the 30(b)(6) topics
17 so that we could get somewhere. And if we had had those, and
18 that's why we would need them for this reset 30(b)(6)
19 deposition, that's what we're asking for in the motion to
20 compel that was filed on February the 10th, Your Honor.

21 And so in effect, that -- and I'm happy to answer any
22 more questions, but these requests, the first set is
23 specifically tailored as follow-up to stuff that we got in
24 discovery to get more information about a definitely defined
25 set of parameters. And then the second set is really just

1 tracts, you know, the 30(b)(6) topics that we had filed, that
2 we had already been approved twice by Judge Keesley.

3 So that would be my summary of where we are on those two
4 motions to compel, and we would just ask the Court give us
5 time to -- give them time to comply with those 30(b)(6);
6 withdraw those objections.

7 They've not agreed to narrow the scope. They've
8 not -- their position has been, well, we're just not going to
9 give you anything on this, and so -- and I think, frankly, at
10 this point, it's -- you know, that's the position that they
11 stood on coming up to this hearing, and that's why we think
12 we're entitled to get all these documents.

13 THE COURT: If you could, Mr. Few, as to request 45
14 through 48, go ahead and address the privacy argument as to
15 the nonparty civil litigation. I know I'm going to hear that,
16 so if you could just go ahead and speak on that on the front
17 end.

18 MR. FEW: Well, Your Honor, the -- I think Ms. Barbier
19 addressed this issue earlier, the fact that somebody -- you
20 know, we have a confidentiality order in place, and what we
21 would propose and what I would be planning on doing when -- if
22 I were on the other side of a case like this, and I'm
23 frequently on the other sides of cases like this where I'm
24 having to produce confidential information -- is you just use
25 the confidentiality order, and you mark things as

1 confidential.

2 And if anything is -- requires any further protection,
3 then we have a standard provision in there that says that you
4 have to file an additional motion for protection for that
5 stuff, and you would designate it as attorney's eyes only.

6 And you know, normally, that relates to things such as
7 trademarks -- I mean, trade secrets and things that are really
8 and truly highly confidential. But we're entitled to know and
9 these people are entitled to know that they may have been
10 recorded.

11 And we have videos that we have obtained through SLED's
12 search that we don't think that these folks have been notified
13 about, and it may be those people on the videos. When you see
14 somebody on a video, you don't know who they are unless you
15 have some other indicator of their identity.

16 And so while there may be 21 or 23,000 image files or
17 video files within what SLED seized from Mr. Riviere's
18 devices, going through there and saying this is that person is
19 just not something that anyone is able to do.

20 And so you know, we -- also, Your Honor, this is relevant
21 because there's a dispute about where the box was kept. Mr.
22 Riviere has maintained that -- and we have settled with him,
23 but we still have our claims pending against Katherine Thomas
24 about what was the condition of the room.

25 On one story, we were told that the Bluetooth speaker was

1 supposed to be in the kitchen. Well, in the depositions last
2 week of Josee (phonetic) Riviere, she testified that even
3 though they were divorced for many years, that she went to
4 this particular property on 115 Third Avenue, and that she
5 must have told us 18 times in that deposition that there was a
6 camera in the bedroom, but it was pointed down the hallway.
7 She kept saying down the hallway. It was pointed down the
8 hallway.

9 And so you know, these -- we need to know -- we're
10 entitled to find out what the premises looked like when these
11 people were there and also to know if they were recorded. And
12 so -- but once again -- so there's always protections in place
13 that can be used, the first of which is a confidentiality
14 order.

15 And also, Your Honor, something that comes up in this
16 case and in other cases that I don't agree with is, there's
17 this notion that we have to redact everything. Well, no, you
18 don't. If you mark it confidential, you don't need to redact
19 it. And redacting is, I would agree, a lot of work. But if
20 you've marked a document confidential or if it actually
21 warrants greater protection than that, then you don't need to
22 redact -- you don't need to redact it.

23 Now, if some of this information were to include
24 someone's social security number, that probably should be
25 redacted and could be redacted. But their address and things

1 of that nature and who they are and their identities and the
2 fact that they may have rented this property immediately
3 before or immediately after our clients were there -- or our
4 client was there is stuff that we're entitled to find out
5 about.

6 And Mr. Ashmore misspoke slightly earlier when he said
7 that Michelle Jain was represented by the Strom Firm. She was
8 actually represented by a lawyer here in Greenville, and
9 whether or not he sued Airbnb really doesn't matter.

10 But the Strom firm had clients that were young girls that
11 were recorded in yet another property that was in Mr.
12 Riviere's portfolio that was part of Airbnb's portfolio of
13 four properties that he had with them. However, those two
14 girls that the Strom Firm represented did not arrange the
15 rental through Airbnb, and that is why Mario Pacella at the
16 Strom Firm did not sue Airbnb.

17 So, Your Honor, those privacy matters can be addressed,
18 and we maintain that they should have already been addressed,
19 and they could have been addressed, but what we're dealing
20 with is just an unwillingness to give us any information under
21 any of limited scope or agreed-upon scope at all, and that's
22 what you can see throughout the entirety of all of these
23 requests for production, the first four that are set forth in
24 the first motion, and then the second set, which are, again,
25 substantially identical to the 30(b)(6) topics.

1 An example there, and I don't want to -- we've been here
2 a long time -- is an organizational chart. We've asked for an
3 organizational chart in our request for production, and we've
4 gotten, no, you can't have it.

5 THE COURT: I don't want to guess too much, but I'm going
6 to guess, though, that Airbnb -- that one of the concerns is
7 not just the privacy of the other customers and keeping their
8 information confidential from the public, but the concern is
9 probably what that leads to.

10 So they could mark it confidential and give you names and
11 addresses, but the only reason you want names and addresses is
12 to reach out to those people as potential -- either potential
13 witnesses or potential plaintiffs.

14 So are you trying to get more clients? Are you trying to
15 get witnesses? Are you trying to help SLED because
16 that's -- the SLED part is not really your responsibility to
17 notify potential crime victims that they've been victims of
18 crimes.

19 MR. FEW: Well, Your Honor, with respect, Ms. Barbier has
20 done the lion's share of SLED's work in this case, if the
21 record needs to be clear on it, but the fact that our right to
22 identify witnesses may have other side benefits to it does
23 that mean that we're not entitled to it, Your Honor.

24 And we have videos of a gentleman -- and really, the
25 placement of this thing is critical to us knowing it. And one

1 of the things that we have asked and that is that -- what
2 Katherine Thomas's knowledge was. And we're also seeking
3 discovery on whether or not and why Airbnb never done -- they
4 don't do any property inspections, and some of these things
5 were alluded to earlier, but as far as the undertaking
6 goes -- and this is to the scope, Your Honor.

7 This is why we're entitled to see these things because
8 your CEO cannot go out on the squawk box and the MSNBC and the
9 CNN when you have some type of a tragedy and assure the
10 customers and the hosts and the venture capital money and the
11 potential IPO people that you're going to be dealing with that
12 your corporation is built upon trust and then make all these
13 way-out outlandish promises.

14 And then when we come along in a discovery lawsuit, in
15 little ol' South Carolina, where they have like tens of
16 thousands of hosts. I think Debbie discovered one time that
17 we're one of the ninth most profitable states for Airbnb
18 because we have been considered Airbnb friendly, and because
19 they have completely ignored 40-57-20, which says if you
20 anticipate getting a fee for renting a property, you got to be
21 licensed, but this is the things that the guy has said.

22 Maybe we've been too gradual. We should take more
23 responsibility. We've had a hands-off model. We must do
24 better. We will. This is unacceptable. We will verify 100
25 percent of listings on the site.

1 You might imagine I asked questions about those types of
2 things of the Vicki Ballagh witness that I referred to
3 earlier, and she was unable to tell me anything that she was
4 personally aware of that the company has done to follow
5 through on these promises that their CEO is making to the
6 public. And so Your Honor, that's why we need to get this
7 information.

8 If, in fact, there are legitimate redaction and privacy
9 things that need to be addressed, that can be done. As has
10 been said before, there's some really clever people on here
11 with probably over a hundred years of experience altogether,
12 and we can work with them on that, but that is not a grounds
13 to tell us, as we've been told all along, stop, you can't go
14 there.

15 So any of those privacy concerns can be addressed, and
16 also, Your Honor, the Stored Communications Act claim is
17 something that I'm at a complete loss for, but I do want to
18 address it because the other side is probably going to mention
19 it.

20 THE COURT: Okay, let me -- let me hit you with a timeout
21 before we get to that. I just need to take a quick break.

22 MR. FEW: Okay.

23 THE COURT: I'll come right back to y'all. Hold tight.

24 (Recess.)

25 THE COURT: Sorry, folks. I had a surprise guest that

1 wanted to say hey, and she was about to leave because she was
2 tired of waiting. Anyway --

3 Okay. I'm sorry, there's a lot going on in here with my
4 dad, his clerk, my clerk, visitors, whatever. Yes.

5 MR. FEW: Well, I don't know if that -- this was as
6 famous as the last person, but that gave me a moment to flip
7 over because I think -- I don't want to just gloss over our
8 request for production number 16 to 44, but I don't want to go
9 through every one of them either.

10 But Your Honor, if you look at number 34. We ask for
11 reports or complaints made to Airbnb of guests being secretly
12 videotaped while staying in an Airbnb during the time period
13 from December 1, 2013, to the present. And we've got nothing.

14 And when we had a conversation with myself and opposing
15 counsel about a month ago when they -- we agreed to postpone
16 some depositions because of vacation schedules, I gave them an
17 example of how in the world -- and by way of example, when
18 Vicki Ballagh remembered -- she's been working there for
19 years. She remembered one time in global crisis management
20 role that she addressed a video recording, but she could only
21 remember that it was probably in 2018 when she first went to
22 work there, and it was in Florida, and she didn't know -- she
23 didn't know anything else. Couldn't remember the county,
24 couldn't remember the circumstances, couldn't remember who she
25 talked to about it.

1 So you see -- and we think that may have been when a
2 lawsuit was filed in Manatee County, which is specifically
3 laid out in paragraph 82 of our amended complaint. So
4 paragraphs 80, 81, and 82, we refer to things that we're aware
5 of that show that they were on notice that these things
6 happen, but yet we can't get any documents from them to
7 acknowledge that there was any response within the company.
8 And Your Honor, we have to be able to show what they knew,
9 what they knew the risks were, and what did they do about it.

10 And I've analogized this to the defective automobiles and
11 all the fights that the plaintiff lawyers went through in
12 those cases to get access to the design documents. Did you
13 know that this vehicle was going to blow up when this
14 happened?

15 So they've known as, as Debbie has said, since 2013 or
16 '15 that these things can happen, as if a company like this
17 would not know that already, just sitting around thinking,
18 what can we do? Because we do go and tell the whole world
19 that you're safe here. And so what can we do to make sure
20 that the guests are, in fact, safe there?

21 And my supposition and my belief at this point is is they
22 do absolutely nothing. They make more money by having people
23 sign up as easily as possible. In order to sign up -- I've
24 used this as an analogy when I'm explaining this to people.

25 If a young man had next-door neighbors that were college

1 professors and they were to go on sabbatical to New Zealand
2 for the summer and he was cutting their grass and had keys to
3 the garage apartment in the house, he could sign up as a host,
4 give a birth date, give an email. He could go create a Gmail
5 or a Hotmail or whatever.

6 That's pretty much all that would be required for him to
7 be registered as a host. See, we were misunderstanding that
8 you to actually apply to be a host, but apparently, all you do
9 is register.

10 And so they claim to do these background checks and
11 things, but they don't. They don't even confirm, Your Honor.
12 if that young boy -- just like they didn't in this case with
13 Katherine Thomas.

14 They never reached out to Katherine Thomas and said, hey,
15 you're renting out four different properties on our platform.
16 Do you own these properties? The answer would have been no.
17 Are you a licensed real estate broker in South Carolina? Are
18 you a licensed property manager? No. Do you work for a
19 company that is a licensed property manager in South Carolina?
20 No. Do you have a contract with the owner of these properties
21 that we could put on file to show that we, in fact, have a
22 legitimate, informed basis for taking random people off of the
23 internet and sending them to these properties in Aiken County?
24 No. They don't even ask.

25 And so their CEO is on record saying we're verifying all

1 these listings, but yet the Vicki Ballagh girl that I deposed
2 a month or so ago can't even tell me, and she's an Airbnb
3 user. She works there. She doesn't even know what, if
4 anything, they do to be consistent with the promises that they
5 make to the public of keeping things safe.

6 And that's why, you know -- I think I'm belaboring the
7 point, Your Honor. These topics, these 30(b)(6) topics have
8 already been approved. And we want to have a productive
9 30(b)(6) deposition or a more productive 30(b)(6) deposition.

10 And I'm sure we won't like some of the answers that we
11 get, but we'll actually be getting real answers that are
12 consistent with a mud tire grabbing traction in the mud to get
13 the truck unstuck so that we can go somewhere. And thus far
14 we haven't been able to do that, but that's why we need all of
15 this information. And again, their response has been just
16 blanket objections. You're not entitled to anything.

17 And what is the concern and a possibility is that within
18 the company, they elevate these things to global crisis
19 management. She said she gets like a hundred things a week,
20 but yet everything's directed by legal. I couldn't wrap my
21 head around that, Your Honor. And if she gets a hundred
22 things a week and they have 35,000 complaints or tickets about
23 recording, that's a big gap.

24 And so we just got to get the documents, Your Honor, so
25 that we can find out what's really going on, who knows what,

1 who do we need to call as a witness. And then what further
2 discovery do we need to take on the steps of once you knew
3 this was a risk, what, if anything, business-wise did you do
4 about it? Because we know what you said you were doing about
5 it, but did you even do any of that? And as near as we can
6 tell, the answer again is no.

7 MS. TAYLOR: Your Honor, may I be heard on this?

8 THE COURT: Thank you.

9 MS. TAYLOR: That was a lot, so I'll deal with one motion
10 at a time. So let's deal with the requests 45 to 48. And
11 just by way of table setting here, just so the Court knows,
12 what they're asking for, it's two categories of information.

13 First, personally identifying information about every
14 individual who has ever listed property on Airbnb's platform
15 from December 2013 through the present, who has ever been
16 convicted of any of 82 different crimes: Bail jumping,
17 blackmail, and if you, you know, did something in Guadalajara
18 that has nothing to do with hidden cameras, right? That's the
19 first category of information.

20 The second category of information they're asking for is
21 contact information for all other unrelated guests who stayed
22 at any one of the properties for Defendant Katherine Thomas,
23 listed on Airbnb's platform over multiple years. So I'll deal
24 with the second category first, but the law is the same as the
25 book.

1 And the law in South Carolina, the Supreme Court of South
2 Carolina has said in the *Homan* case, that contacting
3 nonparties is an invasion of privacy. The privacy law is very
4 clear, and I didn't hear counsel specifically address that
5 because it's not helpful for them.

6 So on the second category, just so the Court knows, they
7 have the names of everyone associated with the reservation
8 code. They already have the names. What they want is contact
9 information. They want to do exactly what *Homan* said you
10 can't do, which is reach out and fish for clients and dig
11 around and contact people who have nothing to do with this
12 case.

13 On the second category, they've gone even broader. They
14 want criminal history information about all sorts of crimes
15 having nothing to do with this case, never could have anything
16 to with this case, and they want to reach out to those people,
17 too, or use those people as, you know, part of this proceeding
18 somehow when there's no basis, no showing of relevance.

19 Now, that's concerning for a couple of reasons. One,
20 because it violates the law. It violates clear privacy law
21 under South Carolina -- under the South Carolina Supreme
22 Court.

23 And it's also concerning because Mr. Few just said, you
24 know, all we have to do here is designate it confidential,
25 which is interesting because thus far in this litigation, they

1 have taken the position that not a single scintilla of
2 information at all is confidential despite Judge Keesley's
3 express order to the contrary.

4 So that gives us no comfort. The idea that we could just
5 designate things confidential, and I'm concerned that they're
6 inviting the Court to violate clear South Carolina law. So
7 that's our position on that motion with respect to 45 to 48.

8 Mr. Few just went on and on and on and has been for a
9 while about the Vicki Ballagh deposition. And I feel
10 compelled to address it just because he keeps bringing it up.

11 So Your Honor, we told counsel very clearly, hey, GCM,
12 the global crisis management team, has only ever dealt with
13 one hidden camera matter. This is -- you're barking up the
14 wrong tree.

15 And this is why we've been trying to meet and compel
16 here -- I mean, and confer here because they keep noticing
17 people that are just wrong. And we're like, talk to us, talk
18 to us, let's figure out what you need. They insisted on
19 deposing her, and lo and behold, there was only one hidden
20 camera matter that GCM had ever been involved with.

21 Again, they don't like the answers that they get, but the
22 idea that Airbnb is not being responsive and not engaging is
23 just not true. They have been noticing the wrong people and
24 refusing to meet and confer with us. We've finally gotten
25 traction on that, and I think we'll get to a good place. But

1 it just concerns me that that representation keeps swirling
2 around for this Court because that's not precisely the way
3 things went.

4 And so I'll stop talking on that motion, and if the Court
5 has any questions, we can answer them.

6 THE COURT: Now, let's go on to the other one, the 16
7 through 44.

8 MS. TAYLOR: Yes. And I think that was part of what Mr.
9 Few addressed. He was -- I don't want to invite him to talk
10 again, so I think he's already spoken to that.

11 THE COURT: He has.

12 MS. TAYLOR: On 16 through 44, one of the key issues
13 there is what they refer to as 35,000 tickets. Right? And so
14 we are -- we've addressed in our motion why that is an
15 incredibly burdensome and kind of problematic ask on their
16 behalf. And I won't address the confidentiality thing again.
17 Just designating things as confidential does not give us the
18 comfort that we would need in this case.

19 For the 35,000 tickets, the 30(b)(6) opponent was very
20 clear, and again, whether or not they like it, hidden camera
21 cases is not -- it's not like there's a button that can be
22 pressed where cases are designated hidden camera, right?

23 So what we've done is we have gone and figured out that
24 there are 35,000 customer service tickets -- and that's a term
25 of art here -- associated with a broad -- broadly with

1 surveillance devices. And that means everything that could
2 record audio or video at all, any sound, any video recording.
3 So your Ring doorbell, your baby monitors, your everything.

4 So everything falls within this broad 35,000-ticket
5 category. Within -- including incredibly personal
6 information, as you can imagine, when you're talking about
7 things that can record video or sound; having nothing to do
8 with hidden cameras. And so within each ticket, you can have
9 a number of communications between a user and customer
10 service. So that is an incredibly onerous undertaking for
11 Airbnb to perform.

12 So what we did and the compromise position that we have
13 laid out in our briefing is we have figured out which of those
14 35,000 tickets correspond to hosts who have been removed from
15 the platform. And so we did that because the likelihood of
16 being removed from the platform is probably because you
17 violated an Airbnb policy, for example, having a hidden
18 camera.

19 So we tried to get to the heart of what it is that
20 they're looking for in a way that's actually reasonable and
21 feasible for the company to do that wouldn't take many, many,
22 many months and lots of man hours.

23 And so we've designated that number, and we've offered to
24 them, hey, we will look through this subset of tickets to see
25 which of them involve hidden cameras. We will make the

1 appropriate redaction so that we're not giving you third party
2 private contact information, and we will produce that to you.
3 They're saying no.

4 I believe it's a reasonable position. It's the only
5 position that will get them the information in any kind of
6 reasonable time period that does not require us to turn over
7 lots of private confidential information about people having
8 nothing to do with this case.

9 We hope that the Court agrees with that position, but
10 that's our position with respect to the 35,000 tickets that I
11 think is the most important category under that motion.

12 MR. FEW: Your Honor, if I may, we do not agree that 16
13 to 44 conflates to or equivocates with the 35,000 tickets. We
14 had a conference with them yesterday. And they proceeded to
15 tell us how burdensome it was going to be to go through the
16 35,000 tickets, and we were hearing a lot of, well, this is
17 what I understand.

18 And so frankly, I was of the belief that they don't
19 really know what it would involve because they have not taken
20 a handful of them themselves to actually determine what the
21 procedure and the method would be for doing it.

22 And we said would you please give us an example of, you
23 know, 10 or 12 of these things so that we can understand what
24 you're talking about because we want to understand what you're
25 talking about, and they were unable to do that. And then the

1 call just devolved into we're not going to talk anymore.

2 And so Your Honor, they just need to answer each one of
3 these requests. I mean, there's no way that every one of 16
4 through 44 is legitimately a 100 percent objectionable. And
5 if they wanted to talk about some and narrow the scope, we can
6 do that. We'd be more than happy to do that.

7 But it's really, frankly, Your Honor, it's too late for
8 that because they have not sought to do that. They've
9 answered the discovery, they've called our bluff, and they've
10 not reached out to us to say, hey, let's work through these
11 things because we can give you this.

12 And as Debbie told them yesterday, we'll take the burden
13 of going through the 35,000, you know, just, you know, that
14 eliminates the burden. They've already pulled the 35,000
15 aside. We'll do the work, but we have to have something to
16 work from. At this point, we have virtually nothing to work
17 from.

18 And so, Your Honor, just take issue completely with the
19 categorization that we're only talking about 35,000 tickets
20 because we're not. We're talking about simple things, like
21 things that are in our complaint, like you have documents and
22 things that are not privileged that relate to the filing of
23 these other lawsuits. What did you do about them?

24 I mean, we don't have to -- we're not asking to get into
25 the general counsel's office and read privileged memos, but

1 they have unprivileged documents about these things.

2 The lawsuits that they were served with, they could give
3 us the pleadings, but they just don't want to do it. And
4 if -- and you know trust. Trust is the word, right? Well,
5 they don't trust us, and we don't trust them.

6 So what we need is the documents. We will do the work to
7 figure out which of the documents are relevant. We do not
8 agree that Airbnb, in-house lawyers, O'Melveny & Myers
9 lawyers, whoever else, gets to make the decisions about what
10 is and is not relevant at least in terms -- because they may
11 not think something's relevant, but we do.

12 I mean there, there obviously has to be a defined scope,
13 but that's what we're seeking. We've already gone through
14 what's relevant with Judge Keesley. And so in order to have a
15 productive 30(b)(6) deposition, which would address the
16 concern that I stated earlier that I was not -- didn't think
17 that to be a promising.

18 But if we get a real response to these requests, then we
19 can have questions to ask those witnesses about what, in fact,
20 the company has done on these subjects. And there's a lot
21 more to these subjects than 35,000 tickets that the 30(b)(6)
22 witness testified about.

23 And Debbie could probably explain what the 35,000 tickets
24 are. At this point, I think all that that I know is that
25 there's a category of 35,000 of something that they have set

1 aside that may be relevant, but if that's all we get, if we
2 have to do the work, we're willing to do the work.

3 MR. ASHMORE: Judge, that --

4 MS. BARBIER: Your Honor, just briefly, Your Honor. I
5 just want to supplement what Mr. Few said because I did take
6 the Rule 30(b)(6) deposition. And the way that this issue
7 arose is one of the topics in the 30(b)(6) deposition is, you
8 know, other complaints of hidden cameras in Airbnb properties.

9 When we got to that topic, it's topic 18, the witness
10 said that she couldn't tell me how many complaints there were.
11 She hadn't reviewed any other complaints and that she could
12 tell me what she personally knew about, when she worked in the
13 safety department, and it was less than ten. Okay.

14 And so I said to her, you know, do you mean to tell me,
15 are you testifying under oath that Airbnb, an electronic
16 platform and a company that builds its name on being, you
17 know, web-based and sophisticated and electronic, cannot
18 (audio interference

19 amongst your complaints or your customer service tickets
20 to determine when hidden cameras were involved in a complaint.
21 And she would -- she refused. She dodged my question. That
22 was the question that spurred Judge Keesley's involvement.
23 Okay.

24 Judge Keesley got on the phone and said that's a proper
25 question, you need to answer it. After he ordered her to

1 answer it, she still didn't answer it.

2 She came back in January, and she said she had met with
3 an IT person and within an hour was able to determine that
4 there were approximately 35,000 complaints that were related
5 to surveillance devices, but she said that could be a Ring
6 doorbell. And I said, well, it could also be a hidden camera
7 in someone's shower, couldn't it? And she agreed, yes, that
8 could be that, too.

9 Now, 35,000 pages of documents -- I mean, Your Honor, as
10 you know and as we all know who are involved in litigation
11 with big companies, that is nothing. I can review 35,000
12 documents or pages or whatever it is in a couple of days. I
13 had to do -- I had to review 100,000 not long ago in a
14 privileged matter, and it was -- you know, it wasn't fun, but
15 I did it.

16 Airbnb's law firm has 700 lawyers. Okay. And they have
17 thousands of employees. And so I think that 35,000 documents
18 is nothing. It's nothing to me, then it must be nothing to
19 them. And we're happy to go through those customer services
20 tickets to determine whether or not they're relevant to our
21 case. But just to say that a multi-billion dollar company, to
22 say it's just too burdensome and that their 700-member law
23 firm can't do it is -- frankly, it's absurd. And it's just
24 another example of the stonewall tactics we've gotten.

25 You know, we're -- I'd hate to disagree with Ms. Taylor

1 because I know she's doing her job, but I don't think we're
2 making progress. I think that Airbnb's counsel wants you to
3 believe we're making progress. If we were making progress,
4 Your Honor, I promise you, we would not have wasted your
5 morning. We just wouldn't have. I -- we -- I wouldn't do
6 that to you. We're desperate because we have no documents and
7 we have no answers, and we have no -- you know, we can't even
8 get names of witnesses. So that's where we are with that. I
9 just wanted to speak to the burden. Thank you.

10 MR. ASHMORE: Just briefly, Your Honor. The -- so every
11 time we have a communication, it's a ticket. Okay. Like --
12 they like to call them complaints; those are tickets. I had a
13 nice time at Airbnb, that's a ticket. Had a terrible time
14 Airbnb, that's a ticket. Okay. So there are millions of
15 tickets out there.

16 What we were able to do within those tickets are
17 determine that there are 35,000 tickets related to
18 surveillance devices. That could be a hidden camera. Could
19 also be a Ring doorbell, a baby monitor, a left iPad, a left
20 cell phone, a left video camera, for instance. Now, there --
21 we -- so within that bucket of 35,000, we've determined that
22 3,000 people have been kicked off the Airbnb platform. And as
23 Ms. Taylor points out, that is more than likely because of a
24 violation of our terms in service, which could include hidden
25 cameras.

1 We just don't have a separate button to hit to say, hey,
2 these are all the hidden camera cases. We've got -- that
3 doesn't exist. Okay. We don't keep up with it that way. And
4 so, Your Honor, that being said, we're, again, more than happy
5 to provide that, within the 35,000, those 3,000 that had been
6 kicked off. As to the others, Judge, there are going to be
7 people that contacted Airbnb and essentially say, hey, you
8 know, I'm having an affair and I recorded my significant other
9 or my girlfriend or my boyfriend, and I forgot the camera, or
10 it's on my cell phone. And I -- who knows what privacy
11 concerns we would be invading with regard to those other
12 people.

13 And Judge, there's state and federal statutes that comply
14 here. And again, we've had really bad luck on confidentiality
15 orders in this case, Judge. And so, for those reasons, you
16 know, we think it's more than reasonable to -- for us to
17 produce the number of individuals that have been kicked off
18 under the surveillance device bucket.

19 MS. TAYLOR: If I may be heard, just briefly. I want to
20 correct just one more thing. So I've sat here for a long
21 time, just like you have, Your Honor, very patiently. I
22 appreciate that. But it sticks in my car a little bit because
23 lots of representations have been made to this Court about
24 what other judges have said, and I've been present for some of
25 this stuff. And so I want to correct a couple of things.

1 Mr. -- Ms. Barbier just referred to Judge Keesley, you know,
2 directing the witness that she needed to answer that and all
3 of that.

4 So opposing counsel, Ms. Barbier, called Judge Keesley, I
5 believe, within 45 minutes of the 30(b)(6) deposition. I
6 mean, I think she had the number on speed dial. Like, I mean,
7 they were threatening sanctions 20 minutes in. It was that
8 kind of thing, right. So she didn't even let the witness
9 answer before she started threatening her with sanctions. And
10 when we explained to Judge Keesley how the mechanism works,
11 right, like we just -- there is no capability to just say,
12 hid -- you know, hidden camera and have something spit out.
13 That's just not how the records are maintained within the
14 company. It just isn't.

15 Judge Keesley said, well, if you can't do it, you can't
16 do it. So -- all right -- which is -- I mean, that's the way
17 it is. The way records are maintained are the way they are
18 maintained. And so what we have here is the umbrella of
19 surveillance device policy, which includes a whole bunch of
20 stuff. And the idea that we're talking about 35,000 pages is
21 just not accurate. We're talking about 35,000 tickets. And
22 within a ticket could be two messages; it could be 20
23 messages, right. We're talking about -- right. We're talking
24 about voluminous information that is not easily exportable
25 from Airbnb. There's no way to just export this and put it

1 in, you know, in an easy format. So you have to go through
2 and review each ticket one-by-one-by-one because the way their
3 systems are maintained, it's not easy to just transfer it to a
4 file that's searchable. So you got to look through it.

5 And so -- you know, we are a 700 -- I don't know if we're
6 a 700-member law firm. I -- you know, I believe Ms. Barbier.
7 I have not checked, myself. But the idea of what's
8 burdensome, the fact that a law firm may have 700 people does
9 not make that request any less burdensome when a lot of what
10 you're going to be finding has nothing to do with the facts of
11 this case, with the allegations in this case. What we have
12 tried to do is a compromise position that's designed to get at
13 what plaintiffs want here, which is hidden camera --
14 complaints about hidden cameras. I assume that they don't
15 want complaints about Ring doorbells. I know they want to
16 make us work, but that's not really what this litigation is
17 about or what they're asking for.

18 And so we think our compromise position is reasonable.
19 Of course, redactions need to be made because we're talking
20 about third parties having nothing to do with this case. And
21 we're prepared -- we are going through those now. And we're
22 prepared to produce those. We'll do whatever the Court asks,
23 but we have done -- what we have done is designed to get at
24 what they want.

25 There are other requests in -- there are other issues in

1 16 through 44. I did not go through each of them because our
2 motion (indiscernible) -- I know that the Court is sick of
3 hearing from us. I can if you would like. We've teed up in
4 our briefing exactly what we have provided and what we have
5 not provided. We disagree with their position on all of this.
6 If the Court wants me to argue, I am prepared to go through
7 each one of them.

8 THE COURT: Well, no. And what I keep thinking is -- I
9 mean, I know that there's this compromise that's been offered.
10 But it hasn't been produced. So that leaves us right back at
11 the beginning. I know that there's been some initial
12 discussion about, I don't know, some specificity or some
13 compromise and all of that. And I'm wondering if -- y'all
14 tell me -- if this same 15 days that I'm giving you for
15 whatever the other motion was several hours ago will be
16 beneficial here too so it can whittle down what I actually
17 need to address without today going through one-by-one 16
18 through 44.

19 Because what I'm not going to do, as I sit here right
20 now, is really -- because there are so many of them, I'm just
21 not going to get into very much detail. I would rule based on
22 what's written there, you know, what the request is, and
23 whether it appears appropriate to me. 35,000 tickets does not
24 sound overly broad and unduly burdensome to me, considering
25 where we are in this corporate structure that things are

1 electronic. Maybe if we were talking about 35,000 separate
2 files in somebody's warehouse with paper documents in them,
3 that might be a different story. But this tech company that
4 has computerized records -- you know, if I can find stuff on a
5 Google search with different search terms or on Westlaw or
6 wherever with various search terms, I don't doubt that Airbnb
7 could do something similar. And of course, I don't know the
8 platform that's being used. I don't know that. And I don't
9 know what it would take to do that. But you either have to do
10 that or got to produce all of them, or something. I don't
11 know.

12 And so the compromise may be sufficient. I don't know.
13 But the compromise would need to be produced, and there has to be
14 a determination of its sufficiency. And I'm happy to allow
15 that to happen over the next 15 days so that maybe some
16 progress can be made. But I don't know if that'll be helpful.

17 MS. TAYLOR: Your Honor --

18 MS. BARBIER: Judge, let me tell you why the compromise
19 would -- doesn't -- is meaningless. They don't kick everybody
20 off the platform who's been caught using a hidden camera.
21 Okay. So why would I agree to accept the tickets only for
22 people they've kicked off the platform? I mean, they -- we
23 have already -- we already know that they have found that
24 people who have hidden cameras and they didn't kick them off
25 the platform. That would be -- I mean, they have people

1 all -- their criminal background policy check allows people
2 who have felonies and beyond to be hosts. And this is one of
3 the things that they don't want out there. So some of their
4 policies are so, you know, shocking that there's -- the
5 compromise won't work at all. I mean, that's just people
6 being kicked off.

7 THE COURT: Well -- and it may not, but the compromise is
8 a start. And the truth of the matter is, I'm going down this
9 road because even if, you know, the compromise gives you 10
10 percent of the information, the other 90 percent is
11 objectionable, the rules require you to produce that portion
12 which is not objectionable. So if the compromise is the part
13 that's not objectionable, you're required, under the rules, to
14 produce that anyway. I deal with what you don't agree with.

15 So I'm not saying that the compromise will resolve the
16 issue in its entirety, but it's a start. And it's -- what
17 they're offering is required to be produced no matter what.

18 MS. TAYLOR: Your Honor, may I speak to that? Yes, it
19 would be helpful to -- I -- 15 days is not enough time. For
20 better or worse, it's a proprietary platform, so it's not
21 keyword searchable. I wish it were. It would make my life a
22 whole lot easier.

23 I think 15 days is not enough. 30 days we could get that
24 done. We are beginning that -- we are -- sorry. We're
25 conducting that search at the -- that review as we speak. We

1 just need a little bit more time to do it.

2 MR. FEW: Your Honor --

3 THE COURT: Go ahead, Mr. Few.

4 MR. FEW: -- what I heard you saying is you wanted to put
5 us in the position that we should have been with them giving
6 us what they admit that they should have given us, which they
7 have not done. And this is not a question of what you can't
8 do; this is a question of what you won't do. And so, Your
9 Honor, with that in mind, I would just respectfully request
10 that the Court grant the motion -- the request for production.
11 This does not require witnesses. They can have 30 days to
12 give us the documents, but all of these topics are relevant.
13 They've already been signed off on by the judge, by Judge
14 Keesley, in hotly contested -- I don't know that I'll ever
15 spend -- or anybody'll spend that much time arguing over a
16 30(b)(6) deposition we started trying to take over a year ago
17 with the first set of lawyers. And so I just think that that
18 is the only way to address it because, as Your Honor has said,
19 and as we know, they're only going to give us what they want
20 to give us anyway. And then if we find it to be insufficient,
21 then we come back to the Court. But given the position that
22 they've taken, we should not have to -- they don't get an
23 opportunity to come in now and say, well, how about we
24 compromise and do what we agree to do.

25 No, Airbnb and its lawyers do not define the scope of

1 discovery unless it's by consent. The Court does. And they
2 made us file these motions -- these motions have been pending
3 for a long time on known topics, and the topics are narrowly
4 tailored. They just need to give us the production, all of
5 it, because we will definitely be back here again if we get
6 their compromise.

7 Now, I wish I had their compromise prior to this hearing
8 because then I would be able to talk to Your Honor about, look
9 at this document; it shows that they had these others but --
10 so I just think that that's the only fair result, Your Honor,
11 particularly on these requests for production, is that they be
12 ordered to give us a complete response to all of the things
13 and not push us to use all this court time and then come along
14 and say, well, now we've figured out what -- and you just
15 heard, they haven't even done it.

16 MS. TAYLOR: That's not true.

17 MR. FEW: They have not even done it.

18 MS. TAYLOR: Well, Judge, that's not true. If I may?
19 Part of the problem here is that plaintiffs have refused to
20 meet and confer with us for months. So the idea that this --
21 that the court intervention was the only recourse is just no
22 true. They are not just learning about the compromise
23 position. And so unfortunately, it would take months for us
24 to go through all 35,000 tickets. That's part of the reason
25 why we suggested this compromise. We can get the compromise

1 done within 30 days, but it's -- it is an onerous process, and
2 that's frustrating for me too. But it is what it is, as they
3 say -- as the kids say.

4 And so the idea that we have been stalling and the court
5 intervention is the only recourse here is just not true. We
6 have tried to meet and confer with plaintiffs for so very long
7 now, with them refusing.

8 MS. BARBIER: Judge, I have a question for the Court. I
9 know I'm not going to speak directly to Airbnb's counsel. But
10 if they don't have the ability to electronically search for
11 things, how in the world do they have the ability to identify
12 documents that were -- where someone involving these customer
13 service tickets were kicked out or taken off the platform?

14 I mean, all --

15 THE COURT: It appears inconsistent to me too.

16 MS. BARBIER: It's very inconsistent.

17 THE COURT: Um-hum.

18 MS. BARBIER: And if it's going to take them months to go
19 through 35,000 customer service tickets, Mr. Few and I, Mr.
20 Beasley (phonetic), are very capable of doing it, probably,
21 within a week. And we're happy to do that.

22 THE COURT: Well, (indiscernible) 30 days. If I order 30
23 days, the condense the many months down to 30 days somehow
24 too. I mean, will it take months or will it take 30 days?
25 I'm not sure.

1 MS. TAYLOR: So 30 days for the subset. So I'm sorry,
2 Your Honor, if I was not clear. So the compromise position,
3 that will take 30 days. You can order us to do it sooner, and
4 we will do our -- we will do our very, very best. But for the
5 full 35,000 tickets, that would take months.

6 MS. BARBIER: But Judge, how are they already divided if
7 they haven't reviewed them?

8 MS. TAYLOR: Because it is easy to search -- it is easy
9 to see which of those hosts are no longer hosts on the
10 platform. We don't have to search the individual substance of
11 the communications to see which hosts are no longer on the
12 platform.

13 THE COURT: But you also know which (indiscernible) --

14 MR. FEW: That's one --

15 THE COURT: -- surveillance of any sort.

16 MR. FEW: That's one -- I'm --

17 THE COURT: You've narrowed down the 35 -- yeah,
18 surveillance. So you searched something.

19 MS. TAYLOR: All -- the way these things are -- they're
20 called tags. The way these things are tagged when they come
21 in, they're tagged by surveillance devices. So when a
22 customer service ticket is made, it's given a tag. And the
23 broader tag is for surveillance devices. It doesn't go more
24 specific beyond that.

25 And so we have the broad surveillance device tagging. We

1 can get that without doing searches of the content. The
2 question is, now, searching within that broader category to
3 see what the actual complaint was about.

4 MS. BARBIER: So they've had two years to produce this
5 information. And I think they shouldn't need another 30 days.

6 THE COURT: Well -- and so that's sort of the problem. I
7 don't know about two years because I -- you know, I don't
8 know -- that's the initiation of the lawsuit. But these
9 requests for production, 16 through 44, were served in June of
10 last year, and you had a duty -- June 7th -- so by July 7th,
11 you should have produced -- whatever you're saying you'll
12 produce now should have been produced then because you have a
13 duty to produce that which is not objectionable. And then you
14 bring to the Court the disputed portion.

15 So since you should have done that by July 7th -- they
16 were served on June 7th -- what's today? April. I mean, it's
17 already been ten months for you to do something which you
18 required to do in 30 days. And now you want another 30 days;
19 that's 11 months. And that's, you know, 11 times longer than
20 you're supposed to have to begin with. And that's just for a
21 portion of it. So what am I to do with that?

22 MS. TAYLOR: Again, I think our compromise position is
23 reasonable, and we will get through those tickets as quickly
24 as you order us to.

25 THE COURT: Well, why wasn't that produced by July 7th?

1 That portion of information which you're now saying you can
2 be -- you can produce in 30 days. They should have had that
3 by July 7th of last year.

4 MS. TAYLOR: So just to be clear, I -- we -- this is not
5 an admission that these are responsive materials. We're
6 talking about a search -- like, a search that we conducted
7 following the deposition after learning what it is that they
8 wanted because they made these broad requests. They refused
9 to meet and confer about it. At the deposition of the
10 30(b)(6) witness, they clarified a little bit more because
11 they were asking her all these questions. And we endeavor to
12 then, with more specificity, try to determine what we could
13 find. Their request was incredibly broad.

14 THE COURT: Okay. Did you file a motion for a protective
15 order in that 30-day timeframe to project -- protect you from
16 the requirements to respond to those discovery requests?

17 MS. TAYLOR: And Your Honor, again -- just again, for the
18 record. Plaintiff here admitted that she never contacted
19 customer service. So I mean, we had valid objections to these
20 requests.

21 THE COURT: What I want is an answer to my question.

22 MS. TAYLOR: I --

23 THE COURT: Was there a motion for a protective order
24 filed, as required by the rules?

25 MS. TAYLOR: We objected, Your Honor, and there was

1 motion practice over these requests.

2 THE COURT: Was there a motion for protective order by
3 (indiscernible) --

4 MS. TAYLOR: I don't believe --

5 THE COURT: Is this how Airbnb answers questions?
6 Because I would understand the frustration in the deposition.

7 MS. TAYLOR: I apologize. I'm trying to check while
8 we're asking, which is why. I don't believe we filed a motion
9 for protective order; we just objected. I'm trying to talk to
10 my associates as we speak just to make sure. But we just
11 objected; we did not file a motion for protective order. I
12 apologize, Your Honor.

13 THE COURT: Got you. I mean, I'm inclined to just grant
14 both of these motions. And let me just say, to the extent
15 that there's some lack of trust of plaintiffs' counsel, that
16 they'll exceed the scope of the confidentiality order, that's
17 another matter for another time. I don't think that that
18 relieves you of your duty under the rules to produce certain
19 information because you're scared about what you're going to
20 do with it. They're under an order to -- you know, to handle
21 that information in a very specific way. To the extent that
22 they exceed the scope of that order, you know, there are
23 motions for sanctions, the Court has contempt power, et
24 cetera, et cetera.

25 I'm not going to presume on the front end that they will

1 violate a court order and therefore they don't get the
2 information. That would make the order really a nullity
3 because why is it even in place if we can't rely on counsel to
4 adhere to their duties. Let us -- you know, maybe it won't be
5 a surprise to you, but let them surprise me with the violation
6 of the order -- or whatever judge there is.

7 Really, I'm inclined to grant both motions. And I will
8 give you 60 days to fully respond to the request for
9 production delineated in both motions, which then gets you
10 right at about a year that you had to compile the information.
11 I mean, you had to have compiled it somehow in some way to
12 even know that it's objectionable, or you'd have to have seen
13 it, reviewed it. It should be ripe for production.
14 Otherwise, you're just making a blanket objection without
15 knowing the substance of what you're dealing with, because
16 this isn't how this is supposed to work.

17 Frankly, this case should have been on a trial roster
18 more than a year ago, probably. And we're still talking about
19 discovery and 60 more days to produce some discovery
20 information. And I think that's not what is contemplated by
21 the rules, certainly not the rule that requires -- that allows
22 cases to be placed upon a trial roster one year from the date
23 of filing. We don't anticipate that two years later we're
24 still involved in discovery disputes.

25 So that's my ruling on those, 60 days to produce all of

1 that information.

2 MS. TAYLOR: Does that (indiscernible) request for
3 production?

4 THE COURT: Say that again.

5 MS. TAYLOR: Does that apply to the motion about the
6 privacy in -- the private information, contact information,
7 for other users and criminal history information for
8 individuals having nothing to do with this case?

9 THE COURT: Yes.

10 MS. TAYLOR: Yes? Okay.

11 THE COURT: It does. Yes. Whether that's admissible at
12 trial or, you know -- that's another matter for another day.
13 But certainly seems to be reasonably calculated to be -- to
14 potentially lead to the discovery of relevant or admissible
15 evidence that relates to the claims in this case.

16 Also let me suggest that y'all seek complex case
17 designation. That doesn't have anything to do with me here
18 today, but it sounds like a case that needs that. One judge
19 handling everything, you know, all the motions. You don't
20 have to wait for the clerk of court to schedule motions
21 hearings. You can contact the judge directly and send them in
22 whenever. That judge probably won't be me because I'm not a
23 Second Circuit judge and this is not an adjacent circuit. So
24 that's just a suggestions. It just -- it -- yeah, it screams
25 to me as one of those cases that would benefit from complex

1 case designation.

2 MR. ASHMORE: And we thought you were volunteering, Your
3 Honor.

4 THE COURT: Not at all. I've got plenty here in Richland
5 County. So that takes care of that. And now I need to go for
6 real because I've moved my 1 o'clock lunchtime appointment to
7 a 2 o'clock appointment. But I think I've addressed
8 everything.

9 MS. BARBIER: Thank you, Your Honor.

10 MR. ASHMORE: Thank you for your time, Judge.

11 MS. TAYLOR: Thank you, Your Honor.

12 THE COURT: Thank you.

13 MR. ASHMORE: Okay.

14 THE COURT: Thank you all.

15 MR. FEW: Got you. Thanks so much.

16 THE COURT: Have a good day.

17 MS. TAYLOR: You too.

18 (Thereupon, the proceedings were concluded)

19 (End of Transcript of Record)

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Dena Farbman Page
Proofreader

STATE OF SOUTH CAROLINA
COUNTY OF AIKEN

IN THE COURT OF COMMON PLEAS
SECOND JUDICIAL CIRCUIT

C/A NO.: 2021-CP-02-00889

JULIANNE FOSTER,

Plaintiff,

v.

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

Defendants.

**DEFENDANT AIRBNB, INC.'S
RESPONSE TO PLAINTIFF'S
MOTION TO COMPEL
DEFENDANT AIRBNB, INC. TO
RESPOND TO REQUESTS FOR
PRODUCTION NUMBERS 45-48**

INTRODUCTION

Plaintiff has grossly mischaracterized Airbnb as having “repeatedly stonewalled or delayed discovery in this case.” Mot. at 1. In fact, discovery has been ongoing for more than a year and a half, and Airbnb has complied with its discovery obligations in good faith—including in response to many of Plaintiff’s scorched-earth tactics that have been highly disproportionate to the needs of the case. For example, Airbnb’s corporate designee recently sat for more than 13 hours of deposition and Airbnb has produced more than 1,300 pages of evidence in response to Plaintiff’s discovery requests. Plaintiff, on the other hand, has admitted to failing to search for and even destroying relevant evidence, and has consistently provided evasive and incomplete discovery responses. Moreover, Plaintiff admitted at her deposition last week that she was not the person who made the Airbnb reservation. Her friend, Michele Jain, was the individual that actually made the reservation through the Airbnb platform. Also of note, Plaintiff has already settled with the multi-millionaire Rhett Riviere, who is still facing criminal charges for illegally filming her.

In the instant motion, Plaintiff is determined to impinge on the privacy rights of unrelated

third parties by demanding: 1) personally identifying information about every individual around the world who has ever listed a property on Airbnb’s online platform—at any place and at any point between December 2013 through the present—who has ever been convicted of one of 82 crimes, everything from bail jumping to blackmail; and 2) *contact information* for all other, unrelated guests who stayed at any of the three properties that Defendant Katherine Thomas listed on Airbnb’s online platform over a multi-year period. First, Plaintiff cannot show any need for their contact information (or to contact them): law enforcement (SLED) has already determined that none of these other guests was recorded during their stays, and SLED has provided Plaintiff’s counsel with every single video it seized from Defendant Rhett Riviere. Plaintiff already has their names; thus, the only reason Plaintiff seeks their contact information is to contact them. But the South Carolina Supreme Court has squarely foreclosed such nonparty contact when, as here, it would violate the nonparties’ critical privacy rights—rights that are recognized throughout this country, including under the South Carolina Constitution.

Next, compelling Airbnb to produce information about every host on Airbnb’s platform anywhere in the world who has ever been convicted of one or more of 82 crimes would also violate South Carolina law and impinge on their privacy rights. The list is composed of 82 offenses, ranging from bail jumping and contempt of court to blackmail and bribery. Plt.’s Mot. Ex. 1 at 3-7. No party in this lawsuit is alleged to ever have been convicted of *any* offense on this list, and convictions of nonparties have nothing to do with the alleged criminal misconduct perpetrated by Riviere against Plaintiff in this case. Plaintiff cannot show that this information is “relevant and necessary” to her claims: these other hosts have nothing to do with Plaintiff, Riviere, Thomas, their properties, or the incident underlying Plaintiff’s claims—and not once in her nine-page motion did Plaintiff attempt to argue that they did. Plaintiff’s motion should therefore be denied

in its entirety.

Instead of providing justification for her burdensome and unlawful requests, Plaintiff's motion is replete with grossly inaccurate misrepresentations about the procedural history of this case. This transparent attempt to falsely paint Airbnb as uncooperative does not change the reality that the requests at issue here impinge on the critical privacy rights of others who have absolutely nothing to do with Plaintiff's claims. The Court should therefore deny Plaintiff's motion.

BACKGROUND

Plaintiff's claims arise from an incident that occurred during a one-night stay at a property in Aiken owned by co-defendant Rhett Riviere and managed by his then-girlfriend co-defendant Katherine Thomas. FAC ¶¶ 1, 89-92. Riviere allegedly secretly videorecorded her during her stay, which Plaintiff's friend reserved via Airbnb's platform. *Id.* ¶¶ 89, 93, 95, 103-04. There is no dispute that, prior to Plaintiff's stay, Airbnb conducted background checks for Riviere and Thomas and the background checks returned no criminal convictions for either individual. It is for that reason no criminal conviction is alleged in the amended complaint. Plaintiff has admitted that she never had an Airbnb account, never visited Airbnb's website before her stay at Riviere's property, and has never even contacted Airbnb's customer support team. She has further admitted that Airbnb never promised her anything and did not know that Riviere was going to record her. Yet the gist of Plaintiff's claims against Airbnb seems to be that Airbnb lacked the omniscience to prevent Riviere from committing his criminal conduct against her.

In discovery, Plaintiff has already been provided ample information about the other guests who booked Thomas and Riviere's properties through Airbnb's platform, including their full names and the dates, lengths, and prices of their stays. She also has a great deal of information that SLED produced, including its investigative report as to Riviere. SLED thoroughly

investigated Riviere’s alleged misconduct and analyzed the equipment and videos seized from his possession. SLED’s analysis of these videos showed that Plaintiff and her friend were the only individuals Riviere had recorded that had booked their stay through Airbnb. *See generally* SLED Investigative Report (Sept. 28, 2020).¹ As SLED made clear, the “analysis of the seized items by SLED Computer Crimes did not uncover any additional evidence or information pertinent to the investigation.” *Id.* at 5. Moreover, SLED identified and produced to Plaintiff the names and contact information for all individuals identified in Riviere’s recordings—none of whom, aside from Plaintiff and her friend, had booked their stay through Airbnb’s platform. Finally, SLED produced to Plaintiff the “thousands of videos recordings” (FAC ¶ 21) that it seized from Riviere. Based on her review of these materials, Plaintiff’s counsel has already filed lawsuits against Riviere on behalf of other individuals whom he recorded during stays *not* booked via Airbnb’s platform.²

Airbnb objects to the requests at issue here because they seek private information which is not reasonably calculated to lead to relevant information, and to the extent they seek information already in Plaintiff’s possession, custody, or control. Airbnb now opposes Plaintiff’s motion to compel responses to these requests because they are highly invasive to third-party privacy interests, and Plaintiff has not shown that any of this information is necessary to her claims.

PLAINTIFF’S MISCHARACTERIZATIONS

Plaintiff’s attempts to disparage Airbnb’s discovery efforts are wildly inaccurate and—although irrelevant to the instant motion—warrant correction.

¹ Airbnb can make SLED’s Investigative Report available to the Court for in-camera review.

² *See Gabriel Crespo v. Riviere et al.*, Case No. 2022CP0202324 (Aiken Cnty. Ct. of C.P.); *Heather Crespo v. Riviere et al.*, Case No. 2022CP0202323 (Aiken Cnty. Ct. of C.P.); FAC ¶ 21 (noting that the videos seized from Riviere “span many decades”).

May 31, 2022 Hearing. First, Plaintiff notes that the Court granted “Plaintiff’s previous Motion to Compel,” “admonish[ed] the parties at the May 31, 2022 hearing,” and warned that there would be “serious sanctions” if it were determined that something had not been produced. This is an egregious misrepresentation of the record. *See* Ex. 1 (May 31, 2022 Transcript³); *see also* Pl.’s Mar. 3, 2022 Mot. to Compel.⁴ In fact, the only comments regarding sanctions at the May 31 hearing came up as the Court addressed *counsel for Riviere and his corporate entity*; that discussion had nothing to do with Airbnb. The only time Airbnb came up was later in the hearing, when Plaintiff complained that Airbnb had not identified any Airbnb employees who had spoken to Foster or her friend. Ex. 1 at 17:4-7. Airbnb’s counsel explained that no Airbnb employee was involved in the transaction because Airbnb is “an online platform and [Plaintiff’s friend] signed up and booked it on her own volition.” *Id.* at 18:7-11. The Court told Airbnb to simply “respond and say there’s no person that she ever talked to,” *id.* at 18:12-22; nothing more was needed.

Rule 30(b)(6) Deposition. Although it is completely irrelevant to the present dispute about document production, Plaintiff’s motion includes significant mischaracterizations of the Rule 30(b)(6) deposition. As Airbnb explains in its Response to Plaintiff’s motion for sanctions, Airbnb dutifully prepared its witness for Plaintiff’s 24 extremely broad topics, and she provided an enormous amount of information over two full days’ of testimony. This included information about Airbnb’s policies and procedures as well as exhaustive facts pertaining to defendants Riviere and Thomas and their property. Plaintiff’s only complaint is that Airbnb’s witness could not provide answers she liked to questions about minute or irrelevant details that had nothing to do

³ The transcript, at times, refers to Riviere and Chase Enterprises only as Mr. Harte’s or Ms. Moose’s clients and to Thomas as Mr. Wlodarczyk’s client.

⁴ Only one of the five topics in Plaintiff’s March 3, 2022 motion to compel was directed at Airbnb—although Plaintiff did not specify any particular issue with Airbnb’s discovery responses in that motion. *See* Mar. 3, 2022 MTC at 10-11.

with the litigation at hand. Airbnb's testimony was more than sufficient. *Costa v. Cnty. of Burlington*, 254 F.R.D. 187, 190 (D.N.J. 2008) ("Simply because defendant's witness could not answer every question posed to him does not equate to the fact that defendant did not satisfy its obligation to prepare its 30(b)(6) witness.").

LEGAL STANDARD

A party can request protection from abusive discovery tactics via "either [a motion] for a protective order or a return to a motion to compel production." *Hamm v. S.C. Pub. Serv. Comm'n*, 312 S.C. 238, 241, 439 S.E.2d 852, 854 (1994). "The [party] requesting protection from the court ... must initially show good cause by alleging a particularized harm which will result if the challenged discovery is had." *Id.* The party can allege a particularized harm by showing the discovery requested will invade the privacy rights of third parties. *Hollman v. Woolfson*, 384 S.C. 571, 578, 683 S.E.2d 495, 498 (2009). Upon alleging a particularized harm, "the party seeking the discovery must come forward and show that the information sought 'is both relevant and necessary to the case.'" *Hamm*, 312 S.C. at 241-42, 439 S.E.2d at 854. If the party seeking discovery is able to do so, the Court then "must weigh" the particularized harm against the need for the discovery. *Id.* at 242, 439 S.E. 2d at 854.

ARGUMENT

I. The Court Should Deny Plaintiff's Motion to Compel Responses to RFP Nos. 45-47 Regarding Past Guests' Identities and Contact Information.

Compelling Airbnb to produce responses to RFP Nos. 45 through 47 would be highly invasive to the constitutionally protected privacy interests of users who have nothing to do with this litigation. Plaintiff seeks the names and contact information of all guests associated with the reservation, confirmation, and product codes for every booking at Thomas's properties ever made

through Airbnb's platform.⁵ Mot. at 5. Airbnb's users expect that the information they provide when they sign up for an account will be kept private. The fact that these prior guests—whom SLED has already determined were *not* recorded by Riviere—stayed at one of Thomas's other listings does not entitle Plaintiff to invade their privacy. This information is in no way necessary to Plaintiff's claims.

A. The Requests Invade Nonparties' Well-Established Privacy Rights.

The third parties at issue here have a constitutional right to privacy based on both state constitutions and federal precedent. A federal right to privacy extends to “the individual interest in avoiding disclosure of personal matters,” looking at whether the information sought “is within an individual's reasonable expectations of confidentiality.” *Walls v. City of Petersburg*, 895 F.2d 188, 192 (4th Cir. 1990) (“Personal, private information in which an individual has a reasonable expectation of confidentiality is protected by one's constitutional right to privacy.”). Under the South Carolina Constitution, the right to be free from “unreasonable invasions of privacy” is “broad and applies to the full panoply of the privacy rights Americans have come to enjoy over the history of our Nation.” *Planned Parenthood S. Atl. v. State*, --- S.E.2d ---, 2023 WL 107972, at *39 (S.C. Jan. 5, 2023) (opinion of Few, J.). “The South Carolina Supreme Court has defined the ‘right to privacy’ as the right of an individual to be *let alone* and to live a life free from unwarranted publicity.” *Bauer v. Summey*, 568 F. Supp. 3d 573, 603 (D.S.C. 2021) (emphasis added) (citing *Sloan v. S.C. Dep't of Pub. Safety*, 355 S.C. 321, 586 S.E.2d 108 (2003)). Rights to privacy are also found in the constitutions of many other states, including Alaska, Arizona,

⁵ Plaintiff asserts that she is not seeking the contents of any communications with these other guests and that the Stored Communications Act (“SCA”) therefore does not support Airbnb's objections to producing these materials. Airbnb disagrees with some of Plaintiff's arguments about the SCA, but if Plaintiff is not seeking the contents of any communications, Airbnb agrees that the SCA does not apply to RFP Nos. 45-47.

California, Florida, Hawaii, Illinois, Montana, New Hampshire, and Washington—all of which are home to Airbnb users.⁶

South Carolina and other jurisdictions have found that individuals have a “privacy interest” in their “home addresses, personal telephone numbers, and email addresses.” *Glassmeyer v. City of Columbia*, 414 S.C. 213, 223, 777 S.E.2d 835, 840 (Ct. App. 2015) (holding that this contact information was “information of a personal nature where the public disclosure thereof would constitute unreasonable invasion of personal privacy”). Another court has held that “third parties who were not responsible for the initiation of the underlying litigation ... possessed a justifiable expectation of privacy that their names and financial records not be revealed to the public.” *In re Knoxville News-Sentinel Co.*, 723 F.2d 470, 477 (6th Cir. 1983). As one court noted, “Where a person lives and how that person may be contacted fits squarely within the plain meaning of [the] definition of information of a personal nature because that information offers private and even confidential details about that person’s life”; the “release of names and addresses constitutes an invasion of privacy, since it serves as a conduit into the sanctuary of the home.” *Mich. Fed’n of Tchrs. & Sch. Related Pers. v. Univ. of Mich.*, 753 N.W.2d 28, 40 (Mich. 2008).

Airbnb’s users expect that the contact information they provide to Airbnb during the sign-

⁶ Alaska Const. art. I, § 22 (“The right of the people to privacy is recognized and shall not be infringed.”); Ariz. Const. art. II, § 8 (“No person shall be disturbed in his private affairs ... without authority of law.”); Cal. Const. art. I, § 1 (“All people ... have inalienable rights,” including “obtaining safety, happiness, and privacy.”); Fla. Const. art. I, § 23 (“Every natural person has the right to be let alone and free from governmental intrusion into the person’s private life”); Haw. Const. art. I, § 6 (“The right of the people to privacy is recognized and shall not be infringed”); Ill. Const. art. I, § 6 (“The people shall have the right to be secure ... against unreasonable ... invasions of privacy”); Mont. Const. art. II, § 10 (“The right of individual privacy is essential to the well-being of a free society and shall not be infringed”); N.H. Const. art. 2-b (“An individual’s right to live free from governmental intrusion in private or personal information is natural, essential, and inherent.”); Wash. Const. art. 1, § 7 (“No person shall be disturbed in his private affairs ... without authority of law.”).

up process will be kept confidential from unreasonable disclosure. As the Supreme Court has acknowledged, an “individual’s interest in controlling the dissemination of information regarding personal matters does not dissolve simply because that information may be available to the public in some form.” *U.S. Dep’t of Def. v. Fed. Lab. Rels. Auth.*, 510 U.S. 487, 500 (1994); *see also Mich. Fed’n of Tchrs.*, 753 N.W.2d at 42 (“An individual’s home address and telephone number might be listed in the telephone book or available on an Internet website, but he might nevertheless understandably refuse to disclose this information, when asked, to a stranger, a co-worker, or even an acquaintance. The disclosure of information of a personal nature into the public sphere in certain instances does not automatically remove the protection of the privacy exemption and subject the information to disclosure in every other circumstance.”). Here, users do not authorize Airbnb to provide their names or contact information for any purpose, much less to an opposing party in a lawsuit that does not involve them at all. There is no need to invade the privacy of Riviere and Thomas’s other guests, who are not a part of this litigation and whom SLED determined *not* to have been recorded by Riviere. These customers are entitled to the reasonable expectation that their contact information will be kept confidential under these circumstances.

The Supreme Court of South Carolina has also determined that *contacting* nonparties itself is an invasion of privacy. In *Hollman v. Woolfson*, the plaintiffs in a medical malpractice case sought to contact the defendants’ other patients, who were not parties to the suit. 384 S.C. at 576, 683 S.E.2d at 497. Even though the plaintiffs already had the contact information for these nonparty patients, the Court held that these nonparties had significant privacy interests protected by state and federal law, and that particularized harm would arise if the plaintiffs were permitted to contact and interview them. *Id.* at 578, 683 S.E.2d at 498. In fact, the Court found the potential privacy violation so egregious that it reviewed the interlocutory discovery order on a petition for

writ of certiorari. The same rule from *Hollman* applies here, where Plaintiff seeks contact information for nonparty guests of Thomas and Riviere, presumably so she can contact them. SLED already identified and provided contact information for the other individuals who were recorded; permitting Plaintiff to contact the *unrecorded* guests with upsetting allegations about a stay from several years ago is a needless invasion of their privacy, including of their right to be “let alone.” *Summey*, 568 F. Supp. 3d at 603.

B. Plaintiff Has Not Shown That Contact Information of Prior Guests Is Necessary to Her Claims.

Because Airbnb has shown the particularized harm that this discovery would cause, Plaintiff has the burden to show that the discovery is “necessary,” including that there are not “reasonable alternatives available to discover the information.” *Hollman*, 384 S.C. at 580, 683 S.E.2d at 500. Plaintiff has not done so. She argues only that contact information for prior guests is “critical to defend against Mr. Riviere’s claim that the video recording of Ms. Foster was an ‘accident,’” and “is likely to lead to evidence related to Plaintiff’s claims regarding her stay in an Airbnb rental managed by Ms. Thomas.” Mot. at 3, 9.

As an initial matter, Plaintiff settled her claims with Riviere, and so she cannot have it both ways. Airbnb will not dispute that Riviere’s videorecording of Foster was intentional. Moreover, Plaintiff already has ample avenues to demonstrate that Riviere’s misconduct was not an accident. She has (1) all the recordings SLED seized, which she describes in her amended complaint, FAC ¶¶ 15, 20-21; (2) the SLED report detailing the names *and contact information* of the individuals who were actually recorded; (3) the names of *all* of Thomas’s other guests and the dates of their stays; and (4) testimony from Aiken residents as to Riviere’s alleged history and reputation as a “Peeping Tom.” Contact information for prior guests who were *not recorded* will not help Plaintiff show that Riviere’s recordings were not accidental.

Plaintiff also argues that contacting prior guests of Thomas and Riviere “is likely to lead to evidence related to [her] claims regarding to her stay” at the Property, but the South Carolina Supreme Court resoundingly rejected a nearly identical argument. In *Hollman v. Woolfson*, the Court found that the medical malpractice plaintiffs who sought to contact the defendants’ nonparty patients had not shown that such interviews were relevant and necessary, despite the plaintiffs’ “intent to use this personal information to buttress their claims by showing a propensity by [defendants] for malpractice.” 384 S.C. at 578, 683 S.E.2d at 499. These arguments were so weak that the *Hollman* court granted a *second* extraordinary writ to reverse the Circuit Court’s conclusion that contact with nonparties was necessary. The *Hollman* court was clear that how the defendant interacted with nonparty patients was irrelevant to the negligence and fraud claims, which only concerned how defendants treated the plaintiffs at issue. *Id.* at 579-80, 683 S.E.2d at 499. And while the Court found that contacting nonparty patients might have revealed relevant information to the SCUTPA claim, it held that the plaintiffs had not shown that such contact was necessary to pursue those claims; the plaintiffs had “failed to demonstrate with specificity what information they seek or how the lack of interviews with the nonparty patients will impair the presentation of their case to the extent that an unjust result is a real threat,” or that there were “no other reasonable alternatives available ... to discover the information they sought from the nonparty patients.” *Id.* at 581, 683 S.E.2d at 500.

Here, Plaintiff has not even attempted to explain what information she seeks to obtain from other guests of Thomas and Riviere, not to mention establish “exactly how the lack of information will 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 500. There is simply no reason to speak to the remaining guests, who were not recorded by Riviere. Plaintiff might *hope* that

interviews with other guests will drum up something relevant, but such fishing expeditions come nowhere close to satisfying the “necessary” standard under South Carolina law. Moreover, Plaintiff cannot establish there are no reasonable alternatives to seeking this information; she already has contact information for the individuals who were actually recorded, the names of the unrecorded guests, and the 21,000 recordings themselves. Therefore, this discovery cannot be necessary to her case because Plaintiff already has the means to contact other guests of Riviere and Thomas and to show that his recordings were not accidental.

II. The Court Should Deny Plaintiff’s Motion to Compel a Response to RFP No. 48 Regarding Criminal Records of Hosts on Airbnb’s Platform.

Airbnb conducts FCRA-compliant background checks of users who provide sufficient identifying information. Here, Airbnb conducted background checks for both Riviere and Thomas, contradicting one of Plaintiff’s core allegation in the amended complaint. In fact, as Airbnb’s corporate designee testified, the background checks searched not only national and state sex offender registries but also hundreds of sources at the state and county level for individual conviction history. That Riviere does not have any relevant criminal conviction is simply not in dispute.⁷ Indeed, no conviction is alleged in the complaint, and Airbnb’s background check on him did not identify any criminal convictions. As clearly described on Airbnb’s website, individuals who have been convicted of certain crimes may be deemed ineligible to have an Airbnb account—a determination that can be appealed. None of those circumstances are relevant here, where at all relevant times neither Riviere nor Thomas had criminal convictions.

In a scorched-earth tactic designed to harass Airbnb, Plaintiff seeks to compel Airbnb to

⁷ Plaintiff has claimed during discovery that Riviere was convicted only of a DUI. She has also claimed that Riviere was arrested (but not convicted) for “prowling” several decades ago in Florida. The FCRA, of course, prohibits the reporting of that arrest because it occurred more than seven years before any relevant background check. 15 U.S.C. § 1681c(a)(2).

reveal the identities of every host from the past ten years who has a criminal history (with no temporal or geographic limitation) linked to one of 82 listed offenses. There is absolutely no basis for this request. Compelling responses to this request would violate third-party privacy rights, be unduly burdensome, and require Airbnb to violate the Stored Communications Act. Despite these particularized harms, Plaintiff cannot—and has made no effort to—show that third-party criminal records are necessary to her case.

A. Compelling Production of Hosts’ Criminal History Would Invade Third-Party Privacy Rights and Be Unreasonably Burdensome.

Privacy. Although criminal records are public, a person’s criminal past is personal, private, and sensitive information, and a corporation’s mass disclosure of users’ criminal records would be highly invasive to these third parties’ privacy interests. Individuals have a “reasonable expectation[]” that companies that run background checks will not share their criminal past with opposing parties in cases that have nothing to do with them. *Walls*, 895 F.2d at 192; *cf. U.S. Dep’t of Just. v. Reps. Comm. For Freedom of Press*, 489 U.S. 749, 762-63 (1989) (rejecting respondents’ “cramped notion of personal privacy” where respondents argued that petitioner had minimal privacy interest in avoiding disclosure of criminal “rap sheet” which “summarized [events and information] previously disclosed to the public,” and holding that “a third party’s request for law enforcement records or information about a private citizen can reasonably be expected to invade that citizen’s privacy”). This privacy interest should not be ignored.

Burden. Producing all documents identifying any person who has hosted on Airbnb’s platform in the last decade who has ever been convicted of one of the 82 listed offenses would also be “unreasonably burdensome ... taking into accounts the needs of the case.” Rule 26(a), SCRCp. Airbnb does not maintain any identifiable documents that have Plaintiff’s requested information. At best, Airbnb would have to spend significant time searching across multiple databases,

compiling information, and manually reviewing individual user records just to *begin* to respond to Plaintiff's request. And Airbnb's policy for eligibility for prior convictions applies to all users, not just hosts. Airbnb has millions of hosts and many millions of users. This request would require Airbnb to review all users from the last decade to determine if they were a host whose background check was conducted and flagged criminal history, whether any criminal history fell within the 82 listed offenses, and whether there were any communications about eligibility or appeals or communications between users on the platform about the host's criminal history. This would undoubtedly impose a significant burden on Airbnb.

Stored Communications Act. Moreover, to the extent any *communications* identifying a host's criminal history exist, Airbnb would be unable to produce them pursuant to the Stored Communications Act. *See* 18 U.S.C. § 2702(a). Plaintiff's requests for documents identifying a host's criminal history is not, as Plaintiff argues, simply a request for "record or non-content based information." Mot. at 7; *see* 18 U.S.C. § 2702(c).

B. Plaintiff Has Not Shown That Criminal History of Airbnb Hosts Is Necessary to Her Claims.

Plaintiff cannot show that documents identifying any Airbnb host who has ever been convicted of certain offenses is necessary to her claims. She doesn't even try. She asserts only that it is "extremely relevant to Airbnb's false claim that 'Safety is their number one priority,'" without any supporting argument or explanation. Mot. at 3. But the identification of hosts with past criminal convictions is wholly irrelevant to Plaintiff's claims. For starters, Airbnb's representations about safety are only relevant to Plaintiff's claims to the extent that Plaintiff *relied* on those statements. Plaintiff, who did not coordinate or book the Property herself—her friend did—disavows reliance on *any* statement by Airbnb. *See* Ex. 2, Pl.'s Resp. to Airbnb's Interrog. No. 8 (Aug. 12, 2022) (Q. "Describe ***all*** diligence you conducted when selecting the Property")

A. “Plaintiff’s friend and tennis teammate, Michele Jain got the referral for the rentals from another tennis teammate, Tara Walters. The Plaintiff knew Jain arranged the rental through Airbnb, Inc.”) (emphasis added). Moreover, general, non-falsifiable statements about safety are not actionable. *See, e.g., Wright v. PRG Real Estate Mgmt.*, 413 S.C. 276, 289-90, 775 S.E.2d 399, 406 (Ct. App.), *reversed on different grounds*, 426 S.C. 202, 626 S.E.2d 285 (2019) (“[G]eneralized statements” about an apartment’s safety and security “simply cannot be unfair or deceptive acts under [SCUTPA.]”); *Lewis v. Trustmark Ins. Co. (Mut.)*, 182 F.3d 908 (4th Cir. 1999) (“Statements of a vague and general character cannot be read to make representations of a specific character.”).

The only two individuals whose criminal backgrounds could possibly be relevant and necessary to this case are Riviere, who surreptitiously recorded Plaintiff, and Thomas, who hosted the property on Airbnb’s platform. Airbnb has already provided Plaintiff with its background checks for Riviere and Thomas, which show no criminal convictions. Airbnb has also provided Plaintiff with its confidential background check policy, which demonstrates Airbnb’s process for determining eligibility of users who have prior convictions. If Plaintiff wants to pursue this non-actionable claim, the policies Airbnb has already produced will permit her to argue that Airbnb’s statement about prioritizing safety was false. On the other hand, the fact that some hosts may have convictions for the offenses at issue here—*e.g.*, “Resisting Arrest without violence,” “Disorderly Conduct,” “underage drinking,” and “Fraudulently obtaining food stamps,” *see* Mot. Ex. 1 at 4-7—will not help Plaintiff establish her theory that Airbnb has lied about prioritizing safety. The mere fact that someone previously committed one of these crimes does not falsify Airbnb’s purported representations. Further, documents identifying hosts who have ever received a conviction do not account for Airbnb’s process and policy for determining eligibility, including the amount of time that has passed since the conviction or any mitigating facts. Nor should Airbnb

have to litigate its decisions to let particular individuals use its platform when those individuals have nothing to do with this case. Documents identifying individuals who have committed various crimes at any point in time are simply not relevant or necessary to Plaintiff's claims.

CONCLUSION

Airbnb does not dispute that private or confidential information is often discoverable. Indeed, Airbnb has produced its own confidential policies and trade secrets in this very litigation. But courts take privacy and confidentiality concerns seriously, as they should, and therefore require the requesting party to show that the information is necessary. *Hollman*, 384 S.C. at 578, 683 S.E.2d at 498. Here, Plaintiff offers no specific need to invade the privacy of these unrelated guests and hosts. Nor does she make any effort to balance her purported need for the requested information against the strong privacy interests of third parties. *Hamm*, 312 S.C. at 242, 439 S.E.2d at 854 (noting Court "must weigh" the particularized harm against the *need* for discovery). Accordingly, Airbnb respectfully requests that the Court deny Plaintiff's motion to compel and issue a protective order to protect Airbnb from revealing the requested personal information of its users.

Dated this 23rd day of February, 2023.

Respectfully submitted,

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STATE OF SOUTH CAROLINA
COUNTY OF AIKEN

IN THE COURT OF COMMON PLEAS
SECOND JUDICIAL CIRCUIT

JULIANNE FOSTER,

Plaintiff,

v.

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

Defendants.

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

**PLAINTIFFS'S MOTION FOR RULE TO
SHOW CAUSE, REQUIRE COMPLIANCE
WITH THE COURT'S ORDERS
AND FOR SANCTIONS AND FEES**

TO: DEFENDANT AIRBNB, INC., AND THEIR ATTORNEYS:

Plaintiff Julianne Foster, by and through her undersigned attorneys hereby moves the Court to issue a Rule to Show Cause to Defendant Airbnb, Inc. ("Airbnb") commanding it to appear before the Court and show cause why it should not be held in contempt for failing to comply with the Court's Orders.

1. On June 7, 2022, Plaintiff served Airbnb with her Requests to Produce Numbers 16-44. (Ex. 1).
2. In its responses, Airbnb objected on numerous grounds. (Ex. 2).
3. On February 10, 2023, Plaintiff filed a Motion to Compel the production of these documents.
4. On November 1, 2022, Plaintiff served Airbnb with her Requests to Produce 45-48 ("RTP"). (Ex. 3).
5. In its responses, Airbnb objected on numerous grounds. (Ex. 4).

6. On January 18, 2023, Plaintiff filed a Motion to Compel the production of these documents.

7. Both Motions to Compel were heard on April 5, 2023. The Court granted both of the motions during the hearing – giving Airbnb 60 days within which to comply and produce the documents requested. Subsequently on May 25, 2023, the Court entered a Form 4 Order memorializing its decision. (Ex. 5).

8. On June 5, 2023, Airbnb produced some documents to Plaintiff, but informed the undersigned it was withholding production of the remaining responsive documents:

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

(Ex. 6).

9. In addition to the responsive documents Airbnb has admitted to withholding, other responsive documents have also not been produced. As discussed in the April 25, 2023 hearing, Airbnb has failed to produce any responsive internal email communications. (Ex. 7- April 5, 2023 Hearing Tr. 39:13-16). Plaintiff has attempted to discuss how Airbnb intends to perform searches for responsive ESI, but Airbnb has declined to respond.

10. Further, Airbnb has not produced any privilege log even after being informed that if they were withholding documents on the basis of privilege, a log must be produced.

11. The undersigned has attempted to resolve the matter without success.

Plaintiff respectfully requests the Court enter an Order finding Airbnb in contempt for failing to comply with the Court's Order and requiring Defendant Airbnb to immediately comply

with the Court's Order and award such other relief as is required and permitted by the applicable Rules of Civil Procedure under the facts as presented in this motion.

Respectfully submitted,

/s/Wesley D. Few

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-and-

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ATTORNEYS FOR PLAINTIFF JULIANNE
FOSTER

June 8, 2023
Greenville, South Carolina

EXHIBIT 1

WESLEY D. FEW, LLC

Attorney at Law

P.O. Box 9398, Greenville, South Carolina 29604
wes@wesleyfew.com | O: 864-527-5906

June 7, 2022

Via Email:

Andy Watson, Esq.
Butler Weihmuller Katz Craig LLP
11605 N. Community House Drive, Ste.150
Charlotte, NC 28277
awatson@butler.legal

RE: Julianne Foster vs. Rhett Riviere, Katherine A. Thomas, Chase Enterprises, LLC
of South Carolina, and Airbnb, Inc.
Case No.: 2021-CP-02-00889
Our File No.: 00305-001

Mr. Watson,

Enclosed and served upon you are Plaintiff's Amended Requests for Production 16-44 to Airbnb, Inc. and certificate of service for same.

With warm regards, I remain

Sincerely Yours,



Wesley D. Few

WDF/cgy

Enclosures

CC: All Counsel of Record (*Via email only*)
Ryan L. Beasley, Esq. (*Via email only*)
Deborah B. Barbier, Esq. (*Via email only*)
Client (*Via email only*)

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF AIKEN	)	2 ND JUDICIAL CIRCUIT
Julianne Foster,	)	
	)	CASE NO. 2021-CP-02-00889
Plaintiff,	)	
	)	PLAINTIFF'S AMENDED SECOND
vs.	)	SET OF REQUESTS FOR
	)	PRODUCTION TO DEFENDANT
Rhett Riviere, Katherine A. Thomas, Chase	)	AIRBNB, INC. – NO.'S 16-444
Enterprises, LLC of South Carolina, And	)	
Airbnb, Inc.,	)	
	)	
Defendants.	)	
	)	

TO: L. ANDREW WATSON, ESQUIRE, COUNSEL TO DEFENDANT AIRBNB, INC.

Pursuant to Rules 34 of the South Carolina Rules of Civil Procedure, Plaintiff Julianne Foster (“Plaintiff”) hereby requests that Defendant Airbnb, Inc. (“AIRBNB”) answer the following Requests for Production, in writing and under oath, within thirty (30) days from the date of the service hereof.

TABLE OF DEFINITIONS / ABBREVIATIONS

This section defines various words and phrases in this Notice. This information is provided to clarify the means of terms in this Notice to assist AIRBNB in understanding the objectives of Plaintiff’s discovery efforts, and to help locate and furnish the information and materials.

1. “AIRBNB” or “**Defendant**,” - Refers to AIRBNB, Inc., its subsidiaries, divisions, or any other entity (by whatever name and/or denomination), which is/was an owner, a predecessor or successor in interest, including any entity which may have merged or consolidated with AIRBNB’s designee may also be asked questions potentially known by another party, other contracting entities, or their agents or employees. By acceptance of this Notice, and production of a responsive witness thereto. AIRBNB acknowledges it will produce someone knowledgeable

about such matters. To the extent any other party, agent, or employee of AIRBNB can provide answers or responses unknown to AIRBNB's designated representative, be prepared to explain why that is the case.

2. The phrase "**writing and recording**" shall be defined under South Carolina Rules of Evidence Rule 1001(1), which specifically includes all electronic communications and electronically recorded information such as word processing files, e-mails, and computer / network backup media.

3. The term "**photograph**" shall be defined under South Carolina Rules of Evidence Rule 1001(2).

4. Where originals and/or non-identical copies are not available, "**writing and recording**" also means identical copies of original writing or recording and copies of non-identical copies.

5. "**Information**" - This term should include reference to both facts and applicable principles. This word should not be construed to be limited to any method of acquisition or compilation and should, therefore, be construed to include oral information and documents or other tangible objects.

REQUESTS FOR PRODUCTION

16. All documents reflecting the organizational, leadership and management structure of AIRBNB during the time period of January 1, 2019 through the present.

17. All non-privileged information of AIRBNB regarding the factual allegations in the case of *Foster v. Riviere, et al* – 2021-CP-02-00889.

18. All agreements and/or contracts between Rhett Riviere, Chase Enterprises, LLC of South Carolina, and/or Katherine Thomas with AIRBNB.

19. All records, reports, documents, correspondence, handwritten notes or otherwise, materials of any kind that concern, reference or relate to any of the following: Rhett

Riviere, Chase Enterprises, LLC of South Carolina, Katherine Thomas and/or Julianne Foster.

20. All documents which describe the process by which AIRBNB's online booking program notifies potential hosts of policies and procedures related to background checks.
21. All documents which describe the process by which AIRBNB checks public state and county criminal records, as well as state and national sex offender registries.
22. All documents which describe the process by which AIRBNB processes findings from public state and county criminal records, as well as state and national sex offender registries.
23. All documents which describe AIRBNB's policies related to rejecting a host from utilizing AIRBNB's online booking program or guest(s) reservation(s) canceling due to background check findings.
24. All documents which describe any agreement AIRBNB has related to filters for background checks with approved providers (i.e. canvassing public records whereby an arrest took place in addition to any convictions that followed).
25. All documents which describe AIRBNB's policies to execute removals of AIRBNB hosts; reinstatement after removal; criteria for host eligibility; and appeals of hosts after removal.
26. All documents that describe to audiences to whom AirCover protection is offered, including the circumstances under which hosts can opt out of AirCover protection.
27. All documents related to AIRBNB's governance of their privacy policies as they relate to disclosed or concealed monitoring devices in AIRBNB properties including data supporting removal, reinstatement, and appeals of hosts who violate the policy.
28. All documents related to AIRBNB and its hosts' compliance with state statutes concerning real estate property management licensure to hosts and potential hosts.

29. All communications between “Michele” and Defendant Katherine Thomas via AIRBNB’s online booking program since April 12, 2019.
30. All Protocols, manuals, memoranda, or other written standards of care or instructions that reference or concern the safety of guests while staying in an AIRBNB property during the time period of December 1, 2013 through the present.
31. All Protocols, manuals, memoranda, or other written standards of care or instructions that reference or concern the vetting of hosts by AIRBNB during the time period of December 1, 2013 through the present.
32. All Protocols, manuals, memoranda, or other written standards of care or instructions that reference or concern the inspection of host properties by AIRBNB during the time period of December 1, 2013 through the present.
33. All Protocols, manuals, memoranda, or other written standards of care or instructions that reference or concern the use of video cameras by AIRBNB hosts during the time period of December 1, 2013 through the present.
34. All reports and/or complaints made to AIRBNB of guests being secretly videotaped while staying in an AIRBNB during the time period of December 1, 2013 through the present.
35. All lawsuits filed against AIRBNB related to guests being secretly videotaped during the time period of December 1, 2013 through the present.
36. All settlements entered into by AIRBNB related to guests being secretly videotaped during the time period of December 1, 2013 through the present.
37. All information related to the employee training program for all employees of AIRBNB, Inc. that have responsibilities related to guest safety during the time period of December 1, 2013 through the present.
38. The internal reports and/or external reports and/or audits during the last ten years of AIRBNB that relate to guest safety during the time period of December 1, 2013 through

the present.

39. All documents which describe the process by which AIRBNB determines whether an AIRBNB host is the lawful owner and/or occupier of an AIRBNB property.
40. All audited financial statements reflecting the assets and liabilities of AIRBNB during the time period of 2013 through 2022.
41. All communications between AIRBNB and the company / entity known as TROOLY related to Katherine Thomas, for example, as same is identified in AIRBNB's production at pages: AIRBNB-000099, 000100, 000106, 000109 to 000111, 000113, 000114, and 000117 to 000122.
42. All communications between AIRBNB and the company / entity known as TROOLY related to Rhett Riviere, for example, as same is identified in AIRBNB's production at pages: AIRBNB-000099, 000100, 000106, 000109 to 000111, 000113, 000114, and 000117 to 000122.
43. All communications between AIRBNB and the company / entity known as TROOLY related to Chase Enterprises, LLC of South Carolina, for example, as same is identified in AIRBNB's production at pages: AIRBNB-000099, 000100, 000106, 000109 to 000111, 000113, 000114, and 000117 to 000122.
44. All agreements between AIRBNB and the company / entity known as TROOLY identified and described above that were in effect at any time since January 1, 2016.

WESLEY D. FEW, LLC

/s/Wesley D. Few

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ATTORNEYS FOR PLAINTIFF JULIANNE
FOSTER

June 7, 2022
Greenville, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF AIKEN	)	2 nd JUDICIAL CIRCUIT
	)	
JULIANNE FOSTER,	)	Case No: 2021-CP-02-00889
	)	
Plaintiff,	)	CERTIFICATE OF
	)	SERVICE
vs.	)	
	)	
RHETT RIVIERE, KATHERINE A. THOMAS,	)	
CHASE ENTERPRISES, LLC OF SOUTH	)	
CAROLINA, AND AIRBNB, INC.,	)	
	)	
Defendants.	)	

I, Cassy Young, on behalf of the law office of Wesley D. Few, LLC, attorneys for the Plaintiff in this action, do hereby certify that I have served the below parties and / or their counsel of record by Email as set forth below on this date in this action with a copy of the document(s) listed below.

1) Plaintiff's Amended Requests for Production 16-44 to Airbnb, Inc.

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/s/Cassy Young
Cassy Young

June 7, 2022
Greenville, South Carolina

EXHIBIT 2

STATE OF SOUTH CAROLINA

COUNTY OF AIKEN

JULIANNE FOSTER,

Plaintiff,

v.

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

Defendants.

IN THE COURT OF COMMON PLEAS

SECOND JUDICIAL CIRCUIT

CASE NO.: 2021-CP-02-00889

**AIRBNB, INC.'S RESPONSES TO
PLAINTIFF'S AMENDED SECOND SET
OF REQUESTS FOR PRODUCTION 16-
44**

COMES NOW the Defendant, Airbnb, Inc., pursuant to the South Carolina Rules of Civil Procedure and applicable law, and responds to Plaintiff's Amended Second Set of Requests for Production to Defendant Airbnb, Inc. No.'s 16-44 as follows:

GENERAL OBJECTIONS

Airbnb objects to the document requests from Plaintiff to the extent they are not reasonably calculated to lead to the discovery of admissible evidence; to the extent they seek any proprietary, confidential or sensitive corporate information of Airbnb (such documents will be labeled "CONFIDENTIAL" per the Court's September 16, 2021 Protective Order in this action); to the extent they seek work product prepared in anticipation of litigation or attorney-client privileged communications; to the extent they seek private personal information about non-parties to this action without their consent; and to the extent the requests are vague, ambiguous, and unduly burdensome, including by purporting to impose obligations upon Airbnb to create new records or search or compile records beyond those for the subject dispute. Airbnb also objects because the Requests are not limited in time and are thus overbroad, unduly burdensome, and not

reasonably calculated to lead to the discovery of admissible evidence; Airbnb will not produce documents created after the filing of the complaint. To the extent these Requests overlap with the topics proposed in Plaintiff's Rule 30(b)(6) deposition notice, Airbnb incorporates by reference the objections raised in its Motion for a Protective Order, the corresponding Memorandum of Law filed in support, and the oral argument on the motion. By agreeing to produce any documents in response to these Requests, Airbnb does not concede that it has any obligation to make available a corporate witness to give any testimony on a corresponding topic is appropriate. Similarly, if Airbnb agrees to make a corporate representative available to respond to, Airbnb does not concede that it has any obligation to produce documents on any related request for production.

Airbnb further objects to the extent the requests mischaracterize Airbnb's business. Airbnb provides an online marketplace that connects third-parties who wish to offer their unique accommodations (called "Hosts") with third-party travelers seeking to book accommodations (called "Guests"). Airbnb does not own, control or have the right to access the properties Hosts list on its platform. In this matter, the Host was Defendant Katherine Thomas, and the Guest who booked the Host's rental property was non-party Michelle Jain.

RESPONSES AND OBJECTIONS

16. All documents reflecting the organizational, leadership and management structure of AIRBNB during the time period of January 1, 2019 through the present.

RESPONSE: Airbnb objects to this Request for the reasons stated in its general objections, which it incorporates by reference here. Airbnb also objects to this Request on the grounds that it is overbroad, unduly burdensome, not

proportionate to the needs of the case, and compound. Some or all of this information is publicly available in Airbnb's public filings. Airbnb objects to this Request to the extent it seeks information protected by the attorney-client privilege and/or work product doctrine, or other applicable privileges. In addition, Airbnb objects to this Request as not likely to lead to evidence that is related to a claim or defense of any party in this case. Airbnb's organizational, leadership, or management structure has nothing to do with Plaintiff's claims.

17. All non-privileged information of AIRBNB regarding the factual allegations in the case of Foster v. Riviere, et al – 2021-CP-02-00889.

RESPONSE: Airbnb objects to this Request for the reasons stated in its general objections, which it incorporates by reference here. Airbnb also objects to this Request as vague and ambiguous; it does not understand what constitute the "factual allegations" here. Airbnb also objects to this Request as overbroad, unduly burdensome, and not proportionate to the needs of the case. In addition, Airbnb objects to this Request to the extent it seeks information protected by the attorney-client privilege and/or work product doctrine, or information protected by the Stored Communications Act or other applicable laws or doctrine.

Subject to the foregoing objections, Airbnb will produce responsive, non-privileged documents created before May 2019 concerning video cameras at the property that is the subject of this litigation, and any policy governing the use of video cameras by hosts that was in effect in May 2019 it identifies in a reasonably diligent search. It will also search for and produce any Airbnb background check policies effective between the summer of 2016 and May 2019 it identifies in a

reasonably diligent search. Unless specifically requested, Airbnb is not re-producing any documents produced by other Parties during the litigation.

18. All agreements and/or contracts between Rhett Riviere, Chase Enterprises, LLC of South Carolina, and/or Katherine Thomas with AIRBNB.

RESPONSE: Airbnb objects to this Request for the reasons stated in its general objections, which it incorporates by reference here. In addition, Airbnb objects to this Request to the extent it seeks information protected by the attorney-client privilege and/or work product doctrine, or other applicable privileges. Airbnb also objects to this Request as overbroad, unduly burdensome, and not proportionate to the needs of the case to the extent it sweeps in agreements or contracts not involving Airbnb and to the extent it addresses agreements and/or contracts that were not in effect during the events of May 17 and 18, 2019, that form the basis of Plaintiff's claims. None of that information is related to a claim or defense of any party in this case.

Subject to the foregoing objections, Airbnb responds as follows: Airbnb already produced in April the Terms of Service to which Katherine Thomas agreed. Airbnb will produce the Terms of Service to which Rhett Riviere agreed. Airbnb is not re-producing any documents previously produced by any party during the litigation.

19. All records, reports, documents, correspondence, handwritten notes or otherwise, materials of any kind that concern, reference or relate to any of the following: Rhett Riviere, Chase Enterprises, LLC of South Carolina, Katherine Thomas and/or Julianne Foster.

RESPONSE: Airbnb objects to this Request for the reasons stated in its general objections, which it incorporates by reference here. In addition, Airbnb objects to this Request to the extent it seeks information protected by the attorney-client privilege and/or work product doctrine, or information protected by the Stored Communications Act or other applicable laws or doctrine. Airbnb objects to this Request as overbroad, unduly burdensome, and not proportionate to the needs of the case. Nor are “[a]ll” such documents, no matter the author or subject, relevant to the specific claim or defense the parties have raised in this case. Finally, Airbnb objects to the undefined phrase “concern, reference or relate” as vague and ambiguous.

Subject to the foregoing objections, Airbnb responds as follows: Airbnb already produced in April user information from Thomas’ Airbnb account. It produced on July 6 a copy of the screen that Airbnb used to request information from users on July 17, 2016, as captured by the Wayback Machine. Thomas signed up using the “continue with Facebook” option, and therefore Airbnb did not request additional information from her through the sign-up screen. Additionally, Airbnb produced on July 6 a copy of (i) the information Thomas provided during account registration; (ii) the information Thomas provided in creating and managing her listings; (iii) communications between community support agents at partner organizations and Thomas through May 2019; and (iv) a list of Thomas’ reservations through May 2019 and associated payment data. After a reasonable search, Airbnb has not located other relevant records regarding Thomas.

Airbnb will search for and produce any (i) copies of any sign-up screen Riviere used to create an Airbnb account; and (ii) the information Riviere provided during account registration that Airbnb can locate after a reasonable search. After a reasonable search, Airbnb has not located other relevant, responsive records regarding Riviere.

After a reasonable search, Airbnb has not identified any responsive documents regarding Chase Enterprises or Julianne Foster before May 2019. Airbnb is not re-producing any documents previously produced by any party during the litigation.

20. All documents which describe the process by which AIRBNB's online booking program notifies potential hosts of policies and procedures related to background checks.

RESPONSE: Airbnb objects to this Request for the reasons stated in its general objections, which it incorporates by reference here. Airbnb objects to this Request as seeking information not reasonably calculated to lead to evidence related to the claim or defense of any party in this case. Hosts' knowledge of policies and procedures related to background checks are irrelevant to Plaintiff's claims, which relate to the sufficiency of the background checks of Ms. Thomas and Mr. Riviere that actually took place. Airbnb also objects to this Request as overbroad, unduly burdensome, and not proportionate to the needs of the case. Airbnb objects to this Request to the extent it seeks information protected by the attorney-client privilege and/or work product doctrine, or other applicable

privileges. Airbnb also objects to this Request as seeking private information protected by the Stored Communications Act or other applicable statute or regulation to the extent it calls for communications from third parties, or personally identifiable or otherwise sensitive information about third parties.

Subject to the foregoing objections, Airbnb will produce the Airbnb.com webpage that described Airbnb's background check policies and procedures as of the summer of 2016.

21. All documents which describe the process by which AIRBNB checks public state and county criminal records, as well as state and national sex offender registries.

RESPONSE: Airbnb objects to this Request for the reasons stated in its general objections, which it incorporates by reference here. In addition, Airbnb objects to this Request to the extent it seeks information protected by the attorney-client privilege and/or work product doctrine, or other applicable privileges. Airbnb also objects to this Request as overbroad, unduly burdensome, and not proportionate to the needs of the case to the extent it seeks information about specific background checks beyond those of Ms. Thomas and Mr. Riviere. Airbnb also objects to the undefined term "state and national sex offender registries," which is vague and ambiguous.

Subject to the foregoing objections, Airbnb will search for and produce any Airbnb responsive background check policies effective between the summer of 2016 and May 2019 it identifies in a reasonably diligent search. Airbnb is not re-producing any documents previously produced by any party during the litigation.

22. All documents which describe the process by which AIRBNB processes findings from public state and county criminal records, as well as state and national sex offender registries.

RESPONSE: Airbnb objects to this Request for the reasons stated in its general objections, which it incorporates by reference here. In addition, Airbnb objects to this Request to the extent it seeks information protected by the attorney-client privilege and/or work product doctrine, or other applicable privileges. Airbnb also objects to this Request as overbroad, unduly burdensome, and not proportionate to the needs of the case to the extent it seeks information about specific background checks beyond those of Ms. Thomas and Mr. Riviere or any background checks after May 2019.

Subject to the foregoing objections, Airbnb will search for and produce any responsive Airbnb background check policies effective between the summer of 2016 and May 2019 it identifies in a reasonably diligent search. Airbnb is not re-producing any documents previously produced by any party during the litigation.

23. All documents which describe AIRBNB's policies related to rejecting a host from utilizing AIRBNB's online booking program or guest(s) reservation(s) canceling due to background check findings.

RESPONSE: Airbnb objects to this Request for the reasons stated in its general objections, which it incorporates by reference here. In addition, Airbnb objects to this Request to the extent it seeks information protected by the attorney-client privilege and/or work product doctrine, or other applicable privileges.

Airbnb objects to this Request as overbroad, unduly burdensome, and not proportionate to the needs of the case by seeking “[a]ll” documents about any time a host was denied from using Airbnb’s platform due to a background check and without any limitation as to time period. The only specific background checks that are relevant here are those of Ms. Thomas and Mr. Riviere. Airbnb also objects to this Request as seeking information not reasonably calculated to lead to relevant information. Airbnb also objects to the phrase “guest(s) reservation(s) canceling due to background check findings” as vague and ambiguous. Airbnb also objects to this Request as seeking private information protected by the Stored Communications Act or other applicable statute or regulation to the extent it calls for communications from third parties, or personally identifiable or otherwise sensitive information about third parties.

Subject to the foregoing objections, Airbnb will search for and produce any Airbnb background check policies effective between the summer of 2016 and May 2019 it identifies in a reasonably diligent search. Airbnb is not re-producing any documents previously produced by any party during the litigation.

24. All documents which describe any agreement AIRBNB has related to filters for background checks with approved providers (i.e. canvassing public records whereby an arrest took place in addition to any convictions that followed).

RESPONSE: Airbnb objects to this Request for the reasons stated in its general objections, which it incorporates by reference here. In addition, Airbnb objects to this Request to the extent it seeks information protected by the attorney-client privilege and/or work product doctrine, or other applicable privileges.

Airbnb objects to this Request as overbroad, unduly burdensome, and not proportionate to the needs of the case by seeking “[a]ll” documents Airbnb uses to filter for background checks. Airbnb also objects to this Request as seeking information not reasonably calculated to lead to relevant information. Airbnb also objects to the undefined phrase “filters for background checks” as vague and ambiguous.

Subject to the foregoing objections, Airbnb will produce any Airbnb responsive background check policy effective between the summer of 2016 and May 2019 it identifies in a reasonably diligent search. Airbnb is not re-producing any documents previously produced by any party during the litigation.

25. All documents which describe AIRBNB’s policies to execute removals of AIRBNB hosts; reinstatement after removal; criteria for host eligibility; and appeals of hosts after removal.

RESPONSE: Airbnb objects to this Request for the reasons stated in its general objections, which it incorporates by reference here. In addition, Airbnb objects to this Request to the extent it seeks information protected by the attorney-client privilege and/or work product doctrine, or other applicable privileges. Airbnb also objects to this Request as overbroad, unduly burdensome, and not proportionate to the needs of the case by seeking “[a]ll” documents related to any time a host was denied from using Airbnb’s platform due to a background check and without any limitation as to time period. The only specific background checks that are relevant here are those of Ms. Thomas and Mr. Riviere. Airbnb also objects to this Request as seeking information not reasonably calculated to lead to relevant

information. Plaintiff's claims have nothing to do with reinstatements, appeals, or guest background checks. Airbnb also objects to the phrase "AIRBNB's policies to execute removals of AIRBNB hosts; reinstatement after removal; criteria for host eligibility; and appeals of hosts after removal" as unintelligible. Airbnb also objects to this Request as seeking private information protected by the Stored Communications Act or other applicable statute or regulation to the extent it calls for communications from third parties, or personally identifiable or otherwise sensitive information about third parties.

Subject to the foregoing objections, Airbnb will search for and produce any Airbnb responsive background check policies effective between the summer of 2016 and May 2019 it identifies in a reasonably diligent search. Airbnb is not re-producing any documents previously produced by any party during the litigation.

26. All documents that describe to audiences to whom AirCover protection is offered, including the circumstances under which hosts can opt out of AirCover protection.

RESPONSE: Airbnb objects to this Request for the reasons stated in its general objections, which it incorporates by reference here. In addition, Airbnb objects to this Request as seeking information not reasonably calculated to lead to relevant information. Airbnb objects to this Request to the extent it seeks information protected by the attorney-client privilege and/or work product doctrine, or other applicable privileges. Airbnb also objects to this Request as overbroad, unduly burdensome, and not proportionate to the needs of the case by seeking "[a]ll" documents that describe AirCover protection for all audiences. Airbnb also objects to this Request as seeking private information protected by the Stored

Communications Act or other applicable statute or regulation to the extent it calls for communications from third parties, or personally identifiable or otherwise sensitive information about third parties.

27. All documents related to AIRBNB's governance of their privacy policies as they relate to disclosed or concealed monitoring devices in AIRBNB properties including data supporting removal, reinstatement, and appeals of hosts who violate the policy.

RESPONSE: Airbnb objects to this Request for the reasons stated in its general objections, which it incorporates by reference here. In addition, Airbnb objects to this Request to the extent it seeks information protected by the attorney-client privilege and/or work product doctrine, or other applicable privileges. Airbnb objects to this Request as seeking information not reasonably calculated to lead to relevant information. Airbnb also objects to this Request as overbroad, unduly burdensome, and not proportionate to the needs of the case by seeking “[a]ll” documents—including data—“related” to any governance of privacy policies related to any type of monitoring device. Nor does this case involve any reinstatement or appeal of a host who violated a privacy policy. Airbnb also objects to this Request as seeking private information protected by the Stored Communications Act or other applicable statute or regulation to the extent it calls for communications from third parties, or personally identifiable or otherwise sensitive information about third parties.

28. All documents related to AIRBNB and its hosts' compliance with state statutes concerning real estate property management licensure to hosts and potential hosts.

RESPONSE: Airbnb objects to this Request for the reasons stated in its general objections, which it incorporates by reference here. In addition, Airbnb objects to this Request to the extent it seeks information protected by the attorney-client privilege and/or work product doctrine, or other applicable privileges. Airbnb also objects to this Request as seeking information not reasonably calculated to lead to relevant information. Airbnb does not provide legal advice to Hosts, nor does it have any responsibility to keep abreast of state and local properties where Hosts maintain properties, which is the responsibility of Hosts alone. Airbnb also objects to the undefined phrase “state statutes concerning real estate property management licensure.” Airbnb does not understand the specific statutes about which Plaintiff asks. Airbnb also objects to this Request as overbroad, unduly burdensome, and not proportionate to the needs of the case by seeking “[a]ll” documents regarding the statutes in all 50 states and without any limitation as to time period. Airbnb also objects to this Request as seeking private information protected by the Stored Communications Act or other applicable statute or regulation to the extent it calls for communications from third parties, or personally identifiable or otherwise sensitive information about third parties.

29. All communications between “Michele” and Defendant Katherine Thomas via AIRBNB’s online booking program since April 12, 2019.

RESPONSE: Airbnb objects to this Request for the reasons stated in its general objections, which it incorporates by reference here. In addition, Airbnb objects to this Request to the extent it seeks information protected by the attorney-client privilege and/or work product doctrine, or other applicable privileges. Airbnb

objects to the undefined name “Michele” as vague and ambiguous. For the purpose of this response, Airbnb interprets “Michele” to mean Michelle Jain, the guest who booked a stay at 115 Third Ave SW, Aiken, South Carolina on May 17 and 18, 2019. Airbnb also objects to this Request as seeking information not reasonably calculated to lead to relevant information. Airbnb also objects to this Request as overbroad, unduly burdensome, and not proportionate to the needs of the case by seeking testimony about “[a]ll” communications between a guest and a host. Airbnb also objects to this Request as seeking information protected by the Stored Communications Act or other applicable statute or regulation to the extent it calls for communications from third parties, or personally identifiable or otherwise sensitive information about third parties.

30. All Protocols, manuals, memoranda, or other written standards of care or instructions that reference or concern the safety of guests while staying in an AIRBNB property during the time period of December 1, 2013 through the present.

RESPONSE: Airbnb objects to this Request for the reasons stated in its general objections, which it incorporates by reference here. In addition, Airbnb objects to this Request to the extent it seeks information protected by the attorney-client privilege and/or work product doctrine, or other applicable privileges. Airbnb objects to this Request as overbroad, unduly burdensome, and not proportionate to the needs of the case by seeking “[a]ll” instructions that “reference or concern the safety of guests” for nearly a decade. Airbnb objects to the phrase “safety of guests” as vague and ambiguous. Airbnb also objects to this Request as seeking information not reasonably calculated to lead to relevant information. Airbnb also

objects to the term “AIRBNB property” because Airbnb does not own, control, or manage the properties hosts list via its online platform. Airbnb also objects to the phrase “Protocols, manuals, memoranda, or other written standards of care” as vague and ambiguous. Airbnb also objects to this Request as seeking private information protected by the Stored Communications Act or other applicable statute or regulation to the extent it calls for communications from third parties, or personally identifiable or otherwise sensitive information about third parties.

Subject to the foregoing objections, Airbnb will search for and produce any responsive Airbnb background check policies effective between the summer of 2016 and May 2019 it identifies in a reasonably diligent search, and any policies governing the use of video cameras by hosts that were in effect in May 2019 it identifies in a reasonably diligent search. Airbnb has already produced the applicable Terms of Service. Airbnb is not re-producing any documents previously produced by any party during the litigation.

31. All Protocols, manuals, memoranda, or other written standards of care or instructions that reference or concern the vetting of hosts by AIRBNB during the time period of December 1, 2013 through the present.

RESPONSE: Airbnb objects to this Request for the reasons stated in its general objections, which it incorporates by reference here. In addition, Airbnb objects to this Request to the extent it seeks information protected by the attorney-client privilege and/or work product doctrine, or other applicable privileges. Airbnb objects to this Request as overbroad, unduly burdensome, and not proportionate to the needs of the case by seeking “[a]ll” instructions that “reference or concern

the vetting of hosts” for nearly a decade. Airbnb objects to the phrase “vetting of hosts” as vague and ambiguous. Airbnb also objects to this Request as seeking information not reasonably calculated to lead to relevant information. Airbnb also objects to the phrase “Protocols, manuals, memoranda, or other written standards of care” as vague and ambiguous. Airbnb also objects to this Request as seeking private information protected by the Stored Communications Act or other applicable statute or regulation to the extent it calls for communications from third parties, or personally identifiable or otherwise sensitive information about third parties.

Subject to the foregoing objections, Airbnb will search for and produce any responsive Airbnb background check policies effective between the summer of 2016 and May 2019 it identifies in a reasonably diligent search, and any policies governing the use of video cameras by hosts that were in effect in May 2019 it identifies in a reasonably diligent search. Airbnb is not re-producing any documents previously produced by any party during the litigation.

32. All Protocols, manuals, memoranda, or other written standards of care or instructions that reference or concern the inspection of host properties by AIRBNB during the time period of December 1, 2013 through the present.

RESPONSE: Airbnb objects to this Request for the reasons stated in its general objections, which it incorporates by reference here. In addition, Airbnb objects to this Request to the extent it seeks information protected by the attorney-client privilege and/or work product doctrine, or other applicable privileges. Airbnb objects to this Request as overbroad, unduly burdensome, and not proportionate

to the needs of the case by seeking testimony about “[a]ll Protocols, manuals, memoranda, or other written standards of care” that “reference or concern” host property inspection, regardless of the reason, over the course of nearly a decade. Airbnb also objects to this Request as seeking information not reasonably calculated to lead to relevant information.

Subject to the foregoing objections, Airbnb will search for and produce any responsive Airbnb policies governing host property inspections in South Carolina effective between the summer of 2016 and May 2019, if any, it identifies in a reasonably diligent search. Airbnb is not re-producing any documents previously produced by any party during the litigation.

33. All Protocols, manuals, memoranda, or other written standards of care or instructions that reference or concern the use of video cameras by AIRBNB hosts during the time period of December 1, 2013 through the present.

RESPONSE: Airbnb objects to this Request for the reasons stated in its general objections, which it incorporates by reference here. In addition, Airbnb objects to this Request to the extent it seeks information protected by the attorney-client privilege and/or work product doctrine, or other applicable privileges. Airbnb objects to this Request as overbroad, unduly burdensome, and not proportionate to the needs of the case by seeking testimony about “[a]ll Protocols, manuals, memoranda, or other written standards of care or instructions” that “reference or concern” policies governing the use of video cameras, over the course of nearly a decade. Airbnb also objects to this Request as seeking information not reasonably calculated to lead to relevant information.

Subject to the foregoing objections, Airbnb will produce any responsive policies governing the use of video cameras by hosts that were in effect in May 2019 it identifies in a reasonably diligent search. Airbnb is not re-producing any documents previously produced by any party during the litigation.

34. All reports and/or complaints made to AIRBNB of guests being secretly videotaped while staying in an AIRBNB during the time period of December 1, 2013 through the present.

RESPONSE: Airbnb objects to this Request for the reasons stated in its general objections, which it incorporates by reference here. In addition, Airbnb objects to this Request to the extent it seeks information protected by the attorney-client privilege and/or work product doctrine, or other applicable privileges. Airbnb objects to this Request as overbroad, unduly burdensome, and not proportionate to the needs of the case by seeking testimony about every single “report[] and/or complaint[]” over the course of nearly a decade without any limitation in geographic scope. Airbnb also objects to this Request as seeking information not reasonably calculated to lead to relevant information. Airbnb also objects to this Request as seeking private information protected by the Stored Communications Act or other statute or regulation to the extent it calls for communications from third parties, or personally identifiable or otherwise sensitive information about third parties.

35. All lawsuits filed against AIRBNB related to guests being secretly videotaped during the time period of December 1, 2013 through the present.

RESPONSE: Airbnb objects to this Request for the reasons stated in its general objections, which it incorporates by reference here. In addition, Airbnb objects to this Request to the extent it seeks information protected by the attorney-client privilege and/or work product doctrine, or other applicable privileges. Airbnb objects to this Request as overbroad, unduly burdensome, and not proportionate to the needs of the case by seeking testimony about every single lawsuit filed against Airbnb over the course of nearly a decade without any limitation in geographic scope. Airbnb objects to this Request as seeking information that is publicly available and, in the alternative, as protected from disclosure to the extent any requested information is not public and subject to a protective order or other court order preventing its disclosure. Airbnb also objects to this Request as seeking information not reasonably calculated to lead to relevant information.

36. All settlements entered into by AIRBNB related to guests being secretly videotaped during the time period of December 1, 2013 through the present.

RESPONSE: Airbnb objects to this Request for the reasons stated in its general objections, which it incorporates by reference here. In addition, Airbnb objects to this Request to the extent it seeks information protected by the attorney-client privilege and/or work product doctrine, or other applicable privileges. Airbnb objects to this Request as overbroad, unduly burdensome, and not proportionate to the needs of the case by seeking highly confidential information about every single lawsuit filed against Airbnb over the course of nearly a decade without any limitation in geographic scope. Airbnb also objects to this Request as seeking information not reasonably calculated to lead to relevant information.

Airbnb also objects to this Request as seeking private information protected by the Stored Communications Act or other applicable statute or regulation to the extent it calls for communications from third parties, or personally identifiable or otherwise sensitive information about third parties.

37. All information related to the employee training program for all employees of AIRBNB, Inc. that have responsibilities related to guest safety during the time period of December 1, 2013 through the present.

RESPONSE: Airbnb objects to this Request for the reasons stated in its general objections, which it incorporates by reference here. In addition, Airbnb objects to this Request to the extent it seeks information protected by the attorney-client privilege and/or work product doctrine, or other applicable privileges. Airbnb objects to this Request as overbroad, unduly burdensome, and not proportionate to the needs of the case by seeking testimony about confidential employee records for anyone whose responsibilities touch on any type of “guest safety” for a period of almost ten years. Airbnb objects to the undefined phrase “responsibilities related to guest safety” as vague and ambiguous. Airbnb also objects to this Request as seeking information not reasonably calculated to lead to relevant information. Airbnb also objects to this Request to the extent it encompasses material protected from discovery by the attorney-client privilege, work product doctrine, or any other doctrine.

38. The internal reports and/or external reports and/or audits during the last ten years of AIRBNB that relate to guest safety during the time period of December 1, 2013 through the present.

RESPONSE: Airbnb objects to this Request for the reasons stated in its general objections, which it incorporates by reference here. In addition, Airbnb objects to this Request to the extent it seeks information protected by the attorney-client privilege and/or work product doctrine, or other applicable privileges. Airbnb objects to this Request as overbroad, unduly burdensome, and not proportionate to the needs of the case by seeking testimony about every “internal and/or external report[] and/or audit[]” relating to any form of “guest safety” for the past decade. Airbnb also objects to the phrase “relate to guest safety” as vague and ambiguous. This Request is also unintelligible; a “report” from April 2012 could not possibly relate to guest safety in December 2013, and neither category is relevant to this May 2019 incident. Airbnb also objects to this Request as seeking information not reasonably calculated to lead to relevant information.

39. All documents which describe the process by which AIRBNB determines whether an AIRBNB host is the lawful owner and/or occupier of an AIRBNB property.

RESPONSE: Airbnb objects to this Request for the reasons stated in its general objections, which it incorporates by reference here. In addition, Airbnb also objects to this Request as seeking information not reasonably calculated to lead to relevant information. Airbnb objects to this Request to the extent it seeks information protected by the attorney-client privilege and/or work product doctrine, or other applicable privileges. Airbnb also objects to the term “AIRBNB property” because Airbnb does not own, control, or manage the properties hosts list via its online platform. Airbnb also objects to this Request as overbroad, unduly burdensome, and not proportionate to the needs of the case by seeking “[a]ll”

documents related to the process by which Airbnb determines whether a host is the lawful owner and/or occupier of an AIRBNB property. A host's lawful ownership or occupation of property is relevant here at most as it relates to those of Ms. Thomas.

40. All audited financial statements reflecting the assets and liabilities of AIRBNB during the time period of 2013 through 2022.

RESPONSE: Airbnb objects to this Request for the reasons stated in its general objections, which it incorporates by reference here. In addition, Airbnb objects to this Request to the extent it seeks information protected by the attorney-client privilege and/or work product doctrine, or other applicable privileges. Airbnb objects to the undefined terms "assets and liabilities" as vague and ambiguous. Airbnb also objects to this Request as seeking information that is either publicly available through Airbnb's SEC filings, or else highly confidential, and without any limitation as to time period. Airbnb also objects to this Request as seeking information not reasonably calculated to lead to relevant information and is designed to harass.

41. All communications between AIRBNB and the company / entity known as TROOLY related to Katherine Thomas, for example, as same is identified in AIRBNB's production at pages: AIRBNB-000099, 000100, 000106, 000109 to 000111, 000113, 000114, and 000117 to 000122.

RESPONSE: Airbnb objects to this Request for the reasons stated in its general objections, which it incorporates by reference here. In addition, Airbnb also objects to this Request as seeking information not reasonably calculated to

lead to relevant information. Airbnb objects to this Request as unintelligible. As a quick search would have revealed, Airbnb acquired Trooly in June 2017, at which point it ceased operating as an independent company. Airbnb also objects to this Request as overbroad, unduly burdensome, and not proportionate to the needs of the case. Airbnb further objects to operating to the extent it seeks information protected by the attorney-client privilege and/or work product doctrine, or other applicable privileges.

After a reasonable search, Airbnb states there are no responsive communications between Airbnb and Trooly. The cited Trooly checks were completed automatically through Trooly's Application Programming Interface (API), and Airbnb produced the Trooly code it identified after a reasonable search for those checks on April 8.

42. All communications between AIRBNB and the company / entity known as TROOLY related to Rhett Riviere, for example, as same is identified in AIRBNB's production at pages: AIRBNB-000099, 000100, 000106, 000109 to 000111, 000113, 000114, and 000117 to 000122.

RESPONSE: Airbnb objects to this Request for the reasons stated in its general objections, which it incorporates by reference here. In addition, Airbnb also objects to this Request as seeking information not reasonably calculated to lead to relevant information. Airbnb objects to this Request as unintelligible. As a quick search would have revealed, Airbnb acquired Trooly in June 2017, at which point it ceased operating as an independent company. Airbnb also objects to this Request as overbroad, unduly burdensome, and not proportionate to the needs of

the case. Airbnb further objects to operating to the extent it seeks information protected by the attorney-client privilege and/or work product doctrine, or other applicable privileges.

After a reasonable search, Airbnb states there are no responsive communications between Airbnb and Trooly. The cited Trooly checks were completed automatically through Trooly's Application Programming Interface (API), and Airbnb produced the Trooly code it identified after a reasonable search for those checks on April 8.

43. All communications between AIRBNB and the company / entity known as TROOLY related to Chase Enterprises, LLC of South Carolina, for example, as same is identified in AIRBNB's production at pages: AIRBNB-000099, 000100, 000106, 000109 to 000111, 000113, 000114, and 000117 to 000122.

RESPONSE: Airbnb objects to this Request for the reasons stated in its general objections, which it incorporates by reference here. In addition, Airbnb also objects to this Request as seeking information not reasonably calculated to lead to relevant information. Airbnb objects to this Request as unintelligible. As a quick search would have revealed, Airbnb acquired Trooly in June 2017, at which point it ceased operating as an independent company. Airbnb also objects to this Request as overbroad, unduly burdensome, and not proportionate to the needs of the case. Airbnb further objects to operating to the extent it seeks information protected by the attorney-client privilege and/or work product doctrine, or other applicable privileges.

After a reasonable search, Airbnb states there are no responsive communications between Airbnb and Trooly. The cited Trooly checks were completed automatically through Trooly's Application Programming Interface (API), and Airbnb produced the Trooly code it identified after a reasonable search for those checks on April 8.

44. All agreements between AIRBNB and the company / entity known as TROOLY identified and described above that were in effect at any time since January 1, 2016..

RESPONSE: Airbnb objects to this Request for the reasons stated in its general objections, which it incorporates by reference here. In addition, Airbnb also objects to this Request as seeking information not reasonably calculated to lead to relevant information. Airbnb objects to this Request as unintelligible. As a quick search would have revealed, Airbnb acquired Trooly in June 2017, at which point it ceased operating as an independent company. Airbnb also objects to this Request as overbroad, unduly burdensome, and not proportionate to the needs of the case. Airbnb further objects to operating to the extent it seeks information protected by the attorney-client privilege and/or work product doctrine, or other applicable privileges.

Subject to the foregoing objections, Airbnb will search for and produce any agreement between Airbnb and Trooly that were in effect between the summer of 2016 and when Airbnb acquired Trooly in June 2017. Airbnb will not produce any agreements related to Trooly's acquisition by Airbnb.

BUTLER WEIHMULLER KATZ CRAIG LLP



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Attorneys for Airbnb, Inc.

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing **AIRBNB'S RESPONSES TO PLAINTIFF'S AMENDED SECOND SET OF REQUESTS FOR PRODUCTION 16-44** was served this 8th day of July, 2022, via email, to the following:

Wesley D. Few
Wesley D. Few, LLC
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Greenville, SC 29604
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Attorney for Plaintiff

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Ryan L. Beasley
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L. Andrew Watson

EXHIBIT 3

DEBORAH B. BARBIER
ATTORNEY AT LAW

1811 PICKENS STREET
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE (803) 445-1032

FAX (803) 445-1036
EMAIL: dbb@deborahbarbier.com
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November 1, 2022

VIA EMAIL - beattie@beattieashmore.com:

Beattie Ashmore
Beattie B. Ashmore, P.A.
650 East Washington Street
Greenville, South Carolina 29601

RE: Julianne Foster vs. Rhett Riviere, Katherine A. Thomas, Chase Enterprises, LLC
of South Carolina, and Airbnb, Inc.
Case No.: 2021-CP-02-00889

Dear Beattie,

Enclosed and served upon you are Plaintiff's Requests for Production 45-48 to Airbnb,
Inc. and certificate of service for same.

Best regards,

s/Deborah B. Barbier
Deborah B. Barbier

DBB Enclosures

CC: All Counsel of Record (*Via email only*)
Ryan L. Beasley, Esq. (*Via email only*) Wes Few, Esq. (*Via email only*)
Client (*Via email only*)

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF AIKEN	)	2 ND JUDICIAL CIRCUIT
Julianne Foster,	)	
	)	CASE NO. 2021-CP-02-00889
Plaintiff,	)	
	)	PLAINTIFF’S REQUEST FOR
vs.	)	PRODUCTION TO DEFENDANT
	)	AIRBNB, INC. – NOS. 45 -
Rhett Riviere, Katherine A. Thomas, Chase	)	
Enterprises, LLC of South Carolina, And	)	
Airbnb, Inc.,	)	
	)	
Defendants.	)	

TO: BEATTIE B. ASHMORE, ESQUIRE, COUNSEL TO DEFENDANT AIRBNB, INC.

Pursuant to Rules 34 of the South Carolina Rules of Civil Procedure, Plaintiff Julianne Foster (“Plaintiff”) hereby requests that Defendant Airbnb, Inc. (“AIRBNB”) answer the following Requests for Production, in writing and under oath, within thirty (30) days from the date of the service hereof.

TABLE OF DEFINITIONS / ABBREVIATIONS

This section defines various words and phrases in this Notice. This information is provided to clarify the means of terms in this Notice to assist AIRBNB in understanding the objectives of Plaintiff’s discovery efforts, and to help locate and furnish the information and materials.

1. “AIRBNB” or “**Defendant**,” - Refers to AIRBNB, Inc., its subsidiaries, divisions, or any other entity (by whatever name and/or denomination), which is/was an owner, a predecessor or successor in interest, including any entity which may have merged or consolidated with AIRBNB’s designee may also be asked questions potentially known by another party, other contracting entities, or their agents or employees. By acceptance of this Notice, and production of a responsive witness thereto. AIRBNB acknowledges it will produce someone knowledgeable

about such matters. To the extent any other party, agent, or employee of AIRBNB can provide answers or responses unknown to AIRBNB's designated representative, be prepared to explain why that is the case.

2. The phrase "**writing and recording**" shall be defined under South Carolina Rules of Evidence Rule 1001(1), which specifically includes all electronic communications and electronically recorded information such as word processing files, e-mails, and computer / network backup media.

3. The term "**photograph**" shall be defined under South Carolina Rules of Evidence Rule 1001(2).

4. Where originals and/or non-identical copies are not available, "**writing and recording**" also means identical copies of original writing or recording and copies of non-identical copies.

5. "**Information**" - This term should include reference to both facts and applicable principles. This word should not be construed to be limited to any method of acquisition or compilation and should, therefore, be construed to include oral information and documents or other tangible objects.

6. The term "**Guest**" shall be defined as Airbnb Members using Host Services as referenced in Airbnb's Terms of Service (Last Updated: April 16, 2018). *See* AIRBNB 000371.

7. The term "**Host**" shall be defined as Members who offer certain third parties services as referenced in Airbnb's Terms of Service (Last Updated: April 16, 2018). *See* **AIRBNB 000371**.

REQUESTS FOR PRODUCTION

45. Provide all contact information in the possession of Airbnb for each and every Guest

associated with the **reservation id number** which is listed in the attached **Exhibit A**. At a minimum, provide the following information for the Guest(s) associated with the reservation id number:

- a. The Guest's user id(s);
- b. All names associated with the Guest(s)' user id; and
- c. All contact information associated with the Guest(s) in the possession or control of Airbnb.

46. Provide all contact information in the possession or control of Airbnb for each and every Guest(s) associated with the **confirmation code** which is listed in the attached **Exhibit A**. At a minimum, provide the following information for the Guest(s) associated with the confirmation code:

- a. The Guest(s)' user id(s);
- b. All names associated with the Guest(s)' user id; and
- c. All contact information associated with the Guest(s) in the possession or control of Airbnb.

47. Provide all contact information in the possession of Airbnb for each and every Guest associated with the **id product** which is listed in the attached **Exhibit B**. At a minimum, provide the following information for the Guest associated with the id product:

- a. The Guest(s) user id(s);
- b. All names associated with the Guest(s)' user id; and
- c. All contact information associated with the Guest(s) in the possession or control of Airbnb.

48. Provide all documents which identify any individual who has been an Airbnb Host during the time period of December 1, 2013 until the present who has been convicted of any of the

following offenses¹:

1. Inchoate and Secondary Offenses:

- a. Aiding and abetting
- b. Conspiracy
- c. Accessory
- d. Accessory after the fact
- e. Attempt to Commit Sexual Offense
- f. Attempt to Commit Violent Offense
- g. Intent to Commit Sexual Offense
- h. Intent to Commit Violent Offense

2. Adjudicatory Offenses and Dispositions

- a. Probation Violation
- b. Bail Jumping
- c. Obstruction of Justice/Contempt of Court
- d. Deferred Imposition of Sentence

3. Sexual Offenses

- a. Bestiality
- b. Lewd and Lacivious Acts
- c. Incest
- d. Prostitution
- e. Sexual Harassment

4. Violent Offenses

- a. Manslaughter (Involuntary, Vehicular)

¹ These offenses are listed in the “Violation Categorization” of Airbnb’s Background Check Policy (Last Updated: 1/6/2018) See **Attached Exhibit C - AIRBNB 0001335 – 1345.**

- b. Threats of Violence (including Terroristic Threats)
- c. Violating a restraining/protection order
- d. Having a restraining/protection order taken out against you
- e. Simple Assault
- f. Conspiracy to Commit Assault
- g. Battery (Misdemeanor)
- h. Non-Violent Weapons charges (possession, illegal possession, non-firearm weapons charges)
- i. Harassment
- j. Stalking
- k. Organized Crime/RICO
- l. Elder Abuse
- m. Child Abuse
- n. Animal Abuse
- o. Child Neglect
- p. Disorderly Conduct
- q. Resisting Arrest without violence
- r. Resisting Arrest with Violent Component
- s. Fleeing Police without Violence
- t. Fleeing Police with Violent Component

5. Fraud and Dishonesty

- a. Embezzlement
- b. Hacking/Computer Crime
- c. Fraud

- d. Credit Card Fraud
- e. Mail/Wire Fraud
- f. Tax Fraud
- g. Extortion
- h. Blackmail
- i. Forgery
- j. Counterfeiting
- k. Online Impersonation
- l. Bribery
- m. Perjury
- n. Use of a False Identity (e.g. underage drinking, using a fake ID to get into a club, election fraud)
- o. Insider Trading
- p. Fraudulently obtaining food stamps or other public benefit

6. Property Damage and Theft

- a. Robbery (Misdemeanor)
- b. Burglary (Felony)
- c. Burglary (Misdemeanor)
- d. Property Damage (Felony)
- e. Theft (Felony)
- f. Theft (Misdemeanor)
- g. Breaking and Entering (Misdemeanor)
- h. Property Damage/ Vandalism (Misdemeanor)
- i. Larceny (Felony)

- j. Petit Larceny/Theft
- k. Shoplifting
- l. Theft by Check/Theft by Credit Card
- m. Theft of Services
- n. Trespassing

7. Drug Offenses

- a. Distribution (under Drug Offenses)
- b. Maintaining a Drug House
- c. Manufacturing, Production, Cultivation – Not marijuana
- d. Manufacturing/Delivery Combined
- e. Manufacturing, Production, Cultivation for marijuana for
NON personal use
- f. Sale or Delivery
- g. Chil
- h. Possession – Not Marijuana
- i. Possession of Drug Paraphernalia
- j. Attempted possession with intent to distribute

8. Privacy

- a. Voyeurism
- b. Unlawful Surveillance
- c. Indecent Exposure
- d. Public Lewdness
- e. Eavesdropping

s/Deborah B. Barbier
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ATTORNEYS FOR PLAINTIFF JULIANNE
FOSTER

November 1, 2022
Greenville, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF AIKEN	)	2 ND JUDICIAL CIRCUIT
Julianne Foster,	)	
	)	CASE NO. 2021-CP-02-00889
Plaintiff,	)	
	)	CERTIFICATE OF SERVICE
vs.	)	
Rhett Riviere, Katherine A. Thomas, Chase	)	
Enterprises, LLC of South Carolina, And	)	
Airbnb, Inc.,	)	
	)	
Defendants.	)	

I, Deborah Barbier, attorney for the Plaintiff in this action, do hereby certify that I have served the below parties and / or their counsel of record by Email as set forth below on this date in this action with a copy of the document(s) listed below.

1) Plaintiff's Requests for Production 45 - 48 to Airbnb, Inc.

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s/Deborah Barbier
Deborah Barbier

November 1, 2022
Columbia, South Carolina

EXHIBIT 4

STATE OF SOUTH CAROLINA

COUNTY OF AIKEN

JULIANNE FOSTER,

Plaintiff,

v.

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

Defendants.

IN THE COURT OF COMMON PLEAS

SECOND JUDICIAL CIRCUIT

CASE NO.: 2021-CP-02-00889

**AIRBNB, INC.'s RESPONSES TO
PLAINTIFF'S REQUESTS FOR
PRODUCTION TO DEFENDANT
AIRBNB, INC. – NOS. 45-48**

COMES NOW the Defendant, Airbnb, Inc., pursuant to the South Carolina Rules of Civil Procedure and applicable law, and responds to Plaintiff's Requests for Production to Defendant Airbnb, Inc.'s Nos. 45-48 (the "Requests") as follows:

GENERAL OBJECTIONS

Airbnb objects to the document Requests from Plaintiff to the extent they are not reasonably calculated to lead to the discovery of admissible evidence; to the extent they seek any proprietary, confidential or sensitive corporate information of Airbnb (such documents will be labeled "CONFIDENTIAL" per the Court's September 16, 2021 Protective Order in this action); to the extent they seek work product prepared in anticipation of litigation or attorney-client privileged communications; to the extent they seek private personal information about non-parties to this action without their consent; and to the extent the Requests are vague, ambiguous, and unduly burdensome, including by purporting to impose obligations upon Airbnb to create new records or search or compile records beyond those for the subject dispute. Airbnb also objects because the Requests are not limited in time and are thus overbroad, unduly burdensome, and not

reasonably calculated to lead to the discovery of admissible evidence; Airbnb will not produce documents created after the filing of the complaint. Airbnb objects to the Requests to the extent they seek documents already in Plaintiff's possession, custody, or control. To the extent Airbnb ultimately produces any documents in response to these Requests, Airbnb does not concede that it has any obligation to make available a corporate witness to give any testimony on a corresponding topic is appropriate. Similarly, if Airbnb agrees to make a corporate representative available to respond to, Airbnb does not concede that it has any obligation to produce documents on any related request for production.

RESPONSES AND OBJECTIONS

45. Provide all contact information in the possession of Airbnb for each and every Guest(s) associated with the **reservation id number** which is listed in the attached **Exhibit A**. At a minimum, provide the following information for the Guest(s) associated with the reservation id number:

- a. The Guest's user id(s);
- b. All names associated with the Guest(s)' user id; and
- c. All contact information associated with the Guest(s) in the possession or control of Airbnb.

RESPONSE: Airbnb objects to this Request for the reasons stated in its general objections, which it incorporates by reference here.

Airbnb objects to this Request because it seeks private information protected by South Carolina's constitutional right to privacy, S.C. Const. Art. 1, § 10; the South Carolina Personal Financial Security Act, S.C. Code Ann. § 16-13-500

et seq.; the Stored Communications Act; California's constitutional right to privacy, Cal. Const. Art. I, § 1; the California Consumer Privacy Act, Cal. Civ. Code § 1798, *et seq.*; the California Financial Information Privacy Act, Cal. Fin. Code § 4052, *et seq.*; and any other applicable constitutional, statutory, and/or common-law privacy rights of entities or persons to the extent it calls for communications from third parties, or personally identifiable or otherwise sensitive information about third parties. The information requested is about third parties who bear no relevance to this lawsuit and have not consented to the disclosure of their personal information to Plaintiff's attorneys.

Airbnb objects to this Request as unintelligible insofar as it requests information regarding certain "reservation id number[s]" purportedly listed in "Exhibit A" to Plaintiff's Requests; "Exhibit A" does not refer to any "reservation id number[s]." Airbnb interprets this Request as instead referring to the "reservation_id[s]" listed in "Exhibit B" to Plaintiff's Requests. Airbnb also objects to this Request as seeking information not reasonably calculated to lead to relevant information. Airbnb further objects to this Request to the extent it seeks documents already in Plaintiff's possession, custody, or control; Airbnb will not produce such documents. Airbnb also objects to this Request on the grounds that it is overbroad, unduly burdensome, not proportionate to the needs of the case because it seeks "all contact information" for Guests other than Michelle Jain, the guest who booked Plaintiff's stay at 115 Third Ave SW, Aiken, South Carolina on May 17 and 18, 2019. Information regarding guests and reservations made by anyone other than Ms. Jain or Plaintiff is not likely to lead to evidence that is related

to a claim or defense of any party in this case. Nor is such information regarding entirely unrelated guests and reservations relevant to any of the acts or omissions Plaintiff alleges to have taken place on May 17 and 18, 2019 during Plaintiff's stay at 115 Third Ave SW, Aiken, South Carolina. Airbnb also objects to this Request as compound. Airbnb also objects to this Request as duplicative of Request No. 46, which seeks the same information regarding the same guests referenced in this Request.

46. Provide all contact information in the possession or control of Airbnb for each and every Guest(s) associated with the **confirmation code** which is listed in the attached **Exhibit A**. At a minimum, provide the following information for the Guest(s) associated with the confirmation code:

- a. The Guest(s)' user id(s);
- b. All names associated with the Guest(s)' user id; and
- c. All contact information associated with the Guest(s) in the possession or control of Airbnb.

RESPONSE: Airbnb objects to this Request for the reasons stated in its general objections, which it incorporates by reference here.

Airbnb objects to this Request because it seeks private information protected by South Carolina's constitutional right to privacy, S.C. Const. Art. 1, § 10; the South Carolina Personal Financial Security Act, S.C. Code Ann. § 16-13-500 *et seq.*; the Stored Communications Act; California's constitutional right to privacy, Cal. Const. Art. I, § 1; the California Consumer Privacy Act, Cal. Civ. Code § 1798, *et seq.*; the California Financial Information Privacy Act, Cal. Fin. Code § 4052, *et*

seq.; and any other applicable constitutional, statutory, and/or common-law privacy rights of entities or persons to the extent it calls for communications from third parties, or personally identifiable or otherwise sensitive information about third parties. The information requested is about third parties who bear no relevance to this lawsuit and have not consented to the disclosure of their personal information to Plaintiff's attorneys.

Airbnb objects to this Request as unintelligible insofar as it requests information regarding certain "confirmation code[s]" purportedly listed in "Exhibit A" to Plaintiff's Requests; "Exhibit A" does not refer to any "confirmation code[s]." Airbnb interprets this Request as instead referring to the "confirmation_code[s]" listed in "Exhibit B" to Plaintiff's Requests. Airbnb also objects to this Request as seeking information not reasonably calculated to lead to relevant information. Airbnb further objects to this Request to the extent it seeks documents already in Plaintiff's possession, custody, or control; Airbnb will not produce such documents. Airbnb also objects to this Request on the grounds that it is overbroad, unduly burdensome, not proportionate to the needs of the case because it seeks "all contact information" for Guests other than Michelle Jain, the guest who booked Plaintiff's stay at 115 Third Ave SW, Aiken, South Carolina on May 17 and 18, 2019. Information regarding guests and reservations made by anyone other than Ms. Jain or Plaintiff is not likely to lead to evidence that is related to a claim or defense of any party in this case. Nor is such information regarding entirely unrelated guests and reservations relevant to any of the acts or omissions Plaintiff alleges to have taken place on May 17 and 18, 2019 during Plaintiff's stay

at 115 Third Ave SW, Aiken, South Carolina. Airbnb also objects to this Request as compound. Airbnb also objects to this Request as duplicative of Request No. 45, which seeks the same information regarding the same guests referenced in this Request.

47. Provide all contact information in the possession of Airbnb for each and every Guest associated with the **id product** which is listed in the attached **Exhibit B**. At a minimum, provide the following information for the Guest associated with the id product:

- a. The Guest(s) user id(s);
- b. All names associated with the Guest(s)' user id; and
- c. All contact information associated with the Guest(s) in the possession or control of Airbnb.

RESPONSE: Airbnb objects to this Request for the reasons stated in its general objections, which it incorporates by reference here.

Airbnb objects to this Request because it seeks private information protected by South Carolina's constitutional right to privacy, S.C. Const. Art. 1, § 10; the South Carolina Personal Financial Security Act, S.C. Code Ann. § 16-13-500 *et seq.*; the Stored Communications Act; California's constitutional right to privacy, Cal. Const. Art. I, § 1; the California Consumer Privacy Act, Cal. Civ. Code § 1798, *et seq.*; the California Financial Information Privacy Act, Cal. Fin. Code § 4052, *et seq.*; and any other applicable constitutional, statutory, and/or common-law privacy rights of entities or persons to the extent it calls for communications from third parties, or personally identifiable or otherwise sensitive information about third parties. The information requested is about third parties who bear no

relevance to this lawsuit and have not consented to the disclosure of their personal information to Plaintiff's attorneys.

Airbnb objects to this Request as unintelligible insofar as it requests information regarding certain "id product[s]" purportedly listed in "Exhibit B" to Plaintiff's Requests; "Exhibit B" does not refer to any "id product[s]." Airbnb interprets this Request as instead referring to the "id_product[s]" listed in "Exhibit A" to Plaintiff's Requests. Airbnb also objects to this Request as seeking information not reasonably calculated to lead to relevant information. Airbnb further objects to this Request to the extent it seeks documents already in Plaintiff's possession, custody, or control; Airbnb will not produce such documents. Airbnb also objects to this Request on the grounds that it is overbroad, unduly burdensome, not proportionate to the needs of the case because it seeks "all contact information" for Guests other than Michelle Jain, the guest who booked Plaintiff's stay at 115 Third Ave SW, Aiken, South Carolina on May 17 and 18, 2019. Information regarding guests and reservations made by anyone other than Ms. Jain or Plaintiff is not likely to lead to evidence that is related to a claim or defense of any party in this case. Nor is such information regarding entirely unrelated guests and reservations relevant to any of the acts or omissions Plaintiff alleges to have taken place on May 17 and 18, 2019 during Plaintiff's stay at 115 Third Ave SW, Aiken, South Carolina. Airbnb also objects to this Request as compound.

48. Provide all documents which identify any individual who has been an Airbnb Host during the time period of December 1, 2013 until the present who has been convicted of any of the following offenses:¹

1. **Inchoate and Secondary Offenses:**

- a. Aiding and abetting
- b. Conspiracy
- c. Accessory
- d. Accessory after the fact
- e. Attempt to Commit Sexual Offense
- f. Attempt to Commit Violent Offense
- g. Intent to Commit Sexual Offense
- h. Intent to Commit Violent Offense

2. **Adjudicatory Offenses and Dispositions**

- a. Probation Violation
- b. Bail Jumping
- c. Obstruction of Justice/Contempt of Court
- d. Deferred Imposition of Sentence

3. **Sexual Offenses**

- a. Bestiality
- b. Lewd and Lacivious Acts
- c. Incest
- d. Prostitution

¹ These offenses are listed in the "Violation Categorization" of Airbnb's Background Check Policy (Last Updated: 1/6/2018) See **Attached Exhibit C - AIRBNB 0001335 – 1345**.

e. Sexual Harassment

4. **Violent Offenses**

a. Manslaughter (Involuntary, Vehicular)

b. Threats of Violence (including Terroristic Threats)

c. Violating a restraining/protection order

d. Having a restraining/protection order taken out against you

e. Simple Assault

f. Conspiracy to Commit Assault

g. Battery (Misdemeanor)

h. Non-Violent Weapons charges (possession, illegal possession, non-firearm weapons charges)

i. Harassment

j. Stalking

k. Organized Crime/RICO

l. Elder Abuse

m. Child Abuse

n. Animal Abuse

o. Child Neglect

p. Disorderly Conduct

q. Resisting Arrest without violence

r. Resisting Arrest with Violent Component

s. Fleeing Police without Violence

t. Fleeing Police with Violent Component

5. **Fraud and Dishonesty**

- a. Embezzlement
- b. Hacking/Computer Crime
- c. Fraud
- d. Credit Card Fraud
- e. Mail/Wire Fraud
- f. Tax Fraud
- g. Extortion
- h. Blackmail
- i. Forgery
- j. Counterfeiting
- k. Online Impersonation
- l. Bribery
- m. Perjury
- n. Use of a False Identity (e.g. underage drinking, using a fake ID to get into club, election fraud)
- o. Insider Trading
- p. Fraudulently obtaining food stamps or other public benefit

6. **Property Damage and Theft**

- a. Robbery (Misdemeanor)
- b. Burglary (Felony)
- c. Burglary (Misdemeanor)
- d. Property Damage (Felony)

- e. Theft (Felony)
- f. Theft (Misdemeanor)
- g. Breaking and Entering (Misdemeanor)
- h. Property Damage/ Vandalism (Misdemeanor)
- i. Larceny (Felony)
- j. Petit Larceny/Theft
- k. Shoplifting
- l. Theft by Check/Theft by Credit Card
- m. Theft of Services
- n. Trespassing

7. Drug Offenses

- a. Distribution (under Drug Offenses)
- b. Maintaining a Drug House
- c. Manufacturing, Production, Cultivation – Not marijuana
- d. Manufacturing/Delivery Combined
- e. Manufacturing, Production, Cultivation for marijuana for NON personal use
- f. Sale or Delivery
- g. Chil
- h. Possession – Not Marijuana
- i. Possession of Drug Paraphernalia
- j. Attempted possession with intent to distribute

8. Privacy

- a. Voyeurism
- b. Unlawful Surveillance
- c. Indecent Exposure
- d. Public Lewdness
- e. Eavesdropping

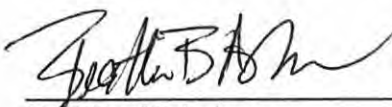
RESPONSE: Airbnb objects to this Request for the reasons stated in its general objections, which it incorporates by reference here.

Airbnb objects to this Request because it seeks private information protected by South Carolina's constitutional right to privacy, S.C. Const. Art. 1, § 10; the South Carolina Freedom of Information Act, S.C. Code Ann. § 30-4-10 *et seq.*; S.C. Code Ann. § 17-1-10 *et seq.*; the Stored Communications Act; California's constitutional right to privacy, Cal. Const. Art. I, § 1; the California Consumer Privacy Act, Cal. Civ. Code § 1798, *et seq.*; the California Financial Information Privacy Act, Cal. Fin. Code § 4052, *et seq.*; and any other applicable constitutional, statutory, and/or common-law privacy rights of entities or persons to the extent it calls for communications from third parties, or personally identifiable or otherwise sensitive information about third parties. The information requested is about third parties who bear no relevance to this lawsuit and have not consented to the disclosure of their personal information to Plaintiff's attorneys.

Airbnb also objects to this Request as seeking information not reasonably calculated to lead to relevant information. Airbnb further objects to this Request to the extent it seeks documents already in Plaintiff's possession, custody, or control; Airbnb will not produce such documents. Airbnb also objects to this

Request on the grounds that it is overbroad, unduly burdensome, not proportionate to the needs of the case because it seeks “all documents” that “identify any individual who has been an Airbnb Host” during nearly a decade-long period and “who has been convicted” of any of a number of offences without any limitation in geographic scope. Information regarding all hosts using Airbnb’s online marketplace other than co-defendants Katherine Thomas or Rhett Riviere involved in Plaintiff’s stay at 115 Third Ave SW, Aiken, South Carolina on May 17 and 18, 2019 is not likely to lead to evidence that is related to a claim or defense of any party in this case. Nor is such information about hosts other than Ms. Thomas or Mr. Riviere, regardless of the host’s location and for a nearly decade-long period for over 80 offenses that are not at issue in this case, relevant to any of the acts or omissions Plaintiff alleges to have taken place on May 17 and 18, 2019 during Plaintiff’s stay at 115 Third Ave SW, Aiken, South Carolina. Airbnb also objects to this Request as compound.

BEATTIE B. ASHMORE, P.A.



Beattie B. Ashmore
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Greenville, SC 29601
Phone: (864) 467-1001
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Attorney for Airbnb, Inc.

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing **AIRBNB, INC.'s RESPONSES TO PLAINTIFF'S REQUESTS FOR PRODUCTION TO DEFENDANT AIRBNB, INC. – NOS. 45-48** was served this 22nd day of December, 2022 by placing the same in the U.S. Mail, postage pre-paid and via email, to the following:

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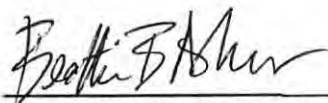

Beattie B. Ashmore

EXHIBIT 5

STATE OF SOUTH CAROLINA
COUNTY OF Aiken
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2021CP0200889

Julianne Foster et al
PLAINTIFF(S)

Airbnb Inc et al
DEFENDANT(S)

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED** (CHECK REASON): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled);
☐ Other
- ☐ **ACTION STRICKEN** (CHECK REASON): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
☐ Other
- ☐ **STAYED DUE TO BANKRUPTCY**
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (CHECK APPLICABLE BOX):
☐ Affirmed; ☐ Reversed; ☐ Remanded;
☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court:

Following a hearing on April 5, 2023,

Plaintiff's Motion to Compel (filed on 1/18/23) was GRANTED, with Defendant Airbnb being allowed 60 days to respond; and

Plaintiff's Motion to Compel (filed on 2/10/23) was also GRANTED, allowing Defendant Airbnb 60 days to respond.

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.

☐ See Page 2 for additional information.

For Clerk of Court Office Use Only

This judgment was electronically entered by the Clerk of Court as reflected on the Electronic Time Stamp, and a copy mailed first class to any party not proceeding in the Electronic Filing System on 05/25/2023 .

Brad Owensby
Damali Taylor for Airbnb Inc
Dawn Sestito for Airbnb Inc
Jane Page Thompson

NAMES OF TRADITIONAL FILERS SERVED BY MAIL

Court Reporter:

E-Filing Note: The date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgment to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.

ELECTRONICALLY FILED - 2023 May 25 11:28 AM - AIKEN - COMMON PLEAS - CASE#2021CP0200889
ELECTRONICALLY FILED - 2023 Jun 08 10:59 AM - AIKEN - COMMON PLEAS - CASE#2021CP0200889



Aiken Common Pleas

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

Case Number: 2021CP0200889

Type: Order/Electronic Form 4

So Ordered

Jocelyn Newman

Electronically signed on 2023-05-25 11:18:25 page 3 of 3

ELECTRONICALLY FILED - 2023 May 25 11:28 AM - AIKEN - COMMON PLEAS - CASE#2021CP0200889
ELECTRONICALLY FILED - 2023 Jun 08 10:59 AM - AIKEN - COMMON PLEAS - CASE#2021CP0200889

EXHIBIT 6

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June 5, 2023

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VIA E-MAIL

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Joe McCulloch, joe@mccullochlaw.com
Kathy R. Schillaci, kathy@mccullochlaw.com

Re: *Foster v. Rhett Riviere, et al.* 2021-CP-02-00889

Dear Counsel:

I write on behalf of Airbnb, Inc. ("Airbnb") in the above-captioned matter. On May 25, 2023, the court issued a Form 4 order granting Plaintiff's January 18 and February 10, 2023, Motions to Compel, allowing Airbnb 60 days to respond. Airbnb is producing documents stamped AIRBNB-001354 to AIRBNB-423515 in password-protected zip files. The password will be sent in a separate email. Contemporaneous with this production, Airbnb is filing a motion for reconsideration and to stay enforcement with respect to Plaintiff's Request for Production Nos. 45, 46, 47 (Non-Party Guest Contact Information) and 48 (Non-Party Host Criminal Convictions). Consequently, Airbnb is withholding production of documents responsive to these requests at this time.

This production has been stamped with confidentiality designations and is being produced pursuant to the September 16, 2021, Confidentiality Order in this action. The production of these materials is not intended to, and does not, waive any applicable privilege or other legal basis under which this information may be protected from disclosure. Airbnb reserves all rights and privileges with respect to documents and information produced.

Further, on May 15, 2023, Airbnb filed a motion to compel arbitration and a motion to stay further judicial proceedings. A hearing on both motions is scheduled for June 13, 2023. This production should not be construed as, and is not, a waiver of the right to compel arbitration or a waiver of our motion to stay further judicial proceedings.

Sincerely,

/s/ Damali A. Taylor

Damali A. Taylor

Enclosures

cc: Beattie Ashmore, Esq.
Richard Harpootlian, Esq.
Mitch Brown, Esq.

EXHIBIT 7

State of South Carolina)
) Court of General Sessions
County of Aiken) 2021CP0200889

Julianne Foster)
)
 vs.) Transcript of Record
)
Airbnb, Inc. et al.)

April 5, 2023
Aiken, South Carolina

B E F O R E:

The Honorable Jocelyn Newman, Judge.

A P P E A R A N C E S (All present by video or telephone):

Wesley Few, Esq.
Attorney for the Plaintiff

Deborah B. Barbier
Attorney for the Plaintiff

Beattie Ashmore, Esq.
Attorney for the Defendant

Damali Taylor, Esq.
Attorney for the Defendant

James Griffin, Esq.
Attorney for the Defendant

Dave DeMasters, Esq.
Attorney for the Defendant

Dena Farbman Page
Proofreader

1 THE COURT: All right. And this is 2021CP0200889,
2 Julianne Foster v. Rhett Riviere. There are a number of
3 motions, and I don't even know where to begin. I don't know
4 if one of you all will tell me what you think is best. Who's
5 ready to take the lead on this?

6 Mr. Ashmore, you look like you're excited to; you're
7 chomping at the bit.

8 MR. ASHMORE: Tickled pink to be here this morning, Your
9 Honor. Beattie Ashmore from Greenville, Judge. And somehow,
10 I find myself speaking first. And there are clearly a number
11 of motions on the docket today, Judge. And unfortunately,
12 they're all still -- we need your assistance on all of them,
13 Judge, so.

14 And Judge, I don't necessarily know where to begin
15 either, but it would make sense that if you were to hear our
16 motion to dismiss, if you were to grant that, that would moot
17 everything else. And if it pleases the Court, that's where
18 I'll begin. Thank you, Judge.

19 So again, Beattie Ashmore on behalf of Airbnb, Judge,
20 from Greenville. And we appreciate your time this morning.

21 We do have a number of motions pending on the docket. We
22 had them set about a month ago in front of Judge Keesley.
23 They were all carried over until today, and now they are on
24 your desk. And we appreciate your time. And it sounds like
25 you certainly have had a chance to dive into this case, and

1 is -- first off, I don't want to set some, you know, dangerous
2 precedents, a slippery slope, et cetera, et cetera. But also,
3 I don't want to allow the deposition only for Mr. Baer to
4 respond by asserting a privilege to each and every question.
5 That's just a waste of everybody's time.

6 If you're going to ask him things that are not subject to
7 that privilege, maybe he has the answers, maybe not. Maybe he
8 sees them all as privileged. And then you're back in court
9 with a motion for a protective order, motion to compel, you
10 know, et cetera, et cetera. But if there is a compliance
11 officer, for example, let's identify that person and just go
12 straight to that person rather than wasting the time with Mr.
13 Baer. And I don't know what he'd say or not say, but counsel
14 seems to suggest that he probably not answer any of your
15 questions, which may be fine, but it might be spinning
16 everyone's wheels and wasting time and money.

17 MS. BARBIER: I agree, and we don't want to do that. I
18 mean, we have already spun a lot of wheels and wasted a lot of
19 time because the interrogatories we sent them ten days ago or
20 so at the request of Airbnb were absolutely unnecessary.
21 We've already asked them for these witnesses two years ago. I
22 mean, this case has been going on now, as Your Honor knows, a
23 long time. And we have asked all the basic interrogatories.

24 They know exactly what we're looking for. They can read.
25 They're very smart people. And so there was no need for those

1 interrogatories, but out of -- in the spirit of trying to
2 cooperate and trying to come to some consensus, we agreed to
3 send them some additional interrogatories.

4 But I have absolutely zero confidence, particularly since
5 Ms. Taylor just said that there is nobody at Airbnb who has
6 not -- that's what the 30(b)(6) designee said. She said there
7 is nobody with any knowledge of any compliance with real
8 estate laws in South Carolina. I don't believe that, Your
9 Honor. There are jurisdictions all over this country where
10 they are being accused of a very similar allegations. And I
11 find it very difficult to believe that they don't have -- we
12 don't know who a compliance officer is. They have never
13 identified one. They have yet to produce one email between
14 anybody at Airbnb. There is no internal email communications
15 that have been produced.

16 There's not one email. There's not one text message.
17 They have given us 1345 pages of documents, which is minuscule
18 as we know in the -- in the stream of these things. This is a
19 billion-dollar corporation that operates globally, and 500 or
20 so of those pages is a publicly filed SEC document, which
21 means they've really produced about six or 700 documents.

22 And those are some that are screenshots from their
23 website, which are also publicly available, and there's a
24 couple of other, you know, policy manuals and whatnot. But
25 Your Honor, they have produced -- if they had produced

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	SECOND JUDICIAL CIRCUIT
COUNTY OF AIKEN	)	
Julianne Foster,	)	Civil Action No. 2021-CP-02-00889
	)	
Plaintiff,	)	
	)	
vs.	)	Airbnb, Inc.'s Response in
	)	Opposition to Plaintiff's Motion for a
Rhett Riviere, Katherine A. Thomas,	)	Rule to Show Cause and Proposed
Chase Enterprises, LLC of South	)	Order
Carolina, and Airbnb, Inc.	)	
	)	
Defendants.	)	
	)	

Plaintiff's "Motion for Rule to Show Cause" should be denied and any order granting that motion would be substantively, procedurally, and structurally improper, for the reasons set forth below. Despite the Court having permitted Plaintiff's request to add her Motion for Rule to Show Cause (the "Motion") to the June 13, 2023 motions docket (with Defendant Airbnb preserving all objections), the Motion was not heard, no required evidentiary hearing was held, and Plaintiff's submission of a Proposed Order is improper. With no factual findings having been made by the court in a show cause hearing as required, Plaintiff has submitted a Proposed order to Airbnb counsel purporting to hold Airbnb in contempt, without any of the required South Carolina elements of contempt having been met.

Without waiving, and indeed expressly reserving its arbitration rights, Airbnb responds to Plaintiff's Motion and Proposed Order by requesting that it be denied and the Proposed Order be rejected:

- (1) While Airbnb took no position on Plaintiff's request to place their rule to show cause motion on the roster before Your Honor, Airbnb specifically preserved all objections to the same, and the rule to show cause motion was not argued at the hearing (aside from complaints respecting lack of production).

- (2) Until there is a written order entered by the Court, there is no ruling, and the Court is free to change its mind. *See 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).
- (3) There is no written order entered as yet by this Court on the Motion to Stay Proceedings pending a decision on arbitration. Procedurally, such a ruling would be required prior to ruling on a motion for Rule to Show Cause.
- (4) Airbnb produced certain documents in response to an Order compelling it to do so, by Judge Jocelyn Newman, although Airbnb did not produce certain other documents. The documents not produced are subject to: 1) a motion to reconsider to be heard by Judge Newman (not yet set or ruled on); 2) a motion to stay the enforcement of the order compelling the documents not produced pending the resolution of the motion to reconsider (not yet set or ruled on). Your Honor should not rule on a motion for rule to show cause respecting an order to compel by a different judge who still has a pending motion to reconsider before her.
- (5) In any event, Plaintiff has failed to establish the procedural pre-requisites for a rule to show cause (e.g., there is no Summons or evidence), much less a holding of contempt.
- (6) Plaintiff did not and cannot establish willful noncompliance with Judge Newman's order.

Thus, the Court should deny Plaintiff's motion.

Background

Plaintiff moved to compel responses to its requests for production on January 18, 2023 (RFPs 45–48), and February 10, 2023 (RFPs 16–44). On April 5, 2023, Judge Newman held a hearing on the motions to compel, orally suggesting the Court would give Airbnb 60 days to provide responsive documents.

Airbnb wrote to Judge Newman before she entered any order on the motions to compel to request clarification from her about the oral directives. With regard to certain documents within the motion to compel ruling ambit, Airbnb raised serious concerns about the protection of non-parties' rights without notice to those non-parties—issues not fully addressed by the Court in the

hearing. Airbnb also asked the Court to hold a status conference on the issue.¹ Ultimately, however, Judge Newman issued her Form 4 Order on May 25, 2023 ordering the documents to be produced.

On June 5, 2023, Airbnb—subject to its arbitration rights—timely produced responsive documents but did not do so for two narrow sets of requests: (1) production of contact information for non-party guests (Requests for Production 45, 46, 47); and (2) the identity and related information of non-party hosts with any criminal convictions out of a list of 82 offenses (RFP 48). Airbnb contemporaneously **moved to reconsider** Judge Newman’s production order with regard to the certain documents ordered to be compelled referenced above. 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).

That ***motion to reconsider is still pending*** before Judge Newman and has not been set for a hearing. Yet Plaintiff still moved for a rule to show cause, just mere days after Airbnb’s supplemental production and before Judge Newman has addressed the motion to reconsider. Plaintiff’s motion is not verified, accompanied by an affidavit, or filed with a summons. Plaintiff’s counsel then contacted the Clerk of Court to request the Motion be heard by Your Honor with Airbnb’s Motion to Compel Arbitration and separate Motion to Stay. Finding that request unusual, in response to that request, Airbnb’s counsel responded to the Clerk and all counsel stating in full, “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.” The Court then held a hearing on June 13, 2023, at

¹ Airbnb notified Judge Newman of its simultaneously filed Motion to Compel Arbitration and that it would be moving to stay the proceedings. (*Id.*)

which it entertained arguments from counsel on Airbnb's and Riviere's Motions to Compel arbitration, with Plaintiffs' complaints about lack of full production by Airbnb receiving only passing discussion. Plaintiff presented no testimony, affidavits, documents, or other evidence to support the Motion for a Rule to Show Cause.

Afterwards, the Court notified the parties that it intended to deny Airbnb and Riviere's Motions to Compel Arbitration and grant the Motion for a Rule to Show Cause. It did not mention Airbnb's separate stay motion. The Court directed Plaintiff's counsel to draft the proposed order for Airbnb's arbitration motion and Plaintiff's rule to show cause motion, explaining that the proposed order on the rule to show cause "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." The email makes no mention of Airbnb being in contempt. Plaintiff prepared a Proposed Order and sent it to the undersigned which states, in part: "This Court finds Airbnb's stated plans to not comply this Court's May 25, 2023 Order on the Motions to Compel **are in contempt** of this Court and violate this Court's order. Airbnb must comply with this Court's May 25, 2023 Order on the Motions to Compel and produce all responsive documents to Plaintiff within forty-five (45) days of the date of this order." (emphasis added)

Because of the procedural, structural, and jurisdictional issues raised by Plaintiff's filings, Airbnb files this memorandum in opposition to Plaintiff's Motion and her Proposed Order.

Argument

I. Plaintiff's Motion was premature because of Airbnb's pending motion to reconsider and stay enforcement, along with its separate Motion to Stay.

Plaintiff's Motion was premature because Airbnb's motion to reconsider and stay enforcement is pending before Judge Newman, (*see* Mot. Reconsider and Stay Enforcement, June 5, 2023), and the Court has not ruled on Airbnb's separate stay motion, (*see* Mot. to Stay, May 16,

2023). A motion under Rule 59(e), SCRCF has long been viewed as a “motion for reconsideration.” *Elam v. S.C. Dep’t of Transp.*, 361 S.C. 9, 21, 602 S.E.2d 772, 778 (2004). In ruling on the motion for reconsideration, Judge Newman may change, modify, or alter the production requirements that are the subject of this motion. Airbnb also moved to stay enforcement of the order, not just to have it reconsidered. (*See* Mot. Reconsider at 2.)² This too should limit Plaintiff’s ability to race to the courthouse to seek a rule to show cause a mere three days after the production deadline set by Judge Newman’s Order. Hence, Plaintiff’s motion for rule to show cause is premature.

Finally, this Court has not yet ruled on Airbnb’s separate Motion to Stay these judicial proceedings altogether. The Court did orally state something to the effect that it did not plan to grant that motion, but the Court has not entered a written order and denied it. Granting Plaintiff’s Motion for a Rule to Show Cause before addressing the stay motion would be, respectfully, placing the cart before the horse. The Court must rule on whether the proceedings should be stayed before it can issue a Rule to Show Cause, much less hold Airbnb in contempt. As a result, the Court should deny Plaintiff’s motion for a rule to show cause.³

II. Plaintiff’s Proposed Order is procedurally and structurally improper because Plaintiff failed to establish the necessary contempt standard with evidence, and thus there could be no finding of contempt.

In the Motion, Plaintiff asks this Court to “command[] [Airbnb] to appear before the Court and show cause why it should not be held in contempt for failing to comply with the Court’s

² This motion is separate from Airbnb’s Motion to Stay filed on May 16, 2023.

³ Plaintiff’s motion is also premature because it is being heard less than ten days since its filing. *See* Rule 6(d), SCRCF. Plaintiff filed the motion just three days after the production deadline set by Judge Newman, and only five days before the hearing. Moreover, “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). Plaintiff failed to provide sufficient notice, an issue Airbnb reserved in its response to the Clerk.

Orders.” (Mot. Rule Show Cause at 1.) Yet Plaintiff fails to comply with the prerequisites for obtaining such relief. She files 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)). Nor does she 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) (“the 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.’”). Thus, she has failed to satisfy the prerequisites for contempt.

Even if the Court had the jurisdiction or authority to determine enforcement of a separate judge’s order and the Court could look past the lack of an affidavit or summons, Plaintiff did not support her contempt claim with evidence. “[B]efore a person may be held in contempt, the record must be clear and specific as to acts or conduct upon which the contempt is based.” *Spartanburg Buddhist Ctr. of S.C. v. Ork*, 417 S.C. 601, 606, 790 S.E.2d 430, 433 (Ct. App. 2016) (quoting *Ex parte Kent*, 379 S.C. 633, 637, 666 S.E.2d 921, 923 (Ct. App. 2008)). “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, 113, 502 S.E.2d 86, 89 (1998)).

Plaintiff’s Motion and her Proposed order fails because she offered no evidence to support it, much less clear and convincing evidence. All Plaintiff offered was the passing argument of

counsel complaining of lack of full production—that is *not* evidence. *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)). The present record is devoid of any *evidence* meeting this standard. On this basis alone, the Court should not issue any order including a contempt finding.

III. Plaintiff has failed to meet her burden of proving willful noncompliance and thus there can be no finding of contempt.

Further, Plaintiff’s lack of any factual showing cannot amount to willful constructive contempt. Plaintiff cannot establish contempt, as there is no evidence that Airbnb willfully disobeyed Judge Newman’s order, much less clear and convincing evidence. *See id.* (quoting *Poston*, 331 S.C. at 113, 502 S.E.2d at 89). To the contrary, Airbnb substantially complied with the Court’s March 5, 2023 order—withholding 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 v. Woolfson*, 384 S.C. 571, 577–78, 683 S.E.2d 495, 498–99 (2009). Airbnb also communicated to Plaintiff the reason for withholding the specific documents and contemporaneously moved to reconsider with the Court. The motion also asked the Court to stay enforcement of the order. The motion to reconsider and to stay are still pending, as stated.

Airbnb’s actions were taken with the specific intent to protect privacy interests in accordance with settled South Carolina authority and to withhold documents until the Court has the opportunity to reconsider its ruling. This is antithetical to 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. “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)). “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).

Accordingly, the relief Plaintiff seeks in her Motion and the Proposed Order is improper.

Conclusion

Based on the record before the Court and Plaintiff’s failure to satisfy the procedural, structural, and jurisdictional prerequisites for contempt, the Court should deny Plaintiff’s motion for rule to show cause.

NELSON MULLINS RILEY & SCARBOROUGH LLP

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July 26, 2023

STATE OF SOUTH CAROLINA
COUNTY OF AIKEN

IN THE COURT OF COMMON PLEAS
SECOND JUDICIAL CIRCUIT

JULIANNE FOSTER,

Plaintiff,

v.

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

Defendants.

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

**PLAINTIFF'S REPLY TO AIRBNB'S
RESPONSE IN OPPOSITION FOR A RULE
TO SHOW CAUSE AND PROPOSED ORDER**

Plaintiff files this reply to Airbnb's Response in Opposition to Plaintiff's Rule to Show Cause ("RTSC") and the Proposed Order granting that motion in which Airbnb now contends that the RTSC Motion was not heard, no evidentiary hearing was held, and Plaintiff's submission of the Proposed Order was improper. Airbnb's objections to the proposed order on the RTSC motion are without merit and Airbnb continues in its endless opposition to demonstrate an utter lack of respect for the Orders issued by South Carolina circuit court judges compelling it to produce discovery.

Airbnb concedes the RTSC Motion was set for and heard at the hearing on June 13, 2023. Further, Plaintiff prepared and submitted the Proposed Order at the direction of the Court.

Airbnb sets out six objections to the Proposed Order on the RTSC Motion (Response at 1-2), which Plaintiff briefly addresses below.

- (1) While Airbnb took no position on Plaintiff's request to place their rule to show cause motion on the roster before Your Honor, Airbnb specifically preserved all objections to the same, and the rule to show cause motion was not argued at the hearing (aside from complaints respecting lack of production).

This point requires little discussion – as Airbnb concedes it “took no position” and at the hearing the RTSC Motion has the opportunity to be heard and, in fact, was heard. Airbnb cannot sit back; fail to object and in fact agree to a motion being placed on the roster; participate in the hearing; and then complain about the Motion being set for a hearing only when the Court has ruled against it. Further, the RTSC Motion was argued; Plaintiff’s “complaints respecting the lack of production” was undoubtedly the basis of the RTSC Motion.

(2) Until there is a written order entered by the Court, there is no ruling, and the Court is free to change its mind. *See 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).

Plaintiff does not argue with this general statement of the law. However, the never ending letters and filings with the Court in this case after a motion has been fully briefed and heard (but prior to a written order being entered) are unprecedented and have become burdensome, to say the least, to Plaintiff and the Court. To protect herself, Plaintiff finds it necessary to respond.

(2) There is no written order entered as yet by this Court on the Motion to Stay Proceedings pending a decision on arbitration. Procedurally, such a ruling would be required prior to ruling on a motion for Rule to Show Cause.

Airbnb concedes that the Court clearly stated that it was denying the Motion to Stay. Yet, Airbnb does not cite any law for the proposition that a ruling on the Motion to Stay pending a ruling on the Motion to Compel Arbitration must be entered prior to the Court ruling on the RTSC Motion. This also makes little sense in this case when the Court has unequivocally stated that it intends to deny the Motion to Compel Arbitration on three grounds. Moreover, the RTSC Motion addresses discovery from over a year ago, which Airbnb was ordered to provide on April 5, 2023.

(3) Airbnb produced certain documents in response to an Order compelling it to do so, by Judge Jocelyn Newman, although Airbnb did not produce certain other documents. The documents not produced are subject to: 1) a motion to reconsider to be heard by Judge Newman (not yet set or ruled on); 2) a motion

to stay the enforcement of the order compelling the documents not produced pending the resolution of the motion to reconsider (not yet set or ruled on). Your Honor should not rule on a motion for rule to show cause respecting an order to compel by a different judge who still has a pending motion to reconsider before her.

Airbnb is not raising new caselaw or some other perhaps justifiable reason for reconsideration; it is raising the same arguments and the same case (*Hollman v. Woolfson*, 348 S.C. 571, 683 S.E.2d 495 (2009)) that it raised in its response to the motion to compel, at the April 5, 2023 hearing, and in its May 15, 2023 letter (which in essence was a motion to reconsider the Court's oral order during the April 5, 2023 hearing), which the Court has considered and rejected. Airbnb has made the same arguments repeatedly hoping for a different result. However, "a motion to reconsider an interlocutory order should not be used to rehash arguments the court has already considered merely because the movant is displeased with the outcome." *South Carolina v. United States*, 232 F. Supp. 3d 785, 793 (D.S.C. 2017) (citations omitted). Further, Airbnb has not been granted a stay of enforcement.

(5) In any event, Plaintiff has failed to establish the procedural pre-requisites for a rule to show cause (e.g., there is no Summons or evidence), much less a holding of contempt.

The RTSC Motion was noticed for hearing on June 13, 2023. Airbnb participated in the hearing where Plaintiff argued that Airbnb had not fully complied with the Court's prior order and Airbnb conceded that it has not produced responsive discovery and thus has not fully complied with the Court's Order.

Importantly, Airbnb failed to raise any alleged procedural issues at the hearing on the RTSC Motion. Airbnb's alleged generic statement to the Clerk of Court that it was reserving and not waiving all of its rights and objections (Response at 3) does not make it so. Airbnb was still

required to raise any specific objections it had as to the RTSC motion to the Court for a ruling at the hearing. Failing to do so, Airbnb has waived any right to objection it may have had.

Moreover, Airbnb incorrectly cites to cases which are inapplicable—discussing criminal and/or constructive contempt and requiring a summons over parties that are not properly before the court. “Contempt results from the willful disobedience of a court order, and before a court may find a person in contempt, the record must clearly and specifically reflect the contemptuous conduct.” *Widman v. Widman*, 348 S.C. 97, 119, 557 S.E.2d 693, 705 (Ct. App. 2001). “[J]udges have the authority to [sua sponte] use contempt proceedings to preserve the authority and dignity of their courts.” *McEachern v. Black*, 329 S.C. 642, 649, 496 S.E.2d 659, 662–63 (Ct. App. 1998). “Once the moving party has made out a prima facie case [for contempt], the burden then shifts to the respondent to establish his . . . defense and inability to comply with the order.” *Miller*, 375 S.C. at 454, 652 S.E.2d at 760. Furthermore, a summons was not needed for defendant Airbnb. See *State v. Sande*, 118 S.C. 498, 502, 110 S.E. 808, 810 (1920) (“The purpose of the summons is to acquire jurisdiction of the person of the defendant . . .”). Finally, there was evidence in support of Plaintiff’s RTSC Motion, as discussed below.

(6) Plaintiff did not and cannot establish willful noncompliance with Judge Newman’s order.

Airbnb argues that Plaintiff has failed to offer any evidence of willful noncompliance with the Court’s Order because “counsel’s complaining of lack of full production” is not evidence. (Response at 6-7). However, Plaintiff does not rely on only her counsel’s complaints of non-compliance. Rather, she relies on Airbnb’s letter accompanying its production in which it states it is withholding responsive documents, which Plaintiff filed as an exhibit to her RTSC Motion. (RTSC Mot., Ex. 6). This is evidence that Airbnb did not comply with the Court’s Order. Furthermore, Airbnb unequivocally concedes it has not fully complied with the Court’s Order; it

specifically states it has not timely produced responsive documents for two sets of requests. (Response at 3). Airbnb cannot seriously argue that it has fully complied with the Court's Order, particularly when it continues to this day to be in noncompliance with the Orders of this Court.

CONCLUSION

For the foregoing reasons, the Court should reject Airbnb's objections to the proposed Order granting Plaintiff's RTSC Motion.

Respectfully submitted,

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July 28, 2023
Columbia, South Carolina

STATE OF SOUTH CAROLINA
COUNTY OF AIKEN

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

JULIANNE FOSTER,

Plaintiff,

v.

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

Defendants.

**DEFENDANT AIRBNB, INC.'S
MOTION TO DISMISS**

TO: THE HONORABLE COURT AND ALL COUNSEL OF RECORD

PLEASE TAKE NOTICE that Defendant Airbnb, Inc. ("Airbnb"), by and through its undersigned counsel, moves this Honorable Court, under Rule 12(b)(6) of the South Carolina Rules of Civil Procedure, for an Order dismissing Plaintiff's Complaint as to Airbnb in this matter. This Motion is based on the following grounds:

1. On April 28, 2021, Plaintiff filed a five-count Complaint against Defendants based on an alleged invasion of her privacy during her stay at an accommodation booked from Defendants Rhett Riviere, Katherine A. Thomas, and/or Chase Enterprises, LLC of South Carolina (collectively, the "Hosts") through Airbnb's online platform. Plaintiff alleges that the Hosts surreptitiously videotaped her while she was staying at the property. She does not allege that Airbnb was involved in or knew about this alleged criminal activity. Instead, Plaintiff advances two claims against Airbnb: one for negligence and/or gross negligence based on its failure to prevent the Host's surreptitious recording and one for negligence *per se* based on its failure to obtain a real estate broker license. The Complaint fails to state facts sufficient to constitute a cause of action against Airbnb for either claim and should therefore be dismissed as to Airbnb.

2. *First*, Plaintiff has not established that Airbnb owed her a duty of care, which dooms her general negligence claim. *See Wright v. PRG Real Estate Mgmt., Inc.*, 426 S.C. 202, 212 (S.C. 2019). There is no general duty under South Carolina law to protect against the criminal acts of third parties. *Id.* at 212; *see McCord v. Laurens Cnty. Health Care Sys.*, 429 S.C. 286, 296 (S.C. Ct. App. 2020) (“In general, our common law recognizes no affirmative duty to control the conduct of another or to warn a third person of danger.”). Exceptions to this no-duty rule are rare, such as where the parties are closely bound by certain special relationships or where a defendant’s “direct action increases a [plaintiff’s] risk of harm from criminal activities.” *Wright*, 426 S.C. at 216. Even landlords owe no duty to protect their tenants from third-party criminal acts. *Id.* Here, the relationship between Airbnb and Plaintiff is even more attenuated than that between landlords and tenants, because Airbnb did not own or control the property at issue. Nor can Plaintiff satisfy the narrow affirmative acts exception, given that Airbnb took no action, direct or otherwise, to create a risk of Hosts covertly recording Plaintiff.

3. Even if Plaintiff could establish that Airbnb owed her a duty, that duty would only extend to acts posing a “*foreseeable risk*” of harm. *Lord v. D&J Enters., Inc.*, 407 S.C. 544, 555 (S.C. 2014). But Plaintiff fails to plead any facts supporting the foreseeability of the alleged crime at issue in this case. Plaintiff is correct that Defendant Riviere “did not disclose that there were cameras located in the bedroom.” Compl. ¶ 62. He did not disclose it to Plaintiff, and he certainly did not disclose it to Airbnb, an online platform with no ownership or control over the property. Plaintiff does not allege Airbnb had any reason to know about Defendant Riviere’s voyeuristic predilections; her negligence claim against Airbnb must be dismissed for this additional reason.

4. *Finally*, Plaintiff fails to state a claim for negligence *per se* based on Airbnb’s alleged violation of the real estate broker licensing statute because Airbnb is not, and does not

purport to be, a real estate broker. The relevant statute, which prohibits a “real estate broker” from “advertis[ing] or provid[ing] services without an active, valid license issued by” the South Carolina Real Estate Commission, defines a “broker” as someone who actively “negotiates” real estate transactions, “solicits a referral,” or acts as a “consultant, counselor, or transaction manager.” S.C. Code Ann. §§ 40-57-20, 40-57-30(3). Airbnb, by contrast, is an “internet platform” and a “community marketplace” that passively connects third parties who wish to offer accommodations with third parties seeking to book accommodations. *See* Compl. ¶¶ 16, 20, 77. Moreover, a broker must be an *individual*; the statute does not require licensure of *entities* like Airbnb. *See* S.C. Code Ann. § 40-57-30(3), (33) (differentiating between a “broker” of real estate and a “real estate brokerage firm”); *see also id.* § 440-57-320 (setting forth licensure requirements unambiguously geared toward individuals, such as education requirements and passing an examination).

5. Plaintiff’s negligence *per se* claim would fail even if she were able to establish that Airbnb violated the licensing statute, since “a licensing statute will not ordinarily provide a basis for a negligence *per se* action.” *Hurst v. Sandy*, 329 S.C. 471, 480 (S.C. Ct. App. 1997). Licensing statutes like § 40-57-20 serve to “regulat[e] of the practice of a profession,” *see id.* at 479, not to guard against personal privacy violations. Even if such regulation, in turn, is intended “to promote the public welfare,” that does not transform a licensing statute into one that can support civil liability on private actors. *See id.* at 478-79. Nor is there a plausible causal relationship between Airbnb’s alleged non-compliance with the licensing statute and Plaintiff’s injuries. *See Whitlaw v. Kroger Co.*, 306 S.C. 51, 53-54 (S.C. 1991). Plaintiff’s negligence *per se* claim against Airbnb therefore must also be dismissed.

6. Because Plaintiff cannot cure these fundamental defects by amendment, Airbnb’s Motion should be granted with prejudice.

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

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

DATED this 3rd day of August, 2021.

BUTLER WEIHMULLER KATZ CRAIG LLP

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STATE OF SOUTH CAROLINA

COUNTY OF AIKEN

IN THE COURT OF COMMON PLEAS

SECOND JUDICIAL CIRCUIT

C/A NO.: 2021-CP-02-00889

JULIANNE FOSTER,

Plaintiff,

v.

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

Defendants.

**DEFENDANT AIRBNB, INC.'S
MEMORANDUM OF LAW IN
SUPPORT OF MOTION TO DISMISS****INTRODUCTION**

Plaintiff Julianne Foster seeks to hold Defendant Airbnb, Inc. (“Airbnb”) liable for the alleged criminal acts of Defendant Rhett Riviere, who she claims surreptitiously videotaped her during a stay at his property. Plaintiff does not allege that Airbnb was involved in or even knew about this unforeseeable, criminal activity. The only nexus between Airbnb and this case is that Plaintiff’s friend allegedly booked the property from Defendants Rhett Riviere, Katherine A. Thomas, and/or Chase Enterprises, LLC through Airbnb’s online booking platform. But this is not enough as a matter of law to support the two claims against Airbnb for: (1) negligence and/or gross negligence, based on its failure to prevent Defendant Riviere’s criminal activity, and (2) negligence *per se*, based on its failure to obtain a real estate broker license.

Plaintiff’s negligence claim fails because she has not adequately pled any exception to South Carolina’s general rule that a person has no duty to protect another against the criminal acts of third parties. Airbnb has no special relationship with Plaintiff—an admitted “third part[y],” Compl. ¶¶ 22-23, 41, who did not even book the reservation at issue—and was not a custodian of Riviere with knowledge of a specific, credible threat. Nor does Airbnb’s policy prohibiting

undisclosed cameras at properties listed by third-party hosts on its platform mean that Airbnb is liable every time someone violates that policy; South Carolina courts have held that while an institution's policies may inform the relevant standard of care once a duty is established, those policies cannot, themselves, *create* a duty where one does not otherwise exist. And even if Plaintiff could establish an applicable exception to the no-duty rule, any such duty would extend only to *foreseeable* harms. Plaintiff has failed to plead *any* facts whatsoever suggesting that Airbnb should—or even could—have predicted Defendant Riviere's alleged crimes.

Plaintiff's novel negligence *per se* theory—premised on an alleged violation of a real estate licensing statute—is even weaker. The statute, which on its face applies only to “individual[s]” and requires those individuals to meet certain training and educational requirements, does not apply to an entity like Airbnb. Even if Airbnb could violate the statute, South Carolina courts have long rejected the proposition that licensing statutes like the one Plaintiff cites can sustain a claim for negligence *per se*.

Plaintiff alleges a serious wrong, but Airbnb is not the responsible party. Any claim lies against her alleged criminal voyeur—not the online marketplace through which her friend booked the property. The Complaint should be dismissed as to Airbnb without leave to amend.

STATEMENT OF FACTS

Airbnb provides an online platform that connects third parties who wish to offer accommodations (“Hosts”) with third-party travelers seeking to book accommodations (“Guests”). Compl. ¶¶ 16, 20. Airbnb does not own or control the properties that Hosts list: it is purely an online platform that allows Hosts and Guests to connect with each other to transact, make payments, and communicate. *See id.* ¶ 16; Declaration of L. Andrew Watson (“Watson Decl.”), Ex. 1 (Airbnb Terms of Service); *accord Airbnb, Inc. v. City & County of San Francisco*, 217 F. Supp. 3d 1066, 1069 (N.D. Cal. 2016) (noting that “Airbnb does not own, manage or operate any

of the host properties, and is not a party to the rental agreements”); *Carroll v. Am. Empire Surplus Lines Ins. Co.*, 289 F. Supp. 3d 767, 772 (E.D. La. 2017) (holding that Airbnb does not control listed properties such as to establish a duty to protect third parties).

According to the Complaint, Plaintiff’s friend used Airbnb’s platform to book a stay from May 17, 2019 to May 18, 2019 at a property in Aiken owned by Defendants Riviere and/or Chase Enterprises, LLC and managed by Defendant Thomas. Compl. ¶¶ 12-14, 16, 18; *see also id.* ¶¶ 40, 78. Plaintiff does not allege that Airbnb owned or controlled the property or was a party to any rental agreement between Plaintiff and Thomas or Riviere. *See id.* ¶ 16.

After her stay, law enforcement informed Plaintiff that Defendant Riviere had used undisclosed cameras at the property to surreptitiously record her. *Id.* ¶¶ 27, 30. Defendant Riviere faces criminal charges for his actions, *see State v. Riviere*, No. 2021A0210700228 (S.C. Mag. Ct.), but Plaintiff nevertheless seeks to hold *Airbnb* civilly liable for Defendant Riviere’s criminal conduct. Plaintiff bases her Complaint on allegations that Airbnb has a policy requiring Hosts to inform Guests of any cameras or similar devices on their property, even if they are turned off, and that Defendant Riviere violated this policy. Compl. ¶¶ 21, 37, 62, 64. Plaintiff also complains that Airbnb “failed to put in place or enforce policies and procedures” sufficient to “protect[]” the “privacy and seclusion” of “third parties” like her. *See id.* ¶ 23. Plaintiff also (falsely) alleges that Airbnb failed to “engage in any meaningful background checks” of Riviere and Thomas, or “verify” their “personal details” or the “details about the property being rented out.” *Id.*

LEGAL STANDARD

“Under Rule 12(b)(6), SCRCP, a defendant may move to dismiss based on a failure to state facts sufficient to constitute a cause of action.” *Fleteau v. Harrelson*, 355 S.C. 197, 201 (Ct. App. 2003). When considering a motion to dismiss under Rule 12(b)(6), courts accept all “well-pled

facts” as true, *Gressette v. S.C. Elec. & Gas Co.*, 370 S.C. 377, 378-79 (S.C. 2006), but not “conclusory” allegations, *Jones v. Gilstrap*, 288 S.C. 525, 528 (S.C. Ct. App. 1986). “The court also may consider other materials that are public records or are otherwise appropriate for the taking of judicial notice.” See *USS Clamagore SS-343 Restoration & Maint. Ass’n, Inc. v. Patriots Point Dev. Auth.*, 2020 WL 1038741, at *1 (S.C. Com. Pl. Mar. 02, 2020); *Doe v. Bishop of Charleston*, 407 S.C. 128, 135 n.2 (S.C. Ct. App. 2004) (taking judicial notice on motion to dismiss); SCRCP 201(f) (“Judicial notice may be taken at any stage of the proceeding.”).

ARGUMENT

“An essential element in a cause of action for negligence is the existence of a legal duty of care owed by the defendant to the plaintiff.” *Rogers v. S.C. Parole Comm. Corr.*, 320 S.C. 253, 255 (S.C. 1995). Thus, “[w]ithout such a duty, there can be no actionable negligence.” *Id.* Because “[w]hether a duty exists is a question of law for the Court,” *Skinner v. S.C. Dep’t of Transp.*, 383 S.C. 520, 523 (S.C. 2009), it is ripe for adjudication on a motion to dismiss, see *Doe v. Marion*, 373 S.C. 390, 395-401 (S.C. 2007) (affirming dismissal under Rule 12(b)(6) for lack of duty). Here, Plaintiff pleads no viable basis for duty against Airbnb, dooming her claims against Airbnb for negligence and negligence *per se*.

Under South Carolina law, there is no general duty to protect others against third-party criminal acts. See *Wright v. PRG Real Est. Mgmt., Inc.*, 426 S.C. 202, 212 (S.C. 2019); *McCord v. Laurens Cnty. Health Care Sys.*, 429 S.C. 286, 296 (S.C. Ct. App. 2020) (“In general, our common law recognizes no affirmative duty to control the conduct of another or to warn a third person of danger.”). Airbnb fits none of the narrow exceptions to this baseline principle, so the no-duty rule applies. And even if Airbnb owed a duty, that duty would not extend to unforeseeable criminal acts like the alleged conduct here—further eroding any colorable basis for Plaintiff’s claims.

Nor can Plaintiff take shelter in her novel negligence *per se* theory, through which she seeks to leverage the state's real estate broker licensing statute, which applies only to natural persons, to manufacture a duty and impose it on Airbnb. That statute establishes no duty of care and no private right of action. Moreover, the statute's purpose is divorced from Plaintiff's harm, and Airbnb did not violate it. For these reasons, the Court should grant Airbnb's motion to dismiss with prejudice.

I. Plaintiff Fails to Plead a Viable Negligence Claim Because Airbnb Had No Duty to Protect Her from Third-Party Criminal Acts.

Plaintiff seeks to hold Airbnb liable for allegedly negligently failing to protect her against Rhett Riviere's "secret recording of Plaintiff, without [Plaintiff's] knowledge or consent," while at a property Plaintiff's friend booked through Airbnb's website. See Compl. ¶ 39. But under South Carolina law, Airbnb "incurs no liability for failure to take steps . . . to protect others from harm not created by [its] own wrongful act." See *Burns v. S.C. Comm'n for the Blind*, 323 S.C. 77, 79 (S.C. Ct. App. 1994). This rule is at its apex when the alleged wrong the third party committed is criminal, as was Riviere's alleged conduct here. See *Wright*, 426 S.C. at 212; *Cramer v. Balcor Prop. Mgmt., Inc.*, 312 S.C. 440, 443 (1994); see also S.C. Code Ann. § 16-17-470 (criminalizing voyeurism).

To overcome this no-duty rule, Plaintiff must adequately plead that her claims fall within one of South Carolina's recognized carve-outs. She cannot. And even if she could, any duty would not extend to the unforeseeable criminal act of voyeurism at issue here.

A. No Exception to the No-Duty Rule Applies Here.

South Carolina law recognizes only five (5) narrow exceptions to the no-duty rule: "1) where the defendant has a special relationship to the victim; 2) where the defendant has a special relationship to the injurer; 3) where the defendant voluntarily undertakes a duty; 4) where the

defendant negligently or intentionally creates the risk; and 5) where a statute imposes a duty on the defendant.” *Doe ex rel. Doe v. Wal-Mart Stores, Inc.*, 393 S.C. 240, 246-47 (S.C. 2011). None of these limited exceptions apply to Plaintiff’s claim.

1. *There Is No Special Relationship Between Airbnb and Plaintiff.*

Airbnb has *no* relationship with Plaintiff, much less the sort of special relationship South Carolina courts require to hold a defendant liable for third-party crimes. The only connection Plaintiff alleges to Airbnb is its run-of-the-mill, arms-length commercial agreement to give *her friend* access to listings on Airbnb’s website. Compl. ¶ 16; Watson Decl., Ex. 1 (Airbnb Terms of Service). Such a routine commercial agreement does not, as a matter of law, give rise to a special relationship to protect even Plaintiff’s friend from the criminal acts of third parties, much less a duty to protect Plaintiff herself, a mere guest of that friend. *See, e.g., Laidlaw Env’t Servs., (TOC), Inc. v. Honeywell, Inc.*, 966 F. Supp. 1401, 1414 (D.S.C. 1996) (holding that a “buyer-seller relationship does not constitute a ‘special relationship’”), *aff’d*, 113 F.3d 1232 (4th Cir. 1997); *Goode v. St. Stephens United Methodist Church*, 329 S.C. 433, 443 (Ct. App. 1997) (“We think it would be absurd to find a landlord owes a higher duty of care to the guests of tenants than to the tenants themselves.”).

South Carolina courts have largely limited the “special relationship” exception in the commercial context to a narrow duty of innkeepers and storeowners to protect their “invitees” from “unreasonable risk of physical harm.” *Bass v. Gopal*, 395 S.C. 129, 134-35 (S.C. 2011); *Cramer*, 312 S.C. at 442-43. “[I]n light of the cautious approach the South Carolina appellate courts have taken even in those contexts,” South Carolina courts have resisted efforts to extend liability beyond those specific contexts. *See Cooke v. Allstate Mgmt. Corp.*, 741 F. Supp. 1205, 1213 (D.S.C. 1990) (landlord owed no duty to tenant). For example, the South Carolina Supreme Court has squarely held that landlords owe no general duty to protect their tenants from third-party criminal acts. *See*

Cramer, 312 S.C. at 443. In *Cramer*, the Supreme Court explained that unlike innkeepers and storeowners, landlords do not invite the general public into their buildings and so do not take on the risk of those members of the public who may break the law. *Id.* (“An apartment building is not a place of public resort where one who profits from the very public it invites must bear what losses that public may create.”). Nor does the no-duty principle change even if the landlord in fact invited the particular assailant. In *Goode v. St. Stephens United Methodist Church*, for example, the court applied *Cramer* to hold that a landlord had no duty to protect a guest in the common area of an apartment from an attack by one of the landlord’s tenants. 329 S.C. at 442-43; *see also* *Cooke*, 741 F. Supp. at 1211 (declining to extend landlord’s obligations to maintain “common areas” to protect tenants in those common areas against criminal actions). The principle of these cases is simple: a landlord who does not open her doors to all-comers “cannot be expected to protect” those who do come through “against the wiles of felony.” *Cramer*, 312 S.C. at 443.

Here, of course, no one can suggest that the property where Plaintiff suffered the alleged criminal harm is a place to which all are invited, such as a public store on a city street or the public lobby of a hotel. *See id.* at 443. Unlike merchants and innkeepers (or indeed, landlords themselves), Airbnb does not own or control the property where Plaintiff was harmed—a fact Plaintiff admits (despite her misleading efforts to define it as “the Airbnb property”), Compl ¶¶ 12-14. *Cf. Wintersteen v. Food Lion, Inc.*, 344 S.C. 32, 36 (S.C. 2001) (“Storekeeper liability is founded upon the duty of care a possessor of land owes to an invitee.”). And Airbnb is not even a party to the actual rental agreement, but merely provided a platform where Riviere advertised the rental. Compl. ¶ 16; Watson Decl., Ex. 1 (Airbnb Terms of Service). For those reasons, courts around the country have agreed—correctly—that Airbnb has no special relationship giving rise to a duty to protect third parties. *See, e.g., Carroll*, 289 F. Supp. 3d at 771-72 (holding that Airbnb

does not control listed properties such as to establish a duty to protect third parties). This Court should reach the same conclusion.

2. *There Is No Special Relationship Between Airbnb and Riviere.*

There is also not the sort of “special relationship” between Airbnb and Defendant Riviere that would impose upon Airbnb a duty to protect Plaintiff from Riviere’s criminal voyeurism. “The rationale behind this line of cases is an individual does not have a duty to protect the public from speculative harm from a dangerous individual within his control,” but “where the custodian knows of a specific, credible threat from a person in their care the injury is no longer speculative in nature.” *Faile v. S.C. Dep’t of Juv. Justice*, 350 S.C. 315, 335 (S.C. 2002). South Carolina law accordingly limits its application to instances where (i) the defendant “has the ability to monitor, supervise and control an individual’s conduct” and (ii) “the individual has made a specific threat of harm directed at a specific individual.” *Marion*, 373 S.C. at 400; *see also Rogers*, 320 S.C. at 255. Neither prong is satisfied.

Here, Airbnb has no “ability to monitor, supervise and control” Riviere’s actions. South Carolina courts traditionally find this prong is met only in custodial settings, such as prisons or mental health institutions. *See Faile*, 350 S.C. at 335, 339 (duty where the Department of Juvenile Justice “had custody of a known dangerous individual” (citing Restatement (Second) of Torts § 319 (1965)); *Bishop v. S.C. Dep’t of Mental Health*, 331 S.C. 79, 83-84, 87-88 (S.C. 1998) (duty where the Department of Mental Health “had custody and control” of an involuntary-committed individual who had threatened violence). This case comes nowhere close. Plaintiff fails to allege that Airbnb was Riviere’s custodian, or indeed had any control over Riviere whatsoever. To the contrary, “Airbnb *has no control over* . . . Host Services . . . , [or] the performance or conduct of any Member.” Watson Decl., Ex. 1 § 1.3. And Plaintiff admits that Riviere was violating Airbnb’s general policy against undisclosed cameras. Compl. ¶ 21. The fact that Riviere ignored the

applicable Airbnb policy shows that Airbnb does not exercise control over its Hosts, much less one that resembles a custodian's control over its charge. *See, e.g., Roe v. Bibby*, 410 S.C. 287, 295-96 (S.C. Ct. App. 2014) (finding "the record contains no evidence [a wife] had a special relationship [with her husband] akin to those special relationships recognized by our courts," such as state custodial situations and the psychiatrist/patient relationship); *cf. Goode*, 329 S.C. at 442 (holding the "attacker's status as a tenant" does not create a duty for a landlord to protect a third party).

But even if Airbnb's relationship with its Hosts did give it sufficient control over Riviere's actions, Plaintiff has failed to plead any facts suggesting Airbnb knew Riviere was a danger to *anyone*, much less Plaintiff in particular. *See Marion*, 373 S.C. at 400. That independently defeats her claim. For example, when a minor patient sued his psychiatrist, Dr. Marion, for child molestation, the South Carolina Supreme Court rejected the premise that the patient could *also* sue the psychiatrist who treated Dr. Marion, despite actual knowledge that Dr. Marion had molested at least one of his patients previously. *Id.* at 393-94. The court explained that even though the plaintiff was "a member of a readily identifiable group of future patients of Dr. Marion" who might be targeted, there was no duty when the plaintiff failed to allege a "distinct, specific, overt threat of harm which the individual makes to a particular victim." *Id.* at 401. Here, Plaintiff does not allege that Riviere made any sort of "specific threat" against Plaintiff. *See id.*

Without plausibly alleging that Airbnb controlled Riviere and had preexisting knowledge of a specific threat, Plaintiff cannot salvage her claim with allegations of Airbnb's supposed lack of "background check" on Riviere or Thomas, or "evaluation of these hosts or the property."¹

¹ Plaintiff is in fact wrong; Airbnb *did* conduct a background check of both Riviere and Thomas, so she will ultimately be unable to prove this allegation in any event. The Complaint cites no source for this falsehood, and Airbnb is unaware on what grounds Plaintiff bases her erroneous

Compl. ¶ 40. “[F]ailing to . . . investigat[e] . . . lessors,” *id.* ¶ 41, is not the test here, but rather *actual knowledge* “of a specific credible threat.” *Faile*, 350 S.C. at 335 (custodian’s duty to protect the public from dangerous individual within its control only triggered once custodian “knows of a specific, credible threat”); *cf. Marion*, 383 S.C. at 400-02 (no duty even upon knowledge of injurer’s general history of child sexual abuse). And regardless, as discussed *infra* at Part I.B., Plaintiff could not plead that an investigation would have turned up a specific threat made against her as necessary to give rise to duty here.

3. *Airbnb Did Not Voluntarily Undertake a Duty to Protect Plaintiff.*

Airbnb did not voluntarily take on any duty to protect Plaintiff from Riviere’s crimes. Plaintiff seeks to make much out of the fact that Airbnb has a general policy requiring Hosts to inform Guests of any cameras at their properties. Compl. ¶ 21. But South Carolina courts have repeatedly held that an institution’s policies are *not* a voluntary undertaking by the institution to ensure those policies are enforced. *See Doe v. Citadel*, 421 S.C. 140, 148 (S.C. Ct. App. 2017) (college’s enactment of policies requiring it to report sexual abuse did not establish a voluntary undertaking of a duty); *Wal-Mart*, 393 S.C. at 248 (business’s policy prohibiting destruction of evidence of child abuse did not establish voluntary undertaking of a duty). At most, such institutional policies “serve as evidence of the standard of care if the duty was established by law,” but cannot establish a duty in and of itself. *Citadel*, 421 S.C. at 148.

This is particularly true here, where Airbnb’s Terms of Service expressly disclaim any such undertaking, rendering any reliance on Airbnb’s alleged policy unreasonable. *E.g.*, Watson Decl.,

claim. *See* SCRCP 11(a) (requiring “good ground to support” submissions). Nor does Airbnb purport to have any control over or otherwise guarantee “(i) the existence, quality, safety, suitability, or legality of any Listings or Host Services, (ii) the truth or accuracy of any Listing descriptions, Ratings, Reviews, or other Member content . . . , or (iii) the performance or conduct of any Member or third party.” Watson Decl., Ex. 1 § 1.3.

Ex. 1 § 1.3 (“Airbnb has no control over and does not guarantee (i) the existence, quality, safety, suitability, or legality of any Listings or Host Services, (ii) the truth or accuracy of any Listing descriptions, . . . or (iii) the performance or conduct of any Member or third party.”); *see Citadel*, 421 S.C. at 147 (undertaking does not create a duty unless plaintiff “suffered harm because he relied upon [that] undertaking”). Perfect enforcement of all institutional policies is not the law in South Carolina, and for good reason: it would have the perverse result of discouraging entities like Airbnb from setting any policies at all.

4. *Airbnb Did Not Take Affirmative Acts That Increased Plaintiff’s Risk of Harm.*

Plaintiff’s negligence claim does not fit into the “affirmative acts” exception, which “is limited to situations where the [defendant’s] *direct action* increases a [plaintiff’s] risk of harm from criminal activities.” *Wright*, 426 S.C. at 216 (emphasis added). Here, Plaintiff’s claim rests on Airbnb’s alleged *inaction*, not its *action*: Plaintiff alleges that Airbnb “conducted no background investigation” or “any reasonable evaluation of the[] hosts.” Compl. ¶ 40; *see also id.* ¶ 23. But “[t]here is a fundamental difference between imposing a general duty to perform with due care all affirmative acts, and a duty to take certain affirmative precautions.” *See Cooke*, 741 F. Supp. at 1210 n.2. Airbnb’s supposed *lack* of certain affirmative precautions cannot trigger the affirmative acts exception.

The only allegedly active conduct of Airbnb’s to which Plaintiff points is the bare practice of listing properties. *See* Compl. ¶ 36. But she accepts that Airbnb is a platform where *Hosts* list their property in a virtual “marketplace.” *See id.* ¶ 20. Courts require a direct nexus between a defendant’s act and plaintiff’s risk of harm, such as where a landlord enters a tenant’s apartment and leaves the door unlocked on his way out, literally leaving the door open for criminal activity. *Wright*, 426 S.C. at 216. Nothing of the sort is alleged here, and because Plaintiff can point to no

affirmative act Airbnb took to increase the risk of her being spied on during her stay, she cannot rely on the affirmative act exception.

5. *Airbnb Did Not Have a Statutory Duty to Protect Plaintiff from Third-Party Crime.*

Finally, Plaintiff does not and could not plead that any statute imposes a duty on Airbnb that would support her general negligence theory. (Plaintiff's separate argument that South Carolina's real estate broker licensing statute supports a negligence *per se* claim also fails for the reasons explained below. *See infra* Part II.)

B. Even Assuming an Exception Applies, Riviere's Criminal Conduct Was Not Foreseeable.

Even if Plaintiff could establish that Airbnb owed her *some* duty of care, that duty would extend only to protecting against acts posing a "*foreseeable* risk" of harm. *See Lord v. D&J Enters., Inc.*, 407 S.C. 544, 555 (S.C. 2014); *see also Bass*, 395 S.C. at 134; *Bullard v. Ehrhardt*, 283 S.C. 557, 559 (1984) (limiting storeowners' duty to take "reasonable care to protect" invitees from third-party crime to situations where "the storeowner knew or had reason to know of the criminal attack"). The scope of a duty to protect is thus contingent on whether a defendant "knew or had reason to know of [the] probability of harm" at issue. *Bass*, 395 S.C. at 135. Plaintiff does not plead facts showing that the alleged criminal voyeurism at issue here was foreseeable.

In addition, Plaintiff nowhere suggests that Airbnb actually knew about Riviere's cameras. To the contrary, Plaintiff admits that Riviere "did not disclose that there were cameras located in the bedroom." Compl. ¶ 62. Nor does Plaintiff suggest that Airbnb knew or should have known of any prior voyeurism (or even any other criminal act) by Riviere at the property, despite the fact that "the presence or absence of prior criminal incidents is a significant factor" in assessing foreseeability. *Bass*, 395 S.C. at 135, 138; *see also Easterling v. Burger King Corp.*, 416 S.C. 437, 450 (Ct. App. 2016) (prior instance of robbery insufficient to render physical assault foreseeable).

Because Airbnb had no reason to know about Defendant Riviere's voyeuristic predilections, Plaintiff cannot possibly prove foreseeability here.

Plaintiff's foreseeability theory apparently hinges on her allegation that Airbnb failed to conduct a background check or other evaluation of Riviere. Compl. ¶ 40. That allegation is in fact false, but even taken as true at this stage of the proceeding, Plaintiff does not allege that such a background check would have uncovered any criminal history at all. *See Search v. Uber Techs., Inc.*, 128 F. Supp. 3d 222, 230 (D.D.C. 2015) (negligence claim premised on alleged failure to conduct background check could not proceed absent allegations of "specific facts from which an inference can be drawn that the employer did not conduct a reasonable background investigation, and that such an investigation would have uncovered a reason not to hire the alleged tortfeasor").

Plaintiff has not sufficiently pled that an exception to South Carolina's no-duty rule applies, nor, even assuming such an exception could apply, that Riviere's criminal act was foreseeable. Her negligence claim against Airbnb must therefore be dismissed.

II. Airbnb Did Not Violate the Real Estate Broker Licensing Statute, Nor Could the Statute Lay the Basis for a Negligence *Per Se* Claim.

Plaintiff also pursues a claim for negligence *per se* against Airbnb based on its supposed noncompliance with South Carolina's estate broker licensing statute, S.C. Code Ann. § 40-57-20. That novel claim fails, too. Airbnb is not violating that statute. Even if it were, any failure to comply would not impose liability on Airbnb for Riviere's alleged acts of voyeurism.

A. Airbnb Is Not a Real Estate Broker Under the Licensing Statute.

Airbnb is not subject to and did not violate the real estate broker licensing statute. Section 40-57-20 prohibits "an individual" from "act[ing] as a real estate broker" or "advertis[ing] or provid[ing] services as such without an active, valid license issued by" the South Carolina Real Estate Commission, and the statute defines a "broker" as someone who actively "negotiates" real

estate transactions, “solicits a referral,” or acts as a “consultant, counselor, or transaction manager.” S.C. Code Ann. §§ 40-57-20, 40-57-30(3). But Airbnb is not—nor purports to be—a real estate “broker” under the statute.

Plaintiff alleges only that Airbnb is a “community marketplace” and “internet platform whereby homeowners pay a fee to advertise the renting of their homes.” See Compl. ¶¶ 16, 20, 77; *accord* Watson Decl., Ex. 1 (Terms of Service). A passive marketplace on which Airbnb accepts a fee to advertise a rental, Compl. ¶ 16, does not require Airbnb to register as a broker any more than it requires the registration of an operator of a billboard on I-20 who accepts a fee to advertise rooms at a nearby Comfort Inn. As an arbitrator rejecting a similar argument under a parallel California law put it:

[Airbnb] is like Lloyd’s of London or the New York Stock Exchange. Both simply provide a marketplace – a place for buyers and sellers of insurance or of stocks to meet and negotiate sales. Neither Lloyd’s nor the NYSE actually buy or sell on that marketplace; they merely furnish a building (the alternative to a website) and some rules, but otherwise leave the actual business to the participants.

McCluskey v. Airbnb, Inc., No. 01-18-0003-7337, at 9-10 & n.4 (Am. Arb. Ass’n Oct. 28, 2019) (Jampol, Arb.), *mot. to vacate arb. award denied by McCluskey v. Airbnb, Inc.*, 2020 WL 2542616 (C.D. Cal. Jan. 7, 2020).² That limited role falls well outside the scope of S.C. Code Ann. § 40-57-20. Tellingly, Plaintiff does not allege that the South Carolina Real Estate Commission has ever suggested Airbnb must register as a real estate broker; this Court should not use negligence *per se* as a back door to second-guess that agency’s authority.

Indeed, it is implausible that Airbnb could obtain a broker license under the statute. The statute contemplates *individual* brokers, not *entities* like Airbnb. See S.C. Code Ann. § 40-57-20 (declaring certain conduct by “an individual” to be unlawful); *id.* § 40-57-30(14) (defining

² Attached as Exhibit 2 to the Declaration of L. Andrew Watson.

“licensee” as “an individual”); *id.* § 40-57-30(3), (23)-(24) (differentiating between a “broker” of real estate who must be licensed and a “real estate brokerage firm”). An individual applicant for a broker license must complete a classroom instructional program, provide proof of a qualifying degree from an institution of higher education, and pass a written examination. *See id.* § 440-57-320. Airbnb obviously cannot sit in a classroom, and it is unaware of any higher education institution that would allow an entity like it to enroll in a degree-seeking (or any other) program.

Contrary to Plaintiff’s pleading, S.C. Code Ann. § 40-57-20 simply does not and was not intended to apply to an entity like Airbnb. Without a statutory violation on which to rest Plaintiff’s negligence *per se* claim, it fails as a matter of law.

B. South Carolina’s Licensing Statute Does Not Impose a Relevant Standard of Care or Confer on Plaintiff a Private Right of Action.

Plaintiff’s negligence *per se* claim would fail even if she were able to establish that Airbnb violated the licensing statute. To prevail on negligence *per se*, Plaintiff must show *both* a duty and a breach. Although a statutory violation could bear on the question of breach, Plaintiff’s claim necessarily fails if the statute imposes no duty on Airbnb to Plaintiff. *See Whitlaw v. Kroger Co.*, 306 S.C. 51, 53-54 (S.C. 1991).

As an initial matter, “a licensing statute will not ordinarily provide a basis for a negligence *per se* action” because licensing statutes generally “fail to set forth a standard of care.” *See Hurst v. Sandy*, 329 S.C. 471, 479-80 & n.5 (S.C. Ct. App. 1997) (engineering licensing statute did not support negligence *per se* claim). Like the engineering licensing statute in *Hurst*, the real estate licensing statute contains no relevant standard of care. *See id.* at 479-80; *see generally* S.C. Code Ann. §§ 40-57-5, *et seq.* Indeed, the standard of care that Plaintiff alleges Airbnb violated—“fail[ing] to conduct a background investigation,” “not engag[ing] in any reasonable evaluations of these hosts or property managers,” and lacking “reasonable policies or procedures . . . to protect

lessees,” Compl. ¶¶ 78-80—has no statutory foundation at all. Plaintiff has failed as well to show that any supposed violation proximately caused Plaintiff’s harm; she cannot allege that Airbnb’s procurement of a broker license had any bearing on the third-party criminal acts from which Plaintiff suffered. *See Whitlaw*, 306 S.C. at 53-54.

Even if this licensing statute provided a relevant standard of care, Plaintiff would need to show: “(1) that the essential purpose of the statute is to protect from the kind of harm [she] has suffered; and (2) that [s]he is a member of the class of persons the statute is intended to protect.” *Id.* at 53. She has shown neither. First, licensing statutes like S.C. Code Ann. § 40-57-20 serve to “regulat[e] . . . the practice of a profession,” *see Hurst*, 329 S.C. at 479, not to enable brokers to prevent property owners from committing crimes against tenants. For example, the licensing exam—covering topics like land use regulations, contract formation, and real estate calculation—does nothing to train brokers-to-be in crime prevention.³ Nor does a college degree. And even assuming the purpose of the statute is “to promote the public welfare,” *id.* at 478-79, that is not enough: “[W]hen a statute does not specifically create a private cause of action, one can be implied only if the legislation was enacted for the special benefit of a private party.” *Marion*, 373 S.C. at 397, 399 (finding no “private cause of action for negligence *per se*” based on statutory child abuse reporting requirement against psychiatrist who did not notify authorities of suspected sexual abuse of plaintiff).

For each of these reasons, Plaintiff’s negligence *per se* claim against Airbnb must also be dismissed.

³ *See* S.C. Real Estate Comm’n, Dep’t of Labor, Licensing & Regulation, *Real Estate Candidate Licensing Information Bulletin* (June 1, 2021).

CONCLUSION

Plaintiff does not and cannot state facts sufficient to constitute a cause of action against Airbnb. SCRCP 12(b)(6). Where “amendment would be clearly futile,” dismissal with prejudice is appropriate. *Skydive Myrtle Beach, Inc. v. Horry County*, 426 S.C. 175, 182-83 (S.C. 2019). The shortcomings of the Complaint go to the heart of Plaintiff’s claims against Airbnb, and she cannot plead around these fatal flaws. Airbnb simply does not belong in this case, and the Court should grant its motion to dismiss without leave to amend.

DATED this 26th day of August, 2021.

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STATE OF SOUTH CAROLINA

COUNTY OF AIKEN

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

JULIANNE FOSTER,

Plaintiff,

v.

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

Defendants.

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

TO: THE HONORABLE COURT AND ALL COUNSEL OF RECORD

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

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

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

Negligence Claim

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

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

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

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

Employment-Based and Vicarious Liability Claims

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

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

Premises Liability Claim

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

Misrepresentation-Based Claims

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

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

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

Claims Based on Real Estate Licensing Statute

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

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

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

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

Punitive Damages

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

* * * * *

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

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

Dated this 20th day of January, 2023.

Respectfully submitted,

/s/ Beattie B. Ashmore

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STATE OF SOUTH CAROLINA
COUNTY OF AIKEN

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

JULIANNE FOSTER,

Plaintiff,

v.

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

Defendants.

**DEFENDANT AIRBNB, INC.'S
MEMORANDUM OF LAW IN
SUPPORT OF ITS MOTION TO
DISMISS AMENDED COMPLAINT**

Airbnb, Inc., by and through its undersigned counsel, submits the following memorandum of law in support of its motion to dismiss the amended complaint under Rule 12(b)(6) of the South Carolina Rules of Civil Procedure.

INTRODUCTION

Plaintiff alleges that defendant Rhett Riviere secretly videorecorded her during her one-night stay at an Aiken property owned by Riviere and defendant Katherine Thomas. Riviere alone committed this crime, and he is being criminally prosecuted for it. Plaintiff testified in her deposition last week that she has never been an Airbnb user, never had any communication with Airbnb before filing this lawsuit, and never even visited Airbnb's website before she stayed at Riviere's property in May 2019.¹ She furthermore concedes that Airbnb has never made any promises to her and that Airbnb did not know that Riviere was going to illegally record her. Airbnb's criminal background check of Riviere showed no red flags and Airbnb is clear with the

¹ Plaintiff's friend booked the stay at Riviere's property and invited Plaintiff to stay with her as a guest.

public about the limitations of background checks—which cannot *predict crimes*, particularly where there is no criminal conviction history. Despite this, Plaintiff has entered into a confidential settlement with Riviere, her perpetrator, and is pursuing scorched-earth litigation against Airbnb.

Even after completing nearly two years’ worth of discovery and a second opportunity to plead her claims, Plaintiff’s amended complaint fails to allege sufficient facts to establish any cause of action against Airbnb. Her negligence claim must fail because she cannot establish that, under the facts alleged, Airbnb had any duty to protect Plaintiff from Riviere’s criminal voyeurism—a question of law appropriate for determination when ruling on a motion to dismiss. Plaintiff’s other claims—for negligence per se; premises liability; two counts of negligent hiring, supervision, and retention; vicarious liability; constructive fraud; and violation of South Carolina’s Unfair Trade Practices Act—also fail. There is no legal basis to allege Airbnb had any control over Riviere’s property, and no allegation Airbnb hired or supervised Riviere or Thomas in any capacity, or made any misrepresentations. Furthermore, South Carolina’s real estate licensing statute is inapplicable to Airbnb on its face. Plaintiff’s amended complaint falls short in all of these respects. The Court should therefore dismiss all claims against Airbnb with prejudice.

BACKGROUND

Plaintiff Julianne Foster has never had an Airbnb account; she does not allege otherwise. Nevertheless, she claims that Airbnb owed her a duty to prevent what it did not know—that defendant Riviere, a man with no criminal convictions and about whom Airbnb received no complaints, would secretly record her when she stayed at a property her friend reserved through Airbnb’s platform. Plaintiff asserts eight causes of action against Airbnb: (1) negligence; (2) negligence per se; (3)-(4) two counts of negligent hiring, supervision, and retention of employee/independent contractor; (5) vicarious liability for Riviere’s invasion of privacy;

(6) constructive fraud; (7) violation of South Carolina’s Unfair Trade Practices Act premised on an alleged false misrepresentation and an alleged violation of South Carolina’s real-estate licensure statute; and (8) premises liability. Each is insufficient as a matter of South Carolina law.

Airbnb provides “a website—an online platform—that connects individuals who wish to offer accommodations (“Host(s)”) with those seeking to book accommodations [“Guest(s)”), nothing more.” Ex. 1, *King v. Pleasant 30 LLC*, 2022 WL 12827986, at *2 (N.Y. Sup. Ct. Oct. 6, 2022); *see also* First Amended Complaint (“FAC”) ¶ 62. Unlike a hotel, Airbnb does not own or control the properties that hosts list, but instead is a forum for hosts and guests to connect with each other to transact and communicate. *See Airbnb, Inc. v. City & Cnty. of S.F.*, 217 F. Supp. 3d 1066, 1069 (N.D. Cal. 2016) (“Airbnb does not own, manage or operate any of the host properties”); Ex. 2, *Carroll v. Am. Empire Surplus Lines Ins.*, 289 F. Supp. 3d 767, 772 (E.D. La. 2017) (Airbnb functions “like a travel agent” and does not control properties that hosts list on the platform); Ex. 1, *King*, 2022 WL 12827986, at *2 (“Airbnb is not an owner of nor has any control over the properties listed on its platform and cannot be liable for negligence or premises liability.”); FAC ¶ 62. Nor is Airbnb a party to the rental agreements between hosts and guests; those who book properties via Airbnb’s platform rent solely from the hosts who offer the listings. *See, e.g., Airbnb, Inc. v. City & Cnty. of S.F.*, 217 F. Supp. 3d at 1069. Airbnb has policies that allow it to regulate the use of its online platform only—for example, to “remove listings and revoke memberships.” Ex. 3 at 5, *Rengifo Jackson v. Airbnb, Inc.*, Case No. 22-3084 (C.D. Cal. Feb. 2, 2023). But those policies do “not allow Airbnb to make physical changes to rental properties,” over which it has no control. *Id.*; *see also* FAC ¶ 68.

Plaintiff’s allegations do not contradict the reality that hosts retain autonomy over their properties, control what is inside them, can invite anyone thereto, and rent their properties outside

of the Airbnb platform. In fact, Airbnb's website was only one of several methods Riviere and Thomas used to offer the Property for rent, including through local realtors. *See* FAC ¶¶ 21, 43, 115.

In her amended complaint, Plaintiff elaborates on Airbnb's role as an online platform, and her allegations make clear that Airbnb owed no duty to Plaintiff here. Nevertheless, Plaintiff has now re-pled the same negligence and negligence per se claims as in her original complaint (along with six new causes of action). The Court is in no way bound by its previous denial of Airbnb's motion to dismiss the original complaint—particularly since almost two years of discovery has only cemented the deficiencies of Plaintiff's claims. *Bessinger v. Bi-Lo, Inc.*, 366 S.C. 426, 431, 622 S.E.2d 564, 567 (Ct. App. 2005) (“[D]enial of a Rule 12(b)(6) motion does not establish the law of the case nor does it preclude a party from raising the issue at a later point.”).

Also, since the filing of Plaintiff's original complaint, numerous courts around the country have considered and uniformly rejected similar claims against Airbnb, finding that Airbnb has no duty to prevent criminal misconduct at properties it does not own, manage, or control. South Carolina law compels the same outcome here.

LEGAL STANDARD

“Under Rule 12(b)(6), SCRCP, a defendant may move to dismiss based on a failure to state facts sufficient to constitute a cause of action.” *Flateau v. Harrelson*, 355 S.C. 197, 201, 584 S.E.2d 413, 415 (Ct. App. 2003). When considering a motion to dismiss under Rule 12(b)(6), courts accept all “well-pled facts” as true, *Gressette v. S.C. Elec. & Gas Co.*, 370 S.C. 377, 378-79, 635 S.E.2d 538, 538 (2006), but not “conclusory” allegations, *Jones v. Gilstrap*, 288 S.C. 525, 528, 343 S.E.2d 646, 648 (Ct. App. 1986)

ARGUMENT

I. Plaintiff's Negligence Claim Should Be Dismissed.

Plaintiff's negligence claim must fail because she does not plead facts sufficient to show that Airbnb owed Plaintiff a duty of care. *Doe v. Wal-Mart Stores, Inc.*, 393 S.C. 240, 246, 711 S.E.2d 908, 911 (2011) (plaintiff must show that "the defendant owes a duty of care to the plaintiff"). "The existence of a duty owed is a question of law" that is appropriate for courts to consider when ruling on a motion to dismiss. *Doe v. Marion*, 361 S.C. 463, 470, 605 S.E.2d 556, 560 (Ct. App. 2004) (affirming dismissal of complaint for failure to allege a duty).

Every other court that has considered the issue has held that Airbnb owes no duty to protect individuals staying at a property booked via Airbnb's platform from the criminal acts of others:

- The Western District of Arkansas ruled that no "particular duty of care stemm[ed] from [Airbnb's] relationship with the users of [its] online platform," and rejected contention that special relationship like "that of innkeeper/guest or business owner/invitee" existed. Ex. 4, *Esposito v. Airbnb Action, LLC*, 2022 WL 2980700, at *5 (W.D. Ark. July 27, 2022) (dismissing negligence and vicarious liability claims against Airbnb);
- The Eastern District of Louisiana found that Airbnb had no duty to property hosts or guests because the contractual "relationship does not involve the direct control, and corresponding responsibility, of the more custodial relationships that have traditionally given rise to a duty to protect third parties." Ex. 2, *Carroll v. Am. Empire Surplus Lines Ins. Co.*, 289 F. Supp. 3d 767, 772 (E.D. La. 2017) (dismissing negligence claim against Airbnb);
- The Central District of California rejected arguments that Airbnb had a duty based upon premises liability, a special relationship, or a negligent undertaking, and held that third-party misconduct was unforeseeable. Ex. 5, *Rengifo Jackson v. Airbnb, Inc.*, --- F. Supp. 3d ---, 2022 WL 16752071, at *7 (C.D. Cal. Nov. 4, 2022) (dismissing negligence claim against Airbnb);
- A Texas district court granted Airbnb's no-evidence motion for summary judgment on negligence claim for lack of a duty to protect against third-party criminal acts on a property booked via Airbnb's platform. Ex. 6, *Maduagwu v. Airbnb, Inc.*, No. 296-00503-2021 (Tex. Dist. Ct. Feb. 15, 2022); and
- The Superior Court of California similarly sustained multiple motions to dismiss negligence claims against Airbnb because Airbnb had no duty to protect

against third-party criminal acts on properties booked via Airbnb's platform. Ex. 7, *Ramirez v. Airbnb, Inc.*, No. CGC-21-590076 (Cal. Sup. Ct. Sept. 1, 2021); Ex. 8, *Dier v. Armbruster*, No. MSC20-01743 (Cal. Sup. Ct. Oct. 12, 2021).

South Carolina negligence law—under which there is “no affirmative duty to control the conduct of another or to warn a third person of danger,” *McCord v. Laurens Cnty. Health Care Sys.*, 429 S.C. 286, 296, 838 S.E.2d 220, 225 (Ct. App. 2020)—demands the same result. Plaintiff has not met any of the limited exceptions to the no-duty rule,² and the claim should accordingly be dismissed.

No Special Relationship Existed Between Plaintiff and Airbnb. Plaintiff has alleged no relationship *at all* between herself and Airbnb. Plaintiff does not allege that she ever registered for an Airbnb account nor that she has ever made a reservation via Airbnb's platform. Airbnb was not even aware of Plaintiff before she filed the instant lawsuit. FAC ¶¶ 93, 95, 121 (alleging Plaintiff's friend booked the listing at issue). This alone forecloses any argument that Airbnb and Plaintiff had a special relationship. *Ellis v. Tall Ships Charleston, LLC*, 593 F. Supp. 3d 253, 265 (D.S.C. 2022) (“South Carolina law provides that ‘policy guidelines and contracts *to which plaintiff was not a party* could not form the basis of a duty to support plaintiff's negligence claim.’” (emphasis added)).

But even if Plaintiff *were* an Airbnb user, she would not have a special relationship with Airbnb. Plaintiff acknowledges that Airbnb is merely an online platform where property owners can post listings, and guests can connect with owners to book these properties. *See, e.g.*, FAC

² The exceptions are: “1) where the defendant has a special relationship to the victim; 2) where the defendant has a special relationship to the injurer; 3) where the defendant voluntarily undertakes a duty; 4) where the defendant negligently or intentionally creates the risk; and 5) where a statute imposes a duty on the defendant.” *Wal-Mart Stores*, 393 S.C. at 246-47, 711 S.E.2d at 911-12. Plaintiff has not alleged any statutory basis for her general negligence claim apart from that asserted in her negligence per se claim, which fails for the reasons discussed *infra* at 22-23.

¶ 58. There is no factual allegation that Airbnb has the ability to control the listed properties or the users of its platform. At most, Airbnb has a contractual, arms-length, web-based relationship with the *millions* of people who sign up after agreeing to its Terms of Service (which expressly disclaims any duty or right to protection). Such a relationship is nothing like the special relationships recognized in South Carolina, which are based on professional duty or physical control or custody. *See Bahringer v. ADT Sec. Servs., Inc.*, 942 F. Supp. 2d 585, 590 (D.S.C. 2013) (“[T]he South Carolina Supreme Court has found a special relationship where the parties’ relationship was (1) one marked by professional duty,” such as for lawyers and corporate consultants, or (2) in “supervisor-supervisee relations,” such as for “design professionals and general contractors who work under their supervisions”); *Courtney v. Remler*, 566 F. Supp. 1225, 1232 & n.2 (D.S.C. 1983) (recognizing special relationships for “innkeeper-guest,” “common carrier-passenger,” “employer-employee,” and “possessor of land-invitee” relationships). Airbnb’s generic, web-based business-customer relationship with users of its online platform is not enough.

In fact, a federal court in South Carolina has already declined to find a special relationship between online users and a similar online property-booking platform called HomeAway.com. *See Kraft Real Est. Invs. v. HomeAway.com, Inc.*, 2012 WL 220271, at *18 (D.S.C. Jan. 24, 2012). Like Airbnb, HomeAway.com provided an online platform for individuals to list and rent out their properties to other users. *Id.* The court rejected the plaintiffs’ negligence claim and held that “[m]ere membership to a website, without evidence establishing a relationship of trust or confidence between the parties, does not create a special relationship establishing an independent duty on one of the contracting parties.” *Id.*; *see also Ellis*, 593 F. Supp. 3d at 265 (no duty “exist[s] through contract absent a[n] [independent] special relationship”); *Laidlaw Env’t Servs., (TOC)*,

Inc. v. Honeywell, Inc., 966 F. Supp. 1401, 1414 (D.S.C. 1996) (“buyer-seller” and “vendor-vendee” relationships insufficient). Here, Plaintiff cannot even allege membership to Airbnb’s platform.

For the same reason the District of South Carolina found in *HomeAway*, multiple courts have uniformly declined to find a special relationship between Airbnb and its users. The Western District of Arkansas, for example, applied these principles to conclude that Airbnb had no special relationship with guests who were assaulted at a property they booked using Airbnb. Ex. 4, *Esposito*, 2022 WL 2980700, at *5. Rejecting the contention that a special relationship like “that of innkeeper/guest or business owner/invitee” existed, the court ruled that no “particular duty of care stemm[ed] from a relationship with the users of [Airbnb’s] online platform” and that the plaintiffs pleaded no facts “to show Airbnb assumed a further duty to protect users from crimes committed by third parties.” *Id.* As in *Esposito*, Plaintiff here “struggle[s] mightily to fit the square peg of [her] unusual facts into the round hole of the established law,” *id.*, and this Court should likewise dismiss Plaintiff’s amended complaint. *See also* Ex. 2, *Carroll*, 289 F. Supp. 3d at 772 (dismissing negligence claim against Airbnb finding no special relationship with property hosts or guests); Ex. 3, *Rengifo Jackson*, Case No. 22-3084 (holding there was no special relationship because Airbnb did not control physical property). This Court should hold the same.

No Special Relationship Existed Between Airbnb and Riviere or Thomas. Nor can Plaintiff establish on the facts alleged that Airbnb had a special relationship with Riviere (who allegedly recorded Plaintiff and owned the property) or Thomas (who managed the property). South Carolina law limits application of this exception to instances where (i) the defendant “has the ability to monitor, supervise and control an individual’s conduct” **and** (ii) “the individual has made a specific threat of harm directed at a specific individual.” *Doe v. Marion*, 373 S.C. 390,

400-01, 645 S.E.2d 245, 250 (2007); *see also Scibek v. Gilbert*, No. 2:20-CV-2638-DCN, 2022 WL 1121001, at *3 (D.S.C. Apr. 14, 2022) (special relationship can apply only when both elements are satisfied). Neither applies to this case.

Plaintiff does not (and cannot) allege that Airbnb can “monitor, supervise and control” each of the millions of people worldwide who list (like Thomas) or have access to (like Riviere) properties listed on its platform. *See Roe v. Bibby*, 410 S.C. 287, 294, 763 S.E.2d 645, 648 (Ct. App. 2014) (listing relationships found sufficient under South Carolina law, including Department of Mental Health and involuntarily-committed patient, psychiatrist and patient, and Department of Juvenile Justice and dangerous juvenile over whom it had custody). And Plaintiff’s conclusory allegations of “control” are unsupported: the alleged policies for using the Airbnb platform in no way show “control” over hosts, who retain autonomy over their properties, the material terms of their bookings, whether and when to list their properties, and whether to rent out their properties via other methods. The scope of Airbnb’s purported “control” from these policies is limited to hosts’ ability to use the *platform*—not to their use of their physical properties. *See Ex. 2, Carroll*, 289 F. Supp. 3d at 775 (rejecting the argument that “control of the platform is control of the property” or the actions of hosts); FAC ¶¶ 62-69. For similar reasons, the District of South Carolina declined to find a special relationship between an online platform and individuals, who—like Thomas and Riviere—listed their properties on that platform. *See HomeAway.com, Inc.*, 2012 WL 220271, at *18 (“Mere membership to a website, without evidence establishing a relationship of trust or confidence between the parties” is insufficient).

The amended complaint is also devoid of any allegation that Thomas or Riviere “made a specific threat of harm directed at” *anyone*, much less at Plaintiff in particular. *Marion*, 373 S.C. at 400, 645 S.E.2d at 251 (being a “member of a readily identifiable group” susceptible to harm

deemed insufficient without specific threat to individual plaintiff); *see also Faile v. S.C. Dept. of Juv. Justice*, 350 S.C. 315, 335, 566 S.E.2d 536, 546 (2002) (“an individual does not have a duty to protect the public from speculative harm from a dangerous individual within his control”). Without meeting this required prong of the standard, there can be no special relationship.

Airbnb Did Not Voluntarily Undertake Any Duty. Plaintiff never alleges that Airbnb promised or otherwise voluntarily undertook to discover surreptitious recording devices at all of the properties listed on its website, nor all past, present, and future misconduct of Airbnb users. Nor could she; Airbnb’s Terms of Service disclaims these very notions. Instead, Plaintiff’s overarching theory, woven throughout the amended complaint, is that Airbnb *did not do enough*. A federal court recently rejected a similar theory against Airbnb, holding that Airbnb could not be held liable under a theory of negligent undertaking for “not do[ing] more.” Ex. 5, *Rengifo Jackson*, --- F. Supp. 3d ---, 2022 WL 16752071, at *7. The same is true under South Carolina law; allegations of inaction cannot give rise to a voluntary undertaking because the defendant “must undertake to *do something*” for the doctrine to apply. *Cramer v. Balcor Property Mgmt., Inc.*, 848 F. Supp. 1222, 1225 (D.S.C. 1994) (emphasis added).

The fact that Airbnb has a policy that hosts should not have undisclosed recording devices in properties listed on its website does not constitute an undertaking. Under South Carolina law, setting rules and requirements for others is not a voluntary undertaking to ensure compliance. *See Allen v. Choice Hotels Int’l*, 276 F. App’x 339, 344 (4th Cir. 2008) (holding, under South Carolina law, that “the fact that Choice required RGH/Gedda to install fire safety systems and made recommendations in its Rules and Regulations that RGH/Gedda install sprinklers does not establish that Choice voluntarily undertook to control or regulate the life safety systems.”). Moreover, South Carolina law makes clear that corporate policies do not give rise to a voluntary

undertaking of a duty. *See Doe 2 v. Citadel*, 421 S.C. 140, 148, 805 S.E.2d 578, 583 (Ct. App. 2017) (“any violation of an internal policy does not give rise to the voluntary assumption” or “voluntary undertaking of a duty”); *Wal-Mart Stores*, 393 S.C. at 248 (similar); *Wade v. Chase Bank USA, N.A.*, C/A No. 2:12-3565-RMG, 2014 WL 12538883, at *5-6 (D.S.C. Jan. 9, 2014) (policy guidelines and contracts to which plaintiff was not a party could not form the basis of a duty to support plaintiff’s negligence claim). Because Airbnb has never represented that it *would or could* prevent hosts—or anyone else—from breaking the law and violating its policies, the voluntary undertaking exception does not apply. *See Jackson v. Swordfish Investments*, 365 S.C. at 613-14, 620 S.E.2d 54, 56-57 (2005) (declining to find voluntary undertaking of duty to provide security *inside* club because landlord agreed only to arrange for security in common areas); *see also* Ex. 3, *Rengifo Jackson*, Case No. 22-3084 (holding that alleged policies to regulate platform and remove memberships did not amount to a voluntary undertaking); Ex. 5, *Rengifo Jackson*, --- F. Supp. 3d ----, 2022 WL 16752071, at *7 (similar).

Airbnb Did Not Create the Risk of Harm. Plaintiff does not allege that any action or statement by Airbnb *increased* the risk of harm to Plaintiff. This is dispositive, since the law requires direct action by a defendant for the exception to apply. *See Wright v. PRG Real Est. Mgmt., Inc.*, 426 S.C. 202, 216, 826 S.E.2d 285, 292 (2019) (“The affirmative acts exception is limited to situations where [a defendant’s] *direct action increases* a [plaintiff’s] risk of harm from criminal activities,” such as “a landlord giving out a master key to someone who should not have one” or “leaving an apartment door or window unlocked” (emphasis added)); *Doe 2*, 421 S.C. at 150, 805 S.E.2d at 583 (“Doe does not present any evidence indicating The Citadel *actively created a situation* that increased the risk of harm to Doe,” especially in the absence of evidence that “The

Citadel was even aware of Doe’s very existence before the commencement of this lawsuit because Doe had no affiliation with The Citadel’s programs or camps” (emphasis added)).

Far from increasing the risk of harm, Airbnb’s alleged promulgation of a policy *banning* hidden recording devices could only conceivably decrease the risk of harm. And (like the voluntary undertaking exception) any purported violation of Airbnb’s policies by someone other than Airbnb could not support a duty under the creation-of-the-risk exception. *See Doe 2*, 421 S.C. at 150, 805 S.E.2d at 583 (rejecting creation-of-risk argument, in part because “any purported violation of the policy does not amount to the existence of a duty”).

Riviere’s Illegal Recording Was Not Foreseeable. Even if Plaintiff could establish that Airbnb owed her a duty to prevent third-party criminal activity (she cannot), it would extend only to harms that were foreseeable to Airbnb. *See Lord v. D&J Enters., Inc.*, 407 S.C. 544, 555, 757 S.E.2d 695, 700 (2014). And, on the flip side, merely alleging that her injury was foreseeable is insufficient to show establish any duty. *S.C. State Ports Auth. v. Booz-Allen & Hamilton, Inc.*, 289 S.C. 373, 376, 346 S.E.2d 324, 325 (1986) (“Foreseeability of injury, in the absence of a duty to prevent that injury, is an insufficient basis on which to rest liability. . . . Foreseeability itself does not give rise to a duty.” (citations omitted))).

Here, Plaintiff does not allege, as she must, that Airbnb “knew or had reason to know of [the] probability of harm” at issue. *Bass v. Gopal, Inc.*, 395 S.C. 129, 135, 716 S.E.2d 910, 913 (2011). Plaintiff’s conclusory allegations do not indicate that Airbnb had reason to know that this property owner in Aiken (who was not the host of the listing) would commit a crime and record Plaintiff, and so the entire FAC instead focuses on: (1) other alleged hidden cameras incidents in other states involving completely different parties—some a decade old; and (2) Riviere’s alleged

reputation in Aiken as a Peeping Tom—something Plaintiff does not allege anyone told Airbnb. FAC ¶¶ 6-10, 79-82. This does not pass legal muster.

First, Airbnb’s alleged awareness that a miniscule fraction of hosts break the law does not make such misconduct foreseeable. In effect, Plaintiff’s chief complaint seems to be that Airbnb should have been, but was not, omniscient. But that is not the legal standard. Plaintiff must allege facts to support that it was foreseeable—to *Airbnb*—that Riviere in particular would commit the specific misconduct alleged. *Jenkins v. CEC Ent. Inc.*, 421 F. Supp. 3d 257, 263 (D.S.C. 2019) (“Plaintiffs must first offer evidence that *Mr. King’s* crime was foreseeable.” (emphasis added)); *Nelson v. Piggly Wiggly Cent., Inc.*, 390 S.C. 382, 393-94, 701 S.E.2d 776, 782 (Ct. App. 2010) (despite conceivability of accident, the “unexpected and unusual” collision was “legally unforeseeable and beyond the realm of any duty Respondents owed to [the plaintiff]” because it would “not happen in the ordinary and normal course of events”). Courts only consider prior incidents involving completely different parties to indicate foreseeability in a limited subset of premises liability cases (not general negligence)—namely, in premises liability cases where the prior incidents occurred at or near the property at issue. *See, e.g., Hiller v. Wal-Mart Stores E., LP*, 2022 WL 686793, at *3 (D.S.C. Mar. 8, 2022) (analyzing whether there were similar prior shooting incidents at the *particular* Walmart store, not if shootings had occurred at any Walmart location or whether shooting crimes at Walmart stores were conceivable); *Easterling v. Burger King Corp.*, 416 S.C. 437, 449-50, 786 S.E.2d 443, 450 (Ct. App. 2016) (analyzing incidents for which the police were called to “*this* Burger King” and finding expert testimony unconvincing where expert “had no knowledge of any physical assaults taking place at *this* Burger King” (emphasis added)). Plaintiff does not—and cannot—allege that any prior known incidents happened at or near the property at issue.

Next, Plaintiff's allegation that Riviere was rumored "in Aiken" to be a "Peeping Tom" cannot suffice. FAC ¶¶ 16, 25. Airbnb is an online platform that is incorporated in Delaware and headquartered in California. Plaintiff alleges no facts to suggest that Airbnb was ever aware of Riviere's rumored reputation in Aiken. *Cf. Brockington v. Pee Dee Mental Health Ctr.*, 315 S.C. 214, 218, 433 S.E.2d 16, 18 (Ct. App. 1993) (defendant not charged with knowledge of employee's prior sexual misconduct in negligent supervision claim where family members had kept "knowledge to themselves" and "allowed matters to continue unabated"). Nor does she allege that Riviere was ever convicted of any crime, much less one indicating that he would surreptitiously video-record Plaintiff in the course of her one-night stay at the Property, such that Airbnb could have discovered the conviction during a background check. FAC ¶ 116 (alleging only that a woman had previously called the police on Riviere). As a federal court recently ruled, "[i]t would have taken something near the level of psychic powers [for Airbnb] to foresee the . . . [criminal] events at the subject property even with knowledge of [similar incidents at other properties]." Ex. 5, *Rengifo Jackson*, --- F. Supp. 3d ----, 2022 WL 16752071, at *8 (granting Airbnb's motion to dismiss).

Gross Negligence. Plaintiff's claim for gross negligence also fails. Gross negligence is an "intentional conscious failure to do something," where the defendant "is so indifferent to the consequences of [its] conduct as not to give slight care as to what [it] is doing." *Clark v. S.C. Dept. of Pub. Safety*, 362 S.C. 377, 382-83, 608 S.E.2d 573, 576 (2005). Plaintiff alleges that Airbnb—which promulgated policies prohibiting hidden cameras at listed properties—failed to discover Riviere's hidden camera or alleged reputation in Aiken. FAC ¶¶ 16, 88, 179. This falls far short of an intentional conscious failure or indifference to consequences.

II. Plaintiff's Vicarious Liability and Negligent Hiring, Supervision, and Retention Claims Should Be Dismissed.

Plaintiff's vicarious liability and negligent hiring, retention, and supervision claims fail because she cannot support her wild, conclusory allegation that Riviere and Thomas were Airbnb employees.³ See *Bank of N.Y. v. Sumter Cnty.*, 387 S.C. 147, 156, 691 S.E.2d 473, 478 (2010) (rejecting negligent supervision claims because there was no employment relationship); *Callum v. CVS Health Corp.*, 137 F. Supp. 3d 817, 861 (D.S.C. 2015) (granting motion to dismiss negligent supervision and retention claims where plaintiff had “not alleged facts creating a plausible inference that the [defendants] qualify as employers”); *Armstrong v. Food Lion, Inc.*, 371 S.C. 271, 276, 639 S.E.2d 50, 52 (2006) (“The doctrine of *respondeat superior* rests upon the relation of master and servant”). Similar claims have been resoundingly rejected by the courts.⁴ Airbnb only provides a service (the use of its online platform) to users—both hosts and guests—for a fee; this is a run-of-the-mill business-customer relationship. As evidenced by Plaintiff's own allegation that hosts “register”—and do not “appl[y]”—for an account, FAC ¶¶ 142, 98, Airbnb does not hire its hosts, much less supervise them, in any capacity.

Plaintiff tries to evade these basic facts by claiming that Airbnb “exercise[s] significant control over its hosts,” including by setting various rules for use of its website, providing hosts with smoke detectors and pricing tools, and terminating hosts for violating rules. FAC ¶¶ 62-69, 141-46, 173. But these allegations do not come close to establishing the “significant control” over

³ The Court should not accept this conclusory allegation as true for the purposes of ruling on Airbnb's motion. *Jones*, 288 S.C. at 528, 343 S.E.2d at 648.

⁴ See Ex. 2, *Carroll*, 289 F. Supp. 3d at 773 (rejecting argument that Airbnb was hosts' employer); Ex. 4, *Esposito*, 2022 WL 2980700, at *6 (rejecting vicarious liability claim as to acts and omissions of property's owners because there was no “agency or employment relationship” with Airbnb).

hosts required for an employment relationship. Alleged guidelines for using Airbnb’s platform in no way give Airbnb the ability, let alone the “right to control [Riviere or Thomas] in the performance of [their] work” in renting out their properties. *Ramirez v. May River Roofing, Inc.*, 433 S.C. 519, 527, 860 S.E.2d 680, 684 (Ct. App. 2021); *see also* Ex. 2, *Carroll*, 289 F. Supp. 3d at 773 (rejecting analogy to employment relationship because “Airbnb’s Terms of Service specifically disclaim any control over, or responsibility for, the actions of hosts and guests.”). For instance, Plaintiff cannot allege that Airbnb can control how Riviere and Thomas use their own property, set the material terms of their listings, or decide when or whether to list the Property on the platform at all. Although Plaintiff alleges that Airbnb can “fire” or “terminate” hosts, FAC ¶ 69, any purported termination relates only to the use of the Airbnb platform; Plaintiff cannot allege that Airbnb can stop hosts from continuing to rent their properties elsewhere—which Plaintiff acknowledges that Riviere and Thomas did. *Id.* ¶¶ 21, 43, 115. In any event, the fact that Airbnb has policies for its customers does not transform those customers into employees.

Perhaps because Plaintiff recognizes the lack of an employment relationship, Plaintiff alleges an alternative theory of negligent hiring, supervision, or retention for *independent contractors*. FAC ¶¶ 162, 166. Airbnb is not aware of any South Carolina authority recognizing this cause of action for independent contractors, but in any event, Plaintiff has not alleged facts to support that Thomas or Riviere were independent contractors either. Under South Carolina law, independent contractors are hired to complete a certain task or achieve a certain result—and are contractually required to do so. *See Fulton v. Westvaco Corp.*, 930 F. Supp. 1115, 1118 (D.S.C. 1995) (independent contractor “contracts to do a piece of work”); *Norris v. Bryant*, 217 S.C. 389, 398, 60 S.E.2d 844, 847 (1950) (independent contractors contract “to produce a given result” and have “no right to terminate the contract”). Airbnb does not contract with hosts like Thomas to

complete any task or achieve any result. Hosts merely register for the opportunity to use Airbnb's platform to rent out their own properties, FAC ¶ 98, but they do not agree to rent out their properties even a single time and can remove their listings at any time. None of this suggests an independent contractor relationship.

Whether based upon a purported employment or independent contractor relationship, the negligent hiring, supervising, and retention claims also fail because Plaintiff has not alleged that Airbnb knew or had reason to know of prior misconduct by Riviere or Thomas. *See Callum*, 137 F. Supp. 3d at 860 (negligent hiring and retention require that employer had "knowledge" of employee's "habit of prior wrongdoings"); *Doe v. Bishop of Charleston*, 407 S.C. 128, 139, 745 S.E.2d 494, 500 (2014) (negligent supervision requires that employer "knows or has reason to know of the necessity and opportunity to exercise [control of the employee]"). Although Plaintiff alleges that Riviere had a reputation "in Aiken" for voyeurism and that Airbnb should have conducted more "meaningful" background checks (FAC ¶ 88(a)), she does not allege that he was ever convicted of any crime that a more "meaningful" background check would have identified, nor that anyone ever notified Airbnb about his purported local reputation in Aiken. As a matter of South Carolina law, Plaintiff's allegations are insufficient. *See Brockington*, 315 S.C. at 218, 433 S.E.2d at 18 (negligent supervision claim defeated because nothing "alerted the defendants that Davis would engage in ... inappropriate sexual conduct," as family members had "kept this knowledge to themselves").

The vicarious liability claim must also fail for the independent reason that criminal voyeurism is not "within the scope" of hosting a property listed on Airbnb's platform—*i.e.*, it is not "reasonably necessary to accomplish the purpose of [hosting]," nor "in furtherance of [Airbnb's] business." *Armstrong*, 371 S.C. at 276, 639 S.E.2d at 52. The District of South

Carolina has rejected a vicarious liability claim on the *exact* facts alleged here. It held that a company was not vicariously liable for its employee’s “surreptitious videotaping” of the plaintiff because that misconduct did not in any way “further[] [the company’s] business” of providing janitorial services (even where, unlike here, there actually was an employment relationship). *Park v. S.E. Serv. Corp.*, 771 F. Supp. 2d 588, 593 (D.S.C. 2011).

III. Plaintiff’s Premises Liability Claim Should Be Dismissed.

Plaintiff’s premises liability claim also fails because she cannot allege that Airbnb owned or controlled the Property. Simply put, “[o]ne who controls the use of property has a duty of care not to harm others by its use,” and “one who has no control owes no duty.” *Miller v. City of Camden*, 329 S.C. 310, 314, 494 S.E.2d 813, 815 (1997); *Swordfish Investments*, 365 S.C. at 612, 620 S.E.2d at 56 (“Appellant’s status as an invitee does not, under the facts of this case, create a duty on the part of Swordfish to protect her from the criminal acts of third parties inside the leased premises, an area which Swordfish did not control or possess.”). Courts nationwide uniformly recognize that Airbnb does not own or control the properties listed on its platform.⁵ Plaintiff’s own allegations establish that Riviere and Thomas owned and controlled the Property. FAC ¶¶ 21, 90-92, 95-96. Plaintiff does not allege that Airbnb had the right to even *access* the Property—let alone that Airbnb could or did control it.⁶

⁵ See, e.g., Ex. 2, *Carroll*, 289 F. Supp. 3d at 772 (holding that Airbnb does not control listed properties so as to establish a duty to protect third parties); Ex. 1, *King*, 2022 WL 12827986, at *2 (dismissing premises liability claim on motion to dismiss because “Airbnb is not an owner of nor has any control over the properties listed on its platform”); Ex. 5, *Rengifo Jackson*, 2022 WL 16752071, at *7 (dismissing complaint, in part, because “Airbnb does not exercise sufficient control over the subject property”).

⁶ Even if Plaintiff had alleged that Airbnb had the right to access the Property, it would not impose any duty based on a premises liability theory. See, e.g., *Charleston Elec. Servs., Inc. v. Rahall*, 427 S.C. 317, 324, 831 S.E.2d 122, 125 (Ct. App. 2019) (landowner’s fiancé did not owe duty of care to licensee of the property because, even though she occupied the property when visiting him, she “did not possess or control any portion of the [p]roperty”); *Byerly v. Connor*, 307 S.C. 441,

At most, Plaintiff alleges that Airbnb promulgates policies related to the use of the online platform. *See, e.g.*, FAC ¶¶ 67-68. This is not enough. In South Carolina, even defendants that promulgate far more extensive policies and exert far greater supervision with respect to the subject premises still lack the requisite control for premises liability. *See Bass v. Gopal, Inc.*, 384 S.C. 238, 248, 680 S.E.2d 917, 922 (Ct. App. 2009) (franchisor held not to control motel despite (1) “inspect[ing] the motel every three months to determine how the property is run”; (2) during inspections, “check[ing] the components of nine rooms, including the bed, television, lock systems, peep holes, and tubs”; (3) “provid[ing] a checklist of changes to be made”; and (4) “requir[ing] owners to attend training” because these facts did not establish “sufficient control over the motel’s daily operations”); *Allen*, 276 F. App’x at 343 (holding under South Carolina law that quality and operational standards and policies “simply ensure uniformity” and do not establish “sufficient control over the operations of the hotel to create a duty”). Other courts have rejected this argument as well. *See* Ex. 3 at 5, *Rengifo Jackson*, Case No. 22-3084 (rejecting argument that Airbnb controlled subject property where alleged policies only “show that Airbnb can remove listings and revoke membership, not that it paves walkways and puts up fences”).

Plaintiff also bizarrely alleges that “to the extent Airbnb collects and remits taxes in the same manner as a hotel or motel operator,” Airbnb must be subject to “the same liability standards under Premises Liability laws” as those operators. FAC ¶ 40. The manner of tax collection or remission does not bear on the threshold issue for premises liability: control of the property. *See Miller*, 329 S.C. at 314, 494 S.E.2d at 815. Because Airbnb lacks control, Plaintiff’s premises liability claim must fail.

443, 415 S.E.2d 796, 798 (1992) (“This duty arises from the owner’s superior knowledge of conditions on the premises within his control.”).

IV. Plaintiff's Claims Based on Alleged Misrepresentations Should Be Dismissed.

Plaintiff's constructive fraud and SCUTPA claims fail too. Her constructive fraud claim hinges on Airbnb's alleged failure to disclose what it did not know: that Riviere had hidden a recording device at his Property. FAC ¶ 223. But a mere omission, without an "affirmative statement," does not support a constructive fraud claim. *Pitts v. Jackson Nat'l Life Ins. Co.*, 352 S.C. 319, 334, 574 S.E.2d 502, 509 (Ct. App. 2002). Nor can Plaintiff rely on allegations about general representations about safety and privacy (e.g., FAC ¶ 250) to satisfy the affirmative-statement requirement because a "mere statement of opinion, commendation of goods or services, or expression of confidence ... does not give rise to liability in tort," *AMA Mgmt. Corp. v. Strasburger*, 309 S.C. 213, 222, 420 S.E.2d 868, 874 (Ct. App. 1992), and "[s]tatements of a vague and general character cannot be read to make representations of a specific character," *Lewis v. Trustmark Ins. Co. (Mut.)*, 182 F.3d 908 (4th Cir. 1999).

Plaintiff's constructive fraud claim should also be dismissed because she fails to plead with the requisite particularity under Rule 9(b), SCRCPP, that Airbnb made a false misrepresentation with "either knowledge of its falsity or a reckless disregard of its truth or falsity." *Armstrong v. Collins*, 366 S.C. 204, 219, 621 S.E.2d 368, 375 (Ct. App. 2005). She alleges only that "[o]ne or more Defendants knowingly did not disclose any security cameras or recording devices in or around the listing occupied by the Plaintiff, despite his [sic] duty to do so," FAC ¶ 225 (emphasis added). This is not particular as to which defendant knowingly did not disclose this information; and indeed, the amended complaint does not allege that Airbnb knew there was a device at the Property. And to the extent Plaintiff seeks to rely upon Airbnb's (non-actionable) generic statements about safety, she does not plead with particularity *what* Airbnb said, what she specifically heard, or when she allegedly heard it.

Plaintiff also fails to allege that she had a “right to rely” upon any representation by Airbnb. *Armstrong*, 366 S.C. at 219, 621 S.E.2d at 375. The FAC—which confirms that Plaintiff was not an Airbnb user and that her friend booked the Property, FAC ¶¶ 93, 95—does not allege *any* basis for such reliance. Indeed, she does not even allege a basis for her *friend’s* right to rely. “[I]n a constructive fraud case, where there is no confidential or fiduciary relationship, and an arm’s length transaction between mature, educated people is involved, there is no right to rely.” *Pitts*, 352 S.C. at 334, 574 S.E.2d at 509. Plaintiff fails to allege any facts to the contrary.

Plaintiff’s SCUTPA claim is similarly premised upon Airbnb’s alleged general representations about “safety and privacy.” FAC ¶ 250; *see also, e.g., id.* ¶ 4 (“Your safety is our priority”; “Airbnb is designed with safety – both online and off – in mind.”). But South Carolina courts routinely reject SCUTPA claims based on similar statements about general safety and security. In *Wright v. PRG Real Estate Management, Inc.*, the Court held that a property manager’s “generalized statements that the apartments are safe and secure” did not constitute “unfair or deceptive acts” under SCUTPA. 413 S.C. 276, 289-90, 775 S.E.2d 399, 406 (Ct. App. 2019), *reversed on different grounds*, 426 S.C. 202 (2019). Similarly, in *Williams v. Preiss-Wal Pat III, LLC*, an apartment complex’s alleged “market[ing] ... as one of the best places students can live and represent[at]ions] to students and parents that the company employs well-trained staff” could not violate SCUTPA, even though the complex allegedly knew its employees were “not properly trained or capable of providing a safe atmosphere.” 17 F. Supp. 3d 528, 532, 538 (D.S.C. 2014). Because Airbnb’s alleged statements do not “guarantee” safety or performance, they are simply not actionable under South Carolina law. *See Bahringer*, 942 F. Supp. 2d at 594 (rejecting SCUTPA claim where company’s marketing materials did not “guarantee that [its] fire alarm systems will always work and will always prevent loss”).

V. Plaintiff's Claims Based on an Alleged Violation of South Carolina's Real Estate Licensing Statute Should Be Dismissed.

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

Further, both claims independently fail because Plaintiff cannot adequately allege that any violation of the licensure statute—whether by Airbnb, Riviere, or Thomas—proximately caused the harm she allegedly suffered, given that the statute governs *licensing* and has nothing to do with protecting individuals from undisclosed recording devices. *Whitlaw v. Kroger Co.*, 306 S.C. 51, 53-54, 410 S.E.2d 251, 253 (1991) (for negligence per se claims, in addition to establishing breach of a statute, "[t]he causation of the injury must also be evaluated"); *Callum*, 137 F. Supp. 3d at 862-63 (for SCUTPA claims, plaintiffs must show the "plaintiff suffered actual, ascertainable damages *as a result of* the defendant's use of the unlawful trade practice" (emphasis added)).

The negligence per se claim additionally fails because licensing statutes that do not "set forth a standard of care" "will not ordinarily provide a basis for a negligence per se action." *Hurst*

v. Sandy, 329 S.C. 471, 479-80 & n.5, 494 S.E.2d 847, 851 & n.5 (Ct. App. 1997) (engineering licensing statute did not support negligence per se claim). The statute at issue here does not set forth any standard of care. Moreover, to support a negligence per se cause of action, the “essential purpose” of the statute must be to “protect from the kind of harm the plaintiff has suffered.” *Whitlaw*, 306 S.C. at 53, 410 S.E.2d at 252. That is not the case here. The statute merely sets out the requirements for obtaining a real-estate license, and its *express* purpose “is to regulate the real estate industry so as to protect the public’s interest when involved in real estate transactions.” S.C. Code Ann. § 40-57-10. It has nothing to do with protecting against criminal voyeurism.

VI. The Court Should Dismiss Plaintiff’s Prayer for Punitive Damages Against Airbnb.

The Court should dismiss Plaintiff’s prayer for punitive damages as to Airbnb because she fails to allege any facts that would support such a remedy under South Carolina law. Punitive damages are available only when a defendant’s conduct was “willful, wanton, or in reckless disregard of the plaintiff’s rights.” *Sea Island Food Grp., LLC v. Yaschik Dev. Co.*, 433 S.C. 278, 289, 857 S.E.2d 902, 907-08 (Ct. App. 2021). The terms “willful,” “wanton,” and “reckless” all “import a greater degree of culpability than mere negligence.” *Fairchild v. S.C. Dep’t of Transp.*, 398 S.C. 90, 99 (2012). Here, Plaintiff alleges that Riviere had a *local* reputation in Aiken for voyeuristic predilections, and Airbnb merely failed to discover this background or the hidden camera at issue—even though Riviere is not alleged to have *any* prior criminal conviction that Airbnb could have discovered with a more “meaningful” background check. FAC ¶¶ 16, 88. Although Plaintiff believes that Airbnb should have done more to prevent what it did not know, the amended complaint acknowledges that Airbnb does conduct background checks *and* promulgates policies that *prohibit* hidden cameras at listed properties. *Id.* ¶¶ 28, 179. These allegations fall far short of willfulness, wantonness, or reckless disregard of Plaintiff’s rights and cannot support a claim for punitive damages.

CONCLUSION

Airbnb respectfully requests that the Court dismiss all causes of action against Airbnb. Rule 12(b)(6), SCRCP. Because Plaintiff cannot cure these fundamental defects by amendment, Airbnb's motion should be granted with prejudice. *Skydive Myrtle Beach, Inc. v. Horry Cnty.*, 426 S.C. 175, 182-83, 826 S.E.2d 585, 588-89 (2019). In addition, Airbnb respectfully requests that the Court strike Plaintiff's prayer for punitive damages.

Dated this 23rd day of February, 2023

Respectfully submitted,

/s/ Beattie B. Ashmore

Beattie B. Ashmore

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Attorney for Defendant Airbnb, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **DEFENDANT AIRBNB, INC.'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION TO DISMISS AMENDED COMPLAINT** has been served by electronic filing on the 23rd day of February, 2023 to the following:

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Beattie B. Ashmore

EXHIBIT 1

2022 WL 12827986 (N.Y.Sup.) (Trial Order)
 Supreme Court of New York.
 Kings County

Brendan KING, Plaintiff,

v.

PLEASANT 30 LLC, Titania Returns LLC, Airbnb, Inc., and “John Doe”, Defendants.

No. 514353/2021.

October 6, 2022.

***1** At an IAS Term, Part 66 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 6th day of OCTOBER, 2022
 Mot. Seq. No. 3

Decision and Order

Hon. Richard Velasquez, JSC.

The following *papers NYSCEF Doc#*'s 44 to 74 read on this motion:

Papers

NYSCEF DOC NO.'s

Notice of Motion/Order to Show Cause

Affidavits (Affirmations) Annexed _____

44-60

Opposing Affidavits (Affirmations) _____

61-64; 74

After having come before the Court and the Court having heard Oral Argument on June 22, 2022 the court finds as follows:

Defendant AIRBNB INC. an Order dismissing with prejudice Plaintiff's Verified Complaint as against Airbnb pursuant to [CPLR § 3211 \(a\)\(7\)](#) for failure to state a cause of action. Plaintiff opposes the same.

Pursuant to [CPLR 3211](#), the pleading is to be afforded a liberal construction (see, [CPLR 3026](#)). We accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory (*Morone v. Morone*, 50 NY2d 481, 484, 429 NYS2d 592, 413 NE2d 1154; *Rovello v. Orofino Realty Co.*, 40 N.Y.2d 633, 634, 389 NYS2d 314, 357 NE2d 970). **“The criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one”** (*Guggenheimer v. Ginzburg*, 43 NY2d 268, 275, 401 NYS2d 182, 372 NE2d 17; *Rovello v. Orofino Realty Co.*, 40 NY2d at 636, 389 NYS2d 314, 357 NE2d 970). **“[B]are legal conclusions and factual claims which are flatly contradicted by the evidence are not presumed to be true on such a motion”** (*Palazzolo v. Herrick, Feinstein, LLP*, 298 AD2d 372, 751 NYS2d 401). If the documentary proof disproves an essential allegation of the complaint, dismissal pursuant to [CPLR 3211\(a\)\(7\)](#) is warranted even if the allegations, standing alone, could withstand a motion to dismiss for failure to state a cause of action (see *McGuire v. Sterling Doubleday Enters., LP*, 19 AD3d 660, 661, 799 NYS2d 65). Although a court should sparingly grant a motion to dismiss for failure to state a cause of action, where the affidavits submitted in support of the motion establish conclusively that the plaintiff has no cause of action,

the court should grant the motion. See *Doe v Ascend Charter Schs.*, 181 AD3d 648 [2d Dept 2020], citing *Sokol v Leader*, 14 AD3d at 1182 [2d Dept 2010], quoting *Lawrence v Graubard Miller*, 11 NY3d 588, 595, 901 N.E.2d 1268, 873 NYS2d 517 [2008], quoting *Rovello v Orofino RealtyCo.*, 40 NY2d at 636 [1976]. See also, *Porat v Rybina*, 177 AD3d 632 [2d Dept 2019].

In the present case Plaintiff asserts two unnamed causes of action against defendants stemming from an alleged injury he suffered jumping a fence. Although unnamed, Plaintiff's claims sound in (i) premises liability and (ii) negligence pursuant to N.Y. Gen. Mun. Law § 205-e and N.Y. Gen. Oblig. Law § 11-106. New York employs notice pleading—the allegations of a complaint need be only “sufficiently particular to give the court and parties notice of the ... occurrence ... intended to be proved.” CPLR §3013.

*2 Plaintiff's complaint fails to meet this liberal pleading standard. The complaint consists of conclusory allegations and fails to allege any facts establishing Airbnb's liability. Plaintiff repeats the same vague and conclusory assertions that “defendants,” collectively, were negligent and careless in maintaining the premises. See NYSCEF Doc No. 34. Specifically, Plaintiff's claims require alleging Airbnb had some ownership, control, or possession of the subject premises. Airbnb is a website—an online platform—that connects individuals who wish to offer accommodations (“Host(s)”) with those seeking to book accommodations, nothing more. Airbnb's Terms of Service (“TOS”), affirm this point, and explicitly state that Airbnb does not own, offer, control, or manage the properties listed on its platform and makes no representations or warranties about their safety, suitability, or condition. Thus, Airbnb is not an owner of nor has any control over the properties listed on its platform and cannot be liable for negligence or premises liability. As plaintiff has not alleged that AIRBNB had some ownership, control, or possession of the subject premises its claims against AIRBNB must be dismissed for failure to state a cause of action.

Accordingly, AIRBNB did not own operate manage, control maintain or supervise the property in question where this accident allegedly occurred. AIRBNB owed no duty to the plaintiff. As such AIRBNB's motion to dismiss is hereby granted as to AIRBNB. This matter is dismissed as against AIRBNB. This constitutes the Decision/Order of the court.

Dated: Brooklyn, New York

October 6, 2022

ENTER FORTHWITH:

<<signature>>

HON. RICHARD VELASQUEZ

End of Document

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EXHIBIT 2

289 F.Supp.3d 767
United States District Court, E.D. Louisiana.

Justin CARROLL, et al
v.
AMERICAN EMPIRE SURPLUS
LINES INSURANCE CO., et al

CIVIL ACTION NO. 16–2589

|
Signed 12/21/2017

Synopsis

Background: Occupant, who was injured while staying at residential property rented by renter through home-sharing website, brought action with his wife against property owners, their insurers, and website operator. Operator moved for summary judgment.

Holdings: The District Court, Jane Triche Milazzo, J., held that:

[1] under Louisiana law, operator did not have a special relationship with occupant, as would have given rise to duty;

[2] operator did not have custody of property, under Louisiana law, as would have given rise to custodial liability; and

[3] there was no evidence that operator had actual or constructive knowledge of defect in stairs at property.

Motion granted.

West Headnotes (15)

[1] Negligence 🔑 Elements in general

Louisiana courts employ a duty-risk approach to negligence claims, requiring a plaintiff to prove that (1) the defendant had a duty to conform his or her conduct to a specific standard of care, (2) the defendant failed to conform his or her conduct to the appropriate standard of care, (3) the defendant's substandard conduct

was a cause-in-fact of the plaintiff's injuries, (4) the defendant's substandard conduct was a legal cause of the plaintiff's injuries, and (5) actual damages. *La. Civ. Code Ann. art. 2315*.

3 Cases that cite this headnote

[2] Negligence 🔑 Necessity and Existence of Duty

Whether the defendant owed the plaintiff a duty is a threshold issue in any negligence action under Louisiana law. *La. Civ. Code Ann. art. 2315*.

1 Case that cites this headnote

[3] Negligence 🔑 Duty as question of fact or law generally

On a negligence claim under Louisiana law, the existence of a duty, and whether a plaintiff's harm falls within its scope, is a question of law. *La. Civ. Code Ann. art. 2315*.

1 Case that cites this headnote

[4] Negligence 🔑 Elements in general

Under Louisiana law, a person who owns or controls a building is liable for harm caused by its defect, but only when the plaintiff can prove the following elements: (1) ownership or control of the building, (2) the owner knew or, in the exercise of reasonable care, should have known of the ruin or defect, (3) the damage could have been prevented by the exercise of reasonable care, (4) the defendant failed to exercise such reasonable care, and (5) causation. *La. Civ. Code Ann. arts. 2317.1, 2322*.

4 Cases that cite this headnote

[5] Negligence 🔑 Buildings and Structures

A finding of custodial liability, under Louisiana statutory provision imposing liability for harm caused by a building's defect upon one who owns or controls the building, is predicated upon a finding of negligence. *La. Civ. Code Ann. arts. 2317.1, 2322*.

- [6] **Brokers** ⚡ Mistake or negligence of broker
Landlord and Tenant ⚡ Existence of Duty of Care

Negligence ⚡ Necessity and Existence of Duty

Negligence ⚡ Ownership, custody and control

Operator of home-sharing website did not have a special relationship with occupant, who was injured when stairs at rented property collapsed while occupant was staying with renter, who rented property from owners through website, and thus operator did not owe a duty to occupant under general negligence principles of Louisiana law; while operator was entitled to remove rental listings from its website for any reason, operator did not have direct control over property, website's terms of service specifically disclaimed any responsibility for actions of owners or renters, and operator merely offered a platform on which owners listed property. *La. Civ. Code Ann. art. 2315.*

- [7] **Brokers** ⚡ Fraud of broker or his agent
Brokers ⚡ Mistake or negligence of broker
Brokers ⚡ Misrepresentation or fraud of broker

Under Louisiana law, real estate agents have the duty to disclose those defects of which they have knowledge, but no duty to inspect the properties they advertise.

- [8] **Brokers** ⚡ Mistake or negligence of broker
Landlord and Tenant ⚡ Existence of Duty of Care

Negligence ⚡ Ownership, custody and control

Under Louisiana law, operator of home-sharing website did not have custody of property renter rented from owners, at which occupant was injured, while staying there with renter, when stairs collapsed, and thus operator did not owe duty to occupant, as would have

given rise to custodial liability; while occupant accessed property as a result of transaction using operator's website, there was no indication operator could have prevented owners from granting access to anyone they pleased, and nor was operator was entitled to alienate property, authorize repairs, or access property at will. *La. Civ. Code Ann. arts. 2317.1, 2322.*

- [9] **Negligence** ⚡ Duty to inspect or discover

Negligence ⚡ Duty to warn

Negligence ⚡ Reasonably safe or unreasonably dangerous conditions

Under Louisiana law, the duty of a custodian of a building is to keep it in a reasonably safe condition, and to discover any unreasonably dangerous condition on his premises and either correct the condition or warn potential victims of its existence. *La. Civ. Code Ann. arts. 2317.1, 2322.*

- [10] **Negligence** ⚡ Custody or control

While ownership of a thing is usually sufficient to establish garde, under Louisiana law, the principle of imposing liability on the entity best able to mitigate risk is broader than ownership alone, and thus more than one party may have garde. *La. Civ. Code Ann. arts. 2317.1, 2322.*

2 Cases that cite this headnote

- [11] **Negligence** ⚡ Custody or control

To determine whether a person has garde over a thing, under Louisiana law, courts look to (1) whether the person bears such a relationship as to have the right of direction and control over the thing, and (2) what, if any, kind of benefit the person derives from the thing. *La. Civ. Code Ann. arts. 2317.1, 2322.*

2 Cases that cite this headnote

- [12] **Brokers** ⚡ Mistake or negligence of broker
Landlord and Tenant ⚡ Existence of Duty of Care

Negligence 🔑 Conditions created or known by defendant

There was no evidence that operator of home-sharing website had actual or constructive knowledge of defect in stairs at property that owners rented to renter through website, at which renter's friend, who was staying there with renter, was injured when stairs collapsed, and thus operator was not subject to custodial liability for occupant's injury under Louisiana law. *La. Civ. Code Ann. art. 2322.*

[13] Negligence 🔑 Knowledge or Notice in General

Under Louisiana law, in order to recover under a theory of custodial liability, a plaintiff must prove that the defendant had actual or constructive knowledge of the vice or defect. *La. Civ. Code Ann. art. 2322.*

[2 Cases that cite this headnote](#)

[14] Negligence 🔑 Duty to inspect or discover

With respect to a claim of custodial liability under Louisiana law, constructive knowledge of a defect at the premises imposes a reasonable duty to discover apparent defects in things under the defendant's garde. *La. Civ. Code Ann. art. 2322.*

[2 Cases that cite this headnote](#)

[15] Negligence 🔑 Constructive notice

Under Louisiana law, with respect to a claim of custodial liability for a defect in premises, constructive notice is the existence of facts which imply actual knowledge, and to establish constructive notice, plaintiff must prove that the defect causing the injury existed over a sufficient length of time to establish that reasonable diligence would have led to its discovery and repair. *La. Civ. Code Ann. art. 2322.*

Attorneys and Law Firms

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SECTION: “H”(5)**ORDER AND REASONS**

JANE TRICHE MILAZZO, UNITED STATES DISTRICT JUDGE

Before the Court is Defendant Airbnb, Inc.'s Motion for Summary Judgment (Doc. 111). For the following reasons, the Motion is GRANTED.

BACKGROUND

This action arises from injuries sustained as a result of the collapse of a staircase. Andrew Callard, plaintiff in the now-settled consolidated action, rented a property at 1423 Royal Street in New Orleans, Louisiana (“the Property”) from its owners, Defendants Mark Hamilton and Lynn Schwarzhoff (the “Owners”), using the website maintained by Defendant Airbnb, Inc. (“Airbnb”).¹ Plaintiff Justin Jude Carroll, a friend of Callard's, also stayed at the Property during Callard's rental.² On April 10, 2015, the wooden stairs that Carroll was ascending to access the Property collapsed, causing Carroll to fall approximately ten feet.³ Plaintiff Carroll alleges that he sustained severe musculoskeletal and neurological injuries as the result of the fall.⁴ Carroll asserts tort claims against Defendants Hamilton and Schwarzhoff, several of their alleged insurers, and Defendant Airbnb.⁵ Plaintiff Keren Rosenblum, Carroll's wife, asserts claims for loss of consortium against the same defendants.⁶

Defendant Airbnb now moves for summary judgment dismissing Plaintiffs' claims against it, arguing that under

Louisiana law Defendant Airbnb owed no duty to Plaintiffs and that Airbnb had no knowledge of the defect that allegedly caused Plaintiffs' injuries. Plaintiffs oppose.

LEGAL STANDARD

Summary judgment is appropriate if “the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations..., admissions, interrogatory answers, or other materials” “shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.”⁷ A genuine issue of fact exists *770 only “if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.”⁸

In determining whether the movant is entitled to summary judgment, the Court views facts in the light most favorable to the non-movant and draws all reasonable inferences in his favor.⁹ “If the moving party meets the initial burden of showing that there is no genuine issue of material fact, the burden shifts to the non-moving party to produce evidence or designate specific facts showing the existence of a genuine issue for trial.”¹⁰ Summary judgment is appropriate if the non-movant “fails to make a showing sufficient to establish the existence of an element essential to that party's case.”¹¹ “In response to a properly supported motion for summary judgment, the nonmovant must identify specific evidence in the record and articulate the manner in which that evidence supports that party's claim, and such evidence must be sufficient to sustain a finding in favor of the nonmovant on all issues as to which the nonmovant would bear the burden of proof at trial.”¹² The Court does “not...in the absence of any proof, assume that the nonmoving party could or would prove the necessary facts.”¹³ Additionally, “[t]he mere argued existence of a factual dispute will not defeat an otherwise properly supported motion.”¹⁴

LAW AND ANALYSIS

[1] [2] [3] Plaintiffs bring negligence claims against Defendant Airbnb, asserting that Airbnb knew or should have known of the defect that caused the stairs to collapse and negligently failed to correct the defect or remove the Property from its listings.¹⁵ Negligence liability in Louisiana flows

from [Louisiana Civil Code article 2315](#).¹⁶ Louisiana courts employ a duty-risk approach to negligence claims, requiring a plaintiff to prove that,

(1) the defendant had a duty to conform his or her conduct to a specific standard of care; (2) the defendant failed to conform his or her conduct to the appropriate standard of care; (3) the defendant's substandard conduct was a cause-in-fact of the plaintiff's injuries; (4) the defendant's substandard conduct was a legal cause of the plaintiff's injuries; and (5) actual damages.¹⁷

Whether the defendant owed the plaintiff a duty is a threshold issue in any negligence action.¹⁸ The existence of a duty, and whether a plaintiff's harm falls within its scope, is a question of law.¹⁹

*771 [4] [5] Additionally, [Louisiana Civil Code articles 2317.1 and 2322](#) provide that a person who owns or controls a building is liable for harm caused by its defect, but only when the plaintiff can prove the following elements:

(1) ownership [or control] of the building; (2) the owner knew or, in the exercise of reasonable care, should have known of the ruin or defect; (3) the damage could have been prevented by the exercise of reasonable care; (4) the defendant failed to exercise such reasonable care; and (5) causation.²⁰

A finding of custodial liability under [article 2317.1](#) and [2322](#) is “predicated upon a finding of negligence.”²¹ A custodian's duty is the same as that under the general negligence theory of [article 2315](#).²²

Defendant Airbnb argues that it is not liable to Plaintiffs for two reasons: a) Defendant Airbnb owed no duty to Plaintiffs because it neither owned nor controlled the Property on which Plaintiff Carroll was injured, and b) Defendant Airbnb had no knowledge of the defective condition of the stairs, foreclosing liability under [articles 2317.1 and 2322](#). Plaintiffs respond by pointing to two sources of duty that they claim Defendant Airbnb owed to them. Plaintiffs argue that Defendant Airbnb had a special relationship with either the Plaintiffs or Owners such that Airbnb had a duty to prevent the Owners from harming third parties like Plaintiffs. And Plaintiffs argue that Defendant Airbnb had sufficient control over the Property so as to become liable under [Louisiana Civil Code articles 2317.1 and 2322](#). Plaintiffs do not specifically respond to the knowledge issue.

I. Duty Pursuant to a Special Relationship

[6] Plaintiffs argue that Defendant Airbnb owed them a duty under [article 2315](#) because a special relationship existed between Airbnb and either Plaintiff Carroll or the Owners, though Plaintiffs are not clear as to which.²³

Louisiana courts have found that if a defendant has a sufficiently close relationship with a wrongdoer, the defendant may owe a duty to third persons to protect them from harm caused by the wrongdoer.²⁴ The examples collected in *Louisiana Tort Law*—the only source regarding this type of special relationship that Plaintiffs cite—are limited to parent or guardian over minor child, master over servant, jailer or over his charge, and perhaps a psychiatric hospital over its committed patients.²⁵ Each of those relationships involves a defendant exerting a degree of control over the other party far exceeding even the amount that Plaintiffs allege that Airbnb exercised over the Defendant Owners.²⁶ At most, Plaintiffs allege that Defendant Airbnb was a “gatekeeper” to the Property, with the right to inspect the *772 property at any time and delist the Property at will.²⁷ Such a relationship does not involve the direct control, and corresponding responsibility, of the more custodial relationships that have traditionally given rise to a duty to protect third parties. Accordingly, Defendant Airbnb did not owe a duty to Plaintiffs because of any special relationship between Airbnb and the Defendant Owners.

Louisiana courts also look for a special relationship when imposing a duty upon a defendant whose breach was the failure to act at all.²⁸ In those situations, courts look to the nature of the relationship between the defendant who failed to act and the injured plaintiff. A relationship with “special attributes of trust or confidence,” as Plaintiffs state, is generally required to trigger such a duty.²⁹ The court in *In re FEMA Trailer Formaldehyde Product Liability Litigation* provided a detailed exploration of the Louisiana jurisprudence on this issue.³⁰ In that case, inhabitants of FEMA trailers sued the companies that FEMA contracted with to install the trailers for breaching a duty to warn the inhabitants of dangerous levels of formaldehyde in the trailers.³¹ The court concluded that Louisiana law only imposes a duty to act for the benefit of others, in that case the inhabitants, when there is some special relationship between the plaintiff and defendant.³² The court noted that a contractual relationship is usually insufficient, and

finding even that lacking, held that the contractors owed the inhabitants no duty.³³

Plaintiffs cite two cases to support their assertion that Plaintiffs and Defendant Airbnb had the special relationship required to trigger a duty to act. In *Fox v. Board of Supervisors of Louisiana State University and Agricultural and Mechanical College*, which tends to support finding no duty, a student from another college who broke his neck at a tournament hosted by the LSU rugby club sued LSU for failing to ensure that the tournament was conducted with adequate safety.³⁴ The court reasoned that LSU, a separate entity from its rugby club, had no duty to the visiting player because there was no special relationship between the player and LSU.³⁵

In *Smith v. Orkin Exterminating Co.*, a homeowner hired the defendant company to provide exterminating services in her home and sued when the defendant's employee sexually assaulted her.³⁶ The court held that the company had a duty to exercise reasonable care in hiring and retaining the employees that it sent into customers' homes.³⁷ The court reasoned that while one does not usually owe others a duty to prevent harm by a third party, the defendant company both created the opportunity for the harm to occur and was in the best position to prevent the harm.³⁸

*773 Plaintiffs argue that Defendant Airbnb is analogous to the defendant company in *Smith* because Airbnb sends guests into the homes of its hosts.³⁹ The Court finds this unpersuasive. As an initial matter, *Smith* is a negligent hiring case, while the case at hand is better viewed through the frame of premises or custodial liability, discussed below.⁴⁰ Even so, the relationship between Defendant Airbnb and either the Defendant Owners or Plaintiffs is much weaker than that between the employer and either the employee or customer in *Smith*.⁴¹ Airbnb's Terms of Service specifically disclaim any control over, or responsibility for, the actions of hosts and guests.⁴² Instead, they describes Airbnb's role as facilitating a transaction between property owners and guests.⁴³ Further, while the company in *Smith* actively selected and managed the employee whose acts harmed the plaintiff, Airbnb merely offered a platform on which the Defendant Owners listed the Property.⁴⁴ In this way, Defendant Airbnb's role is more like that of LSU in *Fox*, which merely maintained the grounds

on which another party staged the tournament at which the plaintiff was injured.

[7] Plaintiffs characterize the relationship between Airbnb and its users differently, but there is no dispute over the underlying facts. In keeping with the characterization of Airbnb's role as a mere intermediary, Plaintiffs state that, "Airbnb provides an online platform that provides property owners, or Hosts, access to Guests, individuals seeking lodging."⁴⁵ Plaintiffs also describe how Airbnb allows property owners to create a profile and collects information about their property as part of the listing process.⁴⁶ On the other hand, Plaintiffs claim that, "Airbnb must accept a potential Host before the Host is allowed to make their property available for rent on Airbnb's website,"⁴⁷ and frequently refer to the fact that Airbnb retains the right to remove a listing for any reason.⁴⁸ While these acceptance and retention rights are superficially similar to those of the employer in *Smith*, Plaintiffs offer no evidence that Defendant Airbnb actually exercises those rights with anything approaching the care and discernment of a business hiring an employee. Instead, Defendant Airbnb's role is more akin to a real estate agent, who works to connect the parties to a transaction and often facilitates payment. A real estate agent also retains the right to accept and terminate listings, just as Airbnb does. Under Louisiana law, real estate agents have the duty to disclose those defects of which they have knowledge, but no duty to inspect the properties they advertise.⁴⁹

*774 Furthermore, unlike the company in *Smith*, Defendant Airbnb was not in the best position to prevent the harm that occurred. Airbnb had no right to inspect the Property before the incident and no right to authorize repairs.⁵⁰ Exclusive control of the property remained with the Defendant Owners, and thus they were in the best position to mitigate the risk posed by a defective staircase.

Accordingly, Defendant Airbnb did not owe Plaintiffs a duty because of a special relationship between Plaintiffs and Airbnb. Having found above that no relationship between Airbnb and Defendant Owners imposed a duty on Airbnb, this Court concludes that Airbnb had no duty pursuant to the general negligence principles of [article 2315](#) to protect Plaintiffs from the harm they suffered.

II. Duty Arising From Custody or Garde

[8] [9] [10] [11] Plaintiffs also assert that Defendant Airbnb owed them a duty because of the custody or control over the Property that Airbnb retained. The duty of a custodian of a building under [articles 2317.1](#) and [2322](#) is to "keep [it] in a reasonably safe condition[, and to] discover any unreasonably dangerous condition on his premises and either correct the condition or warn potential victims of its existence."⁵¹ Defendant Airbnb argues that it does not owe that duty to Plaintiffs because it lacked custody, or garde, over the Property. While ownership of a thing is usually sufficient to establish garde, the principle of imposing liability on the entity best able to mitigate risk is broader than ownership alone and thus more than one party may have garde.⁵² To determine whether a person has garde over a thing, courts look to "(1) whether the person bears such a relationship as to have the right of direction and control over the thing; and (2) what, if any, kind of benefit the person derives from the thing."⁵³

Plaintiffs cannot establish that Defendant Airbnb had garde over the Property because they fail to identify a dispute of material fact as to whether Defendant Airbnb had a right of direction and control over it.

In determining whether a party has a legal relationship with a thing so as to have the right of direction and control over it, courts have looked to a variety of factors, including whether the party has the right to use, alienate, encumber, or lease the thing, or otherwise grant a right of use to others[, see *Doughty*, 576 So.2d at 464–65; *Smith v. State of Louisiana*, 620 So.2d 1172, 1183–84 (La. Ct. App. 1st Cir. 1992)]; whether the party has the right to authorize alterations or repairs to the thing[, *Butler v. Re/Max New Orleans Props., Inc.*, 828 So.2d 43 (La. Ct. App. 4th Cir. 2002)], and whether the party has an unfettered right to access the thing at will, versus only a limited access to enter[, see *Bethea v. Great Atlantic & Pacific Tea Co.*, 22 So.3d 1114, 1116 (La. Ct. App. 4th Cir. 2009)].⁵⁴

Plaintiffs make a variety of factual claims about the nature of the relationship between Defendant Airbnb and the Property, some of which are irrelevant to the issue of garde and some of which lack evidentiary support. Plaintiffs argue that *775 Defendant Airbnb is the "gatekeeper" to the Property, asserting that Airbnb is the "only way" that they gained access to the Property and that Plaintiff Carroll would not have been at the Property had it not been listed with Airbnb.⁵⁵ Plaintiffs have shown that Airbnb was the only way Carroll did access the Property, but have not shown that it was the

only way anyone *could have* done so. In other words, Plaintiff cite to no evidence that the right of Defendant Owners to grant access to their Property to whomever they like was in any way inhibited by their contract with Airbnb. Similarly, though Plaintiffs state that “Airbnb has the sole discretion to allow guests' access to the hosts' properties,” Plaintiffs do not provide evidence that Airbnb had the right to prevent the Defendant Owners from granting access to anyone they please.⁵⁶

Plaintiffs also repeatedly assert that Airbnb had the right to inspect the Property.⁵⁷ However, the only evidence Plaintiffs cite to support that claim is the Airbnb Terms of Service and the deposition of Airbnb's corporate representative. The Terms of Service, in setting forth the conditions that an Airbnb host must fulfill in order to take advantage of insurance provided by Defendant Airbnb, states, “You must permit Airbnb or the designee(s) of Airbnb's insurer to make inspections of Covered Property at all reasonable times.”⁵⁸ Airbnb's corporate representative clarified that this right was to inspect “the damaged property or the property in question...not general inspection of the entire property,” and only existed after an incident occurred.⁵⁹ Plaintiffs point to no evidence suggesting that Defendant Airbnb had the general right to inspect the Property before the incident in question, and conceded so at oral argument.

Plaintiffs list a variety of additional rights that Defendant Airbnb maintained—including the right to remove the Property's listing from its website at will, to require repairs after an accident before re-listing the Property, and the right to conduct background checks of Defendant Owners—none of which bear on whether Airbnb had garde over the Property itself. Plaintiffs summarized their argument as, “control of the platform is control of the property.”⁶⁰ This Court disagrees. Returning to the factors of whether garde exists as summarized in *In re FEMA Trailer*, Plaintiffs produce no evidence that Airbnb retained the right to alienate the Property, to authorize repairs, or to access the Property at will.⁶¹ Rather, Defendant Airbnb was situated more like a travel agent, facilitating a transaction between the Defendant Owners and guests. Travel agents do not have garde over the hotels they book for their customers, just as they do not have a general duty under [article 2315](#) to protect their customers from harm caused by those hotels.⁶²

*776 III. Notice or Constructive Notice of the Defect

[12] [13] [14] [15] Even if Defendant Airbnb did have garde over the Property, Plaintiffs have produced no evidence that Airbnb knew or should have known of the defect in the stairs, as required by [article 2322](#). In order to recover under a theory of custodial liability, “a plaintiff must prove that the defendant had actual or constructive knowledge of the vice or defect. Constructive knowledge ‘imposes a reasonable duty to discover apparent defects in things under the defendant's garde.’”⁶³ “Constructive notice is the existence of facts which imply actual knowledge....To establish constructive notice, plaintiff must prove that the defect causing the injury existed over a sufficient length of time to establish that reasonable diligence would have led to its discovery and repair.”⁶⁴

Plaintiffs do not dispute that Defendant Airbnb had no actual knowledge of any defect in the stairs, and they also fail to cite any evidence that Defendant Airbnb should have known of the condition of the stairs. There is no evidence of the length of time that the alleged defect in the stairs existed, that an inspection would have revealed the condition of the stairs, or that any party had any suspicion that the stairs were dangerous. Accordingly, Plaintiffs have failed to carry their burden at this summary judgment stage on the issue of knowledge.⁶⁵

CONCLUSION

Plaintiffs fail to establish a dispute over a fact material to the question of whether Defendant Airbnb owed a duty to Plaintiffs under either the general negligence obligations of [article 2315](#) or the obligations associated with custody of a thing under [articles 2317.1](#) and [2322](#). Plaintiffs further fail to cite to any evidence suggesting that Defendant Airbnb knew or should have known of the condition of the stairs, as required by [article 2322](#). Because the Court finds that Defendant Airbnb owed no duty to Plaintiffs and had no actual or constructive knowledge of any defect in the stairs, Defendant Airbnb's Motion for Summary Judgment is GRANTED and Plaintiffs' claims against it are DISMISSED with prejudice.

All Citations

289 F.Supp.3d 767

Footnotes

- 1 Doc. 111–2 at 3.
- 2 See Docs. 1 at 3, 111–2 at 3.
- 3 See Doc. 1 at 4.
- 4 Doc. 1 at 4.
- 5 Docs. 1, 44.
- 6 Docs. 1, 44.
- 7 Fed. R. Civ. P. 56.
- 8 *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).
- 9 *Coleman v. Houston Indep. Sch. Dist.*, 113 F.3d 528, 533 (5th Cir. 1997).
- 10 *Engstrom v. First Nat'l Bank of Eagle Lake*, 47 F.3d 1459, 1462 (5th Cir. 1995).
- 11 *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).
- 12 *Johnson v. Deep E. Tex. Reg. Narcotics Trafficking Task Force*, 379 F.3d 293, 301 (5th Cir. 2004) (internal citations omitted).
- 13 *Badon v. R J R Nabisco, Inc.*, 224 F.3d 382, 393–94 (5th Cir. 2000) (quoting *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994)).
- 14 *Boudreaux v. Banctec, Inc.*, 366 F.Supp.2d 425, 430 (E.D. La. 2005).
- 15 Doc. 44 at 4.
- 16 La. Civ. Code art. 2315.
- 17 *Bufkin v. Felipe's Louisiana, LLC*, 171 So.3d 851, 855 (La. 2014).
- 18 *Lemann v. Essen Lane Daiquiris, Inc.*, 923 So.2d 627, 633 (La. 2006).
- 19 See *McLachlan v. New York Life Ins. Co.*, 488 F.3d 624, 627 (5th Cir. 2007); *Lemann*, 923 So.2d at 633.
- 20 *Broussard v. State ex rel. Office of State Bldgs.*, 113 So.3d 175, 182–83 (La. 2013); see also La. Civ. Code arts. 2317.1, 2322.
- 21 *Jackson v. Brumfield*, 40 So.3d 1242, 1243 (La. App. 1 Cir. 2010).
- 22 *Vinccinelli v. Musso*, 818 So.2d 163, 165 (La. App. 1 Cir. 2002).
- 23 Doc. 154 at 9–13.
- 24 See Frank L. Maraist & Thomas C. Galligan, Jr., *Louisiana Tort Law* § 5.07[4] (2004 ed. Supp. 2016). The authors also note that doctors have a duty to warn third parties of danger posed by their patients, but only when the patient has communicated an immediate threat of physical violence to the doctor. Here, Plaintiffs do not allege that Defendant Airbnb had knowledge of the danger the stairs posed.
- 25 See *id.*

- 26 See *id.*
- 27 See Doc. 44 at ¶¶ 15–17.
- 28 See *Fox v. Bd. of Sup'rs of La. State Univ. & Agr. & Mech. Coll.*, 576 So.2d 978, 981 (La. 1991); see also *In re FEMA Trailer Formaldehyde Prod. Liab. Litig.*, 838 F.Supp.2d 497, 506 (E.D. La. 2012) (gathering cases).
- 29 Doc. 154 at 10 (quoting *In re FEMA Trailer Formaldehyde*, 838 F.Supp.2d at 506).
- 30 See *In re FEMA Trailer Formaldehyde*, 838 F.Supp.2d at 504–11.
- 31 *Id.* at 499–503.
- 32 *Id.*
- 33 *Id.* at 506–11.
- 34 *Fox*, 576 So.2d at 980.
- 35 *Id.* at 981–82.
- 36 *Smith v. Orkin Exterminating Co.*, 540 So.2d 363, 364–65 (La. Ct. 1 App. 1989).
- 37 *Id.* at 366–67.
- 38 *Id.* (quoting W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 33, at 201–03 (5th ed. 1984)).
- 39 See Doc. 154 at 11.
- 40 See *Smith*, 540 So.2d at 366–67.
- 41 See *id.*
- 42 Doc. 71–10 at 2.
- 43 Doc. 71–10 at 2, 3–4. Plaintiffs were not party to the Terms of Service, and so are probably not bound by its terms. However, Plaintiffs only connection to Defendant Airbnb is the rental of the Property conducted pursuant to the Terms of Service, and so the document is relevant to describe the nature of Defendant Airbnb's role in the transaction.
- 44 See Doc. 71–10 at 3–4; *Smith*, 540 So.2d at 366–67.
- 45 Doc. 154 at 2.
- 46 Doc. 154 at 2.
- 47 Doc. 154 at 2.
- 48 Doc. 154 at 3–5.
- 49 See, e.g., *Waddles v. LaCour*, 950 So.2d 937, 942 (La. App. 3 Cir. 2007) (“[T]he duty to disclose any material defects extends only to those defects of which the broker or agent is aware.”); *Reeves v. Weber*, 509 So.2d 158, 160 (La. App. 1 Cir. 1987).
- 50 Plaintiffs cite no evidence to support any assertion to the contrary.
- 51 *Vinccinelli*, 818 So.2d at 165.

- 52 See *Dupree v. City of New Orleans*, 765 So.2d 1002, 1009 (La. 2000); *Doughty v. Insured Lloyds Ins. Co.*, 576 So.2d 461, 464 (La. 1991).
- 53 *Dupree*, 765 So.2d at 1009.
- 54 *In re FEMA Trailer Formaldehyde*, 838 F.Supp.2d at 512 (footnotes inserted inline).
- 55 Doc. 154 at 14.
- 56 Doc. 154 at 14
- 57 See Doc. 154 at 11 (“Airbnb can inspect properties for safety related concerns in its sole discretion.”), 14 (“Airbnb has the right to inspect or not inspect the property....”).
- 58 Doc. 71–7 at 42.
- 59 Doc. 154–2 at 11.
- 60 Oral Argument, Dec. 6, 2017.
- 61 See *In re FEMA Trailer Formaldehyde*, 838 F.Supp.2d at 512.
- 62 See *Butler v. Re/max New Orleans Properties, Inc.*, 828 So.2d 43, 47 (La. App. 4 Cir. 2002) (holding that a real estate agent with keys to a property and instructions to sell it did not have garde over the property); *Pierre v. Am.–Int’l Travel, Inc.*, 717 F.Supp. 435, 435–37 (M.D. La. 1989) (holding that, under Louisiana law, a travel agent did not have a duty to protect its customer travelers from the negligence of the airline or airport).
- 63 *Daniel v. Clarion Inn & Suites*, 214 So.3d 38, 41 (La. App. 4 Cir. 2017) (quoting *Tsegaye v. City of New Orleans*, 183 So.3d 705, 718 (La. App. 4 Cir. 2015)).
- 64 *Flenner v. Sewerage & Water Bd. of New Orleans*, 110 So.3d 661, 665 (La. App. 4 Cir. 2013); see also *Dronette v. Shelter Ins. Co.*, 998 So.2d 942, 945 (La. App. 3 Cir. 2008).
- 65 See also *Ukudi v. McMoran Oil & Gas, L.L.C.*, 587 Fed.Appx. 119, 122 (5th Cir. 2014) (upholding summary judgment on liability under article 2322 when plaintiff merely asserted that defendants should have known about a defect, but produced no evidence as to why); *Duplantis v. Cadillac Fairview Shopping Ctr. Properties (La.), Inc.*, 894 So.2d 393, 398 (La. App. 5 Cir. 2005) (rejecting plaintiff’s argument that defendant mall owners should have periodically inspected a handrail and holding that there was no evidence defendants should have known of a defect in it).

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EXHIBIT 3

**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

SALOMES MONIK RENGIFO
JACKSON, et al.,
Plaintiffs,

v.

AIRBNB, INC., a Delaware
Corporation; SNAP, INC., a
Delaware corporation, etc., et al.,
Defendants.

CV 22-3084 DSF (JCx)

ORDER GRANTING AIRBNB,
INC.'S MOTION TO DISMISS
(Dkt. 41)

Airbnb, Inc. moves to dismiss the First Amended Complaint. Plaintiffs oppose. Dkt. 42 (Opp'n). For the reasons stated below, Airbnb's motion to dismiss is GRANTED.

I. Background

On May 18, 2020, seventeen-year-old Michael McGowan shot and killed seventeen-year-old Giselle Jackson Rengifo at an Airbnb, Inc. rental property in Miami-Dade County, Florida (subject property) where both were guests and invitees. Dkt 39 (FAC) ¶ 7. McGowan and other minors had been at the subject property for "several days" prior, "openly engaging in criminal activity," "partying," drinking, doing drugs, and "maintaining weapons." Id. ¶ 8.

On May 5, 2022, Plaintiffs filed this action alleging claims of negligence, gross negligence, and products liability against Airbnb. Dkt. 1-1 at 12-14. The Court granted a motion to dismiss these claims, finding that Airbnb did not owe the duty required to sustain a

negligence claim and that Airbnb is a marketplace, not a product. Dkt. 34 (Order).

Plaintiffs' FAC continues to assert claims of negligence and gross negligence, and adds a claim of negligence per se. FAC ¶¶ 40-54. Plaintiffs added details about Airbnb's Terms of Service (TOS), Airbnb's Global Party Ban, and Airbnb's Responsible Hosting rules. FAC ¶¶ 26, 33.¹

II. Legal Standard

Federal Rule of Civil Procedure 12(b)(6) allows an attack on the pleadings for failure to state a claim on which relief can be granted. "[W]hen ruling on a defendant's motion to dismiss, a judge must accept as true all of the factual allegations contained in the complaint." Erickson v. Pardus, 551 U.S. 89, 94 (2007). However, a complaint must "state a claim to relief that is plausible on its face." Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007). This means that the complaint must plead "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." Id.

"Dismissal under Rule 12(b)(6) is proper when the complaint . . . fails to allege sufficient facts to support a cognizable legal theory." Somers v. Apple, Inc., 729 F.3d 953, 959 (9th Cir. 2013) (internal citation omitted).

III. Discussion

Rengifo's death is tragic, but Plaintiffs once again fail to allege sufficient facts to support their negligence claims against Airbnb.

¹. The FAC also adds details about 911 calls related to the subject property and about Miami-Dade's emergency order. FAC ¶¶ 16, 35. But the Court took judicial notice of the underlying documents in ruling on the last motion. Order at 3-4. These facts are not new to the Court's analysis of the issues.

A. Negligence and Gross Negligence

To establish liability on a theory of negligence or gross negligence, a Plaintiff must “prove duty, breach, causation, and damages.” Conroy v. Regents of Univ. of Cal., 45 Cal. 4th 1244, 1250 (2009); see also Jimenez v. 24 Hour Fitness USA, Inc., 237 Cal. App. 4th 546, 552 n.3 (2015) (noting that “California does not recognize a distinct common law cause of action for gross negligence apart from negligence”).

None of the facts added to the FAC change the prior outcome. Plaintiffs have not pleaded facts sufficient to show the first element of a negligence claim – duty. As detailed in the Court’s prior ruling, in California generally “there is no duty to act to protect others from the conduct of third parties.” Order at 11 (quoting Delgado v. Trax Bar & Grill, 36 Cal. 4th 224, 235 (2005)).² There are some common-law exceptions to this general rule. For example, a special relationship and a negligent undertaking can create a duty even where a third party causes the harm. The California Supreme Court has established a two-step analysis to determine if an exception applies. First, there must be an exception to the no-duty-to-protect rule. Second, if an exception is found, a court then weighs the Rowland factors to see if a duty should

² Plaintiffs argue two theories of duty that the Court finds irrelevant because here a third-party is responsible for the harm. Plaintiffs claim there is “a duty when a person’s actions create a risk of harm to a plaintiff” and “a general duty.” Opp’n at 7; 15-16. These descriptions of duty are just different phrasing of the ordinary negligence duty described in California Civil Code §1714, which states: “Everyone is responsible, not only for the result of his or her willful acts but also for an injury occasioned to another by his or her want of ordinary care or skill in the management of his or her property or person”). This is exactly the type of duty, however, that is irrelevant where a third-party’s malfeasance is responsible for the harm. Order at 11; see also Brown v. USA Taekwondo, 11 Cal. 5th 204, 214 (2021) (explaining that “Section 1714 states a broad rule, but it has limits. We have explained that the law imposes a general duty of care on a defendant only when it is the defendant who has created a risk,” but a party “owes no duty to control the conduct of another.”) (internal quotation marks omitted).

be imposed. Id. at 212-13; see Rowland v. Christian, 69 Cal. 2d 108 (1968)). The Rowland factors to be balanced are:

the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost, and prevalence of insurance for the risk involved.

Id. at 212-13 (citing Rowland, 69 Cal. 2d at 112-13). Once again, Plaintiffs' arguments fail at both steps. No exception applies here, and the Rowland factors preclude the application of an exception.

1. Special Relationship³

Plaintiffs argue that the common law exception of a special relationship applies. Opp'n at 7. But in order to address the earlier defects, Plaintiffs needed to allege facts showing that Rengifo had a "right to expect protection from" Airbnb or that Airbnb had the "ability to control" McGowan's conduct. Brown, 11 Cal. 5th at 216. They did neither.

The facts alleged do not support the conclusion that Airbnb had a special relationship with the third-party responsible for the harm.

³ Plaintiffs discuss "special relationship" and "control over property" as two distinct exceptions. Opp'n 7-10; 12-13. These arguments are not distinct. Compare id. at 7-10 ("Airbnb had the requisite control over the property to establish a special relationship") with Opp'n 12 ("A property manager owes a common law duty of ordinary care to tenants to properly perform his or her duties as property manager, and to maintain the premises in a reasonable manner."). Control over property indicates that one is akin to a landowner with a special relationship and duty to protect invitees on the property. Order at 13. All of Plaintiffs' arguments for these two sections of their briefing are addressed here.

Plaintiffs added no facts about Airbnb's connection to McGowan. As before, there is no suggestion that Airbnb had any ability to control McGowan's conduct. To the extent Plaintiffs argue there was a special relationship between Airbnb and the host of the subject property, that is irrelevant. Opp'n at 9 ("Defendant Airbnb controlled hosts"). The host is not the third party who caused the harm. Plaintiffs allege that McGowan, not the host, shot Rengifo. FAC ¶ 8-9.

None of the facts added sufficiently allege a special relationship between Airbnb and Rengifo. Control over a property creates a duty to the invitees where there is a "power to prevent, remedy or guard against the dangerous condition," which courts often construe as an ability to enact physical changes on a property. Colonial Van & Storage, Inc. v. Superior Court, 76 Cal. App. 5th 487, 498 (2022). As the Court previously noted, "[s]etting policies and providing a security patrol is not sufficient control to create a duty." Order at 13 (citing Univ. of So. Cal. v. Superior Court, 30 Cal. App. 5th 429, 449 (2018), overruled on other grounds by Brown, 11 Cal. 5th at 212). Plaintiffs argue that the Airbnb TOS and the Global Party Ban show that Airbnb controlled the property because it "sets policies related to the use of its platform, maintained the ability to prevent the rental of subject property, and banned parties." Opp'n at 9. The TOS require users to comply with local laws and allow Airbnb to review member content. FAC ¶ 26. The Global Party Ban was an official policy that Airbnb released that prohibited parties and threatened to ban guests who broke those rules. FAC ¶ 33. The policy also opened a neighborhood hotline to report parties, removed "event-friendly" tags on listings, and required users to adhere to COVID-19 public health mandates. Id. Neither of these policies represents sufficient control over the subject property such that Airbnb owed a duty to Rengifo. The TOS and Global Party Ban are simply policies that allow Airbnb to regulate its platform; they did not allow Airbnb to make physical changes to rental properties. The facts show that Airbnb can remove listings and revoke memberships, not that it paves walkways and puts up fences. No special relationship exception applies.

2. Negligent Undertaking

None of the new facts have any bearing on the negligent undertaking analysis. The negligent undertaking exception imposes a duty where a party undertakes rendering services in a manner that “increased the risk of harm beyond what existed without the undertaking.” Barenborg v. Sigma Alpha Epsilon Fraternity, 33 Cal. App. 5th 70, 83-84 (2019). As before, Plaintiffs point to Airbnb policies and claim negligence because Airbnb is not doing more.⁴ As the Court previously explained, these facts do not show that the activities Airbnb undertook made Rengifo worse off than she would have been without the policies. Order at 15. The negligent undertaking exception does not apply.

3. Rowland Factors

Even if there were some relevant exception, the Rowland factors do not support a finding of duty. The Court previously found that (1) the foreseeability of the crime was low, (2) the connection between Airbnb’s conduct and the injury is virtually nonexistent, and (3) the burden of preventing this sort of incident in the future is high. Order at 15

⁴ Compare Order at 13 (“The Plaintiffs have not plausibly alleged a negligent undertaking. They claim that Airbnb ‘undertook measures to protect guests and third parties from crime’ by ‘prohibiting partying, retain[ing] the right to conduct investigations and terminate listings,’ reviewing ‘what the host posted and edit[ing] the listing,’ and ‘require[ing] local compliance with law and ordinances.’ . . . Plaintiffs instead seem to suggest that this undertaking was negligent because Airbnb did not do more.”) (quoting Dkt. 28 at 15) with Opp’n at 10-11 (“Airbnb promulgated rules including rules based upon health and safety standards, prohibited parties at Airbnb properties, encouraged community reporting and implemented enforcement mechanisms, and had a duty to ensure that hosts complied with lease agreements and local laws” but Airbnb “failed to ensure compliance with the law,” “failed to require hosts to provide deeds and rental agreements,” “failed to ensure hosts prohibited partying on the subject property, failed to ensure that hosts complied with local laws and ordinances, and failed to restrict access to guests under the age of 25.”).

(citing Brown, 11 Cal. 5th at 217). None of the new facts alleged by Plaintiffs change this analysis. The Rowland factors do not support the application of an exception. Order 15-18.

Plaintiffs' negligence and gross negligence claims are DISMISSED with leave to amend.

B. Negligence Per Se

Plaintiffs amended complaint adds a negligence per se claim. Plaintiffs argue that Airbnb is negligent per se because it "allowed the subject property to be listed at a time when Miami-Dade County prohibited short-term rentals to all non-essential workers." FAC ¶ 52. As Airbnb correctly points out, negligence per se "is an evidentiary doctrine, rather than an independent cause of action." Jones v. Awad, 39 Cal. App. 5th 1200, 1210 (2019). Under the doctrine,

Negligence is presumed if: (1) The individual violated a statute, ordinance, or regulation of a public entity; (2) The violation proximately caused death or injury to person or property; (3) The death or injury resulted from an occurrence of the nature which the statute, ordinance, or regulation was designed to prevent; and (4) The person suffering the death or the injury to his person or property was one of the class of persons for whose protection the statute, ordinance, or regulation was adopted.

Id. at 1210 (simplified); see also Cal. Evid. Code § 669(a). Even if this were a cause of action and Plaintiffs could plead factors one, two, and four, Plaintiffs are unable to satisfy factor three. Nowhere do Plaintiffs claim that the Miami-Dade order went into effect to address violence at parties. Indeed, Plaintiffs could not plausibly plead that this is the sort of harm the Miami-Dade order was meant to address. The emergency order was clearly adopted in response to COVID-19. The County wanted to "aid the availability of hotel rooms for" essential workers and to "prevent crowds of people inside and around hotels, as COVID-19 continues to spread" because "numerous persons have congregated in Miami-Dade County for spring break and other social activities, and

are congregating in and around hotels without observing the social distancing guidelines.” Dkt. 28-7 at 1-2; see also Order at 3-4 (taking judicial notice of 28-7).

The Plaintiffs’ negligence per se claim is DISMISSED with prejudice.

* * *

Airbnb’s motion to dismiss is GRANTED. Plaintiffs are granted one more opportunity to amend the complaint in conformity with this Order if they can do so consistent with Rule 11 of the Federal Rules of Civil Procedure. An amended complaint may be filed and served no later than February 23, 2023. Failure to file an amended complaint by that date will waive their right to do so and the First Amended Complaint will be dismissed with prejudice. Plaintiffs must provide a redlined version of the amended complaint to the Court’s generic chambers email.

IT IS SO ORDERED.

Date: February 2, 2023



Dale S. Fischer
United States District Judge

EXHIBIT 4

2022 WL 2980700

Only the Westlaw citation is currently available.

United States District Court, W.D.
Arkansas, Fayetteville Division.Britton ESPOSITO; Christian Fresno;
Benjamin Kutyllo; Allyson Esposito; and
Allyson Esposito, as mother and next
friend of Janie Doe, a minor, Plaintiffs

v.

AIRBNB ACTION, LLC; Airbnb Payments,
Inc.; and Airbnb, Inc., Defendants

CASE NO. 5:20-CV-5204

I

Signed July 27, 2022

Attorneys and Law FirmsAlan L. Lane, Odom & Elliott, Fayetteville, AR, Jerry
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Esposito & Staubus LLP, Burr Ridge, IL, for Plaintiffs.Craig M. Derrig, Charles Vogt, Wood Smith Henning &
Berman LLP, Chicago, IL, Keith K. Ybanez, Husch Blackwell
LLP, Denver, CO, for Defendants.**MEMORANDUM OPINION AND ORDER**TIMOTHY L. BROOKS, UNITED STATES DISTRICT
JUDGE

*1 Before the Court are a Motion to Dismiss and Memorandum of Law in Support (Docs. 95 & 96) filed by Defendants Airbnb Action LLC, Airbnb Payments, Inc., and Airbnb, Inc. (collectively, “Airbnb”). Plaintiffs filed a Response in Opposition to the Motion (Doc. 107), and Airbnb filed a Reply (Doc. 110). On May 24, 2022, the Court held a hearing and entertained oral argument on the Motion. At the conclusion of the hearing, the Court took the Motion under advisement.

Now that the Court has had a full opportunity to consider the Amended Complaint, the parties’ briefing on the Motion

to Dismiss, and counsel’s oral argument, the Motion is **GRANTED** for the reasons explained below.

I. BACKGROUND

According to the Amended Complaint, Plaintiffs Britton Esposito and Christian Fresno were married in Buenos Aires, Argentina, on November 14, 2019. Britton is an American citizen, and Christian is Argentinian. In attendance at the wedding were Britton’s family members from Arkansas: her sister, Allyson Esposito, Allyson’s husband, Benjamin Kutyllo, and Allyson and Benjamin’s young daughter, Janie Doe.

Before traveling to Argentina, Allyson decided to secure a vacation rental near Buenos Aires for her immediate family and the newlyweds to relax and unwind after the wedding. Allyson accessed the Airbnb platform from her home in Arkansas and found a listing for a spacious private residence in a gated community called “Puerto Panal.” The listing described the home as follows:

One hour from Buenos Aires, on 5 acres, housing 6 guests, 4 bedrooms, 7 beds, 2.5 baths, private pool, WIFI and the television, Netflix, indoor stairwell slide, one-of-a-kind finishing details and pieces, hosted by Lindsay with a 100% 5-star location and experience rating. The neighborhood, Puerto Panal, has a large community pool, restaurant walking and riding paths, polo field, tennis courts, access to the river, “tons of tons of privacy and open views. (O)ur property is within a gated farm club. There is security gate at the entrance and monitoring throughout the neighborhood. The streets have speed monitoring and infractions will occur fines for speeds over 30 km per hour. If you plan to have day visitors, we allow up to 4 visitors with prior approval. We will need the names and document numbers of each person in your group (including visitors) to allow them access into the neighborhood. The neighborhood also requires the renter to sign a rental contract/reglamento de convivencia before arrival. Our neighborhood requires that all renters sign a rental contract/reglamento de Convivencia prior to rental date and bring the signed copy at check-in to the entrance of the neighborhood. Renters must also provide names and DNI of every person in their party.

(Doc. 92, p. 15, ¶ 56). Allyson reserved the home for a two-night stay.

On November 21, 2019, exactly one week after the wedding, the Plaintiffs traveled by taxicab to the home that Allyson had rented on Airbnb. They arrived at the security gate at the entrance of the Puerto Panal neighborhood, and the taxi driver gave the guards his personal and vehicle information, while the adult Plaintiffs told the guards their names. The guards did not ask the Plaintiffs for their passports or other personal identification, but they seemed to be aware that most of the Plaintiffs were from the United States. As a condition of staying at the home, the owners had required the Plaintiffs to provide them with their full names and their passport numbers. Plaintiffs claim they used the Airbnb platform to send this information to the property owners.

***2** The guards directed the taxicab through the security gate to the rental home. They did not provide Plaintiffs with any door keys. When Plaintiffs arrived at the home, they noticed the sliding doors were unlocked. Security cameras appeared to be positioned around the home, but Plaintiffs found out later that those cameras were not hooked up to a security system and did not function. Plaintiffs settled themselves into the home, unpacked, and made themselves some snacks. Later in the evening, they suffered a harrowing home invasion in which they were terrorized and robbed by four masked men carrying guns and knives.

The intruders entered the house, tied and gagged the four adults, sexually assaulted Allyson and Britton, hit Benjamin on the head with a gun, and threatened to murder Allyson and Benjamin's toddler and dump her in a field. The masked men eventually left the house, and Plaintiffs freed themselves and called the police for help. Eventually, the police arrived, and the security guards, who had helped the intruders gain entry to the gated community, were arrested.

On May 5, 2020, Plaintiffs filed suit in the District Court for the Northern District of Illinois against Airbnb and several Argentine defendants, including the couple who owned the rental home and the Puerto Panal Property Owners' Association. Airbnb moved to transfer the case to the Western District of Arkansas, and the Illinois court granted that motion in an order (Doc. 44) filed on November 20, 2020. The case was then transferred to the undersigned, and an initial scheduling order issued on December 3, 2020. On December 16, Airbnb filed a motion to compel arbitration, which this Court granted. *See* Doc. 78. The remaining claims against the Argentine defendants were eventually dismissed for lack of personal jurisdiction. *See* Doc. 85. On February 5, 2021, the Court directed the Clerk to administratively terminate the case

pending the conclusion of arbitration proceedings between Plaintiffs and Airbnb.

About a year later, on January 18, 2022, Plaintiffs moved to reopen this case. It appears Plaintiffs never pursued their claims in arbitration. Instead, shortly after the motion to compel arbitration was granted, Plaintiffs discovered that Airbnb had publicly announced a change to their official arbitration policy: All sexual assault claims brought against Airbnb would no longer be subject to mandatory arbitration. Plaintiffs believed that since Allyson and Britton had been sexually assaulted by the masked assailants in the rental home in Argentina, the Plaintiffs' lawsuit against Airbnb should be permitted to proceed in this Court—bypassing arbitration. Airbnb agreed with Plaintiffs and waived their right to arbitrate, which prompted the Court to reopen the case and direct Plaintiffs to file an amended complaint. The Amended Complaint (Doc. 92) was filed on March 3, 2022. And just two weeks later, on March 17, Airbnb moved to dismiss all claims in the Amended Complaint pursuant to [Federal Rule of Civil Procedure 12\(b\)\(6\)](#).

The Amended Complaint contains 13 counts. Counts I, III, V, VII, and IX are direct negligence claims brought by each of the five Plaintiffs. Counts II, IV, VI, VIII, and X assert the “vicarious liability” of Airbnb as to each of the five Plaintiffs.¹ Count XI is a claim for civil RICO, which Plaintiffs agree is subject to dismissal. *See* Doc. 107, p. 35. Count XII is a claim for the violation of Plaintiffs' right to privacy. Lastly, Count XIII is a Lanham Act Claim for false advertising under [15 U.S.C. § 1125](#). Below the Court will examine each claim in turn.

II. LEGAL STANDARD

***3** To survive a 12(b)(6) motion, the “complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quotation marks omitted). “A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Glick v. W. Power Sports, Inc.*, 944 F.3d 714, 717 (8th Cir. 2019) (quoting *Iqbal*, 556 U.S. at 678). In ruling, the Court must “accept as true all facts pleaded by the non-moving party and grant all reasonable inferences from the pleadings in favor of the nonmoving party.” *Gallagher v. City of Clayton*, 699 F.3d 1013, 1016 (8th Cir. 2012) (quotation marks omitted).

Still, the complaint must contain sufficient facts “to raise a right to relief above the speculative level.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). Pleadings that contain mere “labels and conclusions” or “a formulaic recitation of the elements of the cause of action will not do.” *Id.* A court is not required to “blindly accept the legal conclusions drawn by the pleader from the facts.” *Westcott v. City of Omaha*, 901 F.2d 1486, 1488 (8th Cir. 1990).

III. DISCUSSION

A. Negligence

Before examining the facts made in support of this claim, the Court must first determine which state's law applies. Airbnb argues in favor of applying Arkansas law, while Plaintiffs argue in favor of California law.² Arkansas's connection with the case arises from the fact that Allyson, an Arkansas citizen, accessed the Airbnb platform and reserved the rental property from her home in Arkansas. California's connection with the case arises from the fact that Airbnb is headquartered there.³

This case was originally filed in Illinois and then transferred to this Court on Airbnb's motion pursuant to 28 U.S.C. § 1404(a). When a case is transferred to a new court under § 1404(a), the transferor state's choice-of-law rules will govern the dispute. *Ferens v. John Deere Co.*, 494 U.S. 516, 519 (1990) (“[T]he transferee court must follow the choice-of-law rules that prevailed in the transferor court.”). Given that the “transferor state” here is Illinois, the following choice-of-law rules apply:

*4 Illinois law, which “applies the choice-of-law analysis from the Restatement (Second) of Conflict of Laws[.]” *Dobbs v. DePuy Orthopedics, Inc.*, 842 F.3d 1045, 1049 (7th Cir. 2016), “tells us that the law of the state with the ‘most significant relationship to the occurrence and the parties’ applies in the event of a conflict[.]” *Bd. of Forensic Document Exam'rs, Inc. v. Am. Bar Ass'n*, 922 F.3d 827, 831 (7th Cir. 2019) (quoting *Barbara's Sales, Inc. v. Intel Corp.*, 227 Ill. 2d 45, 61, 316 Ill. Dec. 522, 879 N.E.2d 910 (Ill. 2007)). But the “most significant relationship” test does not come into play unless there is difference in law that would affect the outcome—absent such a disagreement, the law of the forum state applies. See *Crichton v. Golden Rule Ins. Co.*, 576 F.3d 392, 397 n.1 (7th Cir. 2009) (citing *Int'l*

Administrators, Inc. v. Life Ins. Co. of North America, 753 F.2d 1373, 1376 n.4 (7th Cir. 1985)).

Elzeftawy v. Pernix Grp., Inc., 477 F. Supp. 3d 734, 787 (N.D. Ill. 2020).

First, this Court must first determine whether there are any material differences between Arkansas and California law that might affect the outcome of the negligence claims. If applying Arkansas law over California law will not change the outcome, then Arkansas law—the law of the forum state—should apply. See *Int'l Adm'rs., Inc. v. Life Ins. Co. of N. Am.*, 753 F.2d 1373, 1376 (7th Cir. 1985) (interpreting Illinois choice-of-law rules). However, if differences do exist, the Court must apply the law of the state with the most significant relationship to the occurrence and the parties.

Here, there is no conflict between Arkansas and California law with respect to the elements of a cause of action for negligence. Both states follow the Restatement and require proof of duty, breach, proximate cause, and damages. *Peredia v. HR Mobile Servs., Inc.*, 25 Cal. App. 5th 680, 687 (Cal. Ct. App. 2018); *Coca-Cola Bottling Co. of Memphis v. Gill*, 352 Ark. 240, 254 (2003). Furthermore, both states hold that there is no general duty to protect against third-party criminal acts, though a defendant may voluntarily assume a duty to protect if the criminal activity is sufficiently foreseeable. See *Boren v. Worthen Nat'l Bank*, 324 Ark. 416, 425 (1996); *Sturgeon v. Curnutt*, 29 Cal. App. 4th 301, 306 (1994). Since Arkansas and California law do not differ with respect to their interpretation of negligence claims, the Court will utilize Arkansas law to analyze the negligence claims made in the Amended Complaint.

Plaintiff's contention that Airbnb acted negligently hinges on whether Airbnb owed a duty of care, which Arkansas courts consider, generally, to be a question of law. See *Coca-Cola*, 352 Ark. at 254. There is no dispute that Airbnb is an online platform that allows homeowners to advertise their homes for rent to the general public and earns a commission fee for every booking. See Doc. 92, p. 6, ¶¶ 24–25. The parties also agree that, in general, “a defendant is under no duty to guard against risks it cannot reasonably foresee.” *Coca-Cola*, 352 Ark. at 254. In the Amended Complaint, Plaintiffs assert that when Airbnb allowed the Argentine homeowners to use the online platform to advertise a home for rent, Airbnb assumed a duty to protect the ultimate renters—in this case, the Plaintiffs—from any crimes the Plaintiffs might suffer while staying at the home.

Plaintiffs use much of their briefing to discuss the concept of foreseeability. They argue that Airbnb should have foreseen that travelers to the Buenos Aires area (and to the Puerto Panal neighborhood, in particular) would face a greater-than-average possibility of crime. Because Puerto Panal's crime statistics were at Airbnb's disposal, Plaintiffs believe Airbnb should have strongly warned potential renters of the risk of renting this particular home or else should have denied the homeowners access to the Airbnb site. Since Airbnb did neither, Plaintiffs believe Airbnb breached a duty of care owed to them and should be liable for all the damages Plaintiffs suffered as a result of the home invasion.

***5** The first question the Court must ask is: What duty of care did Airbnb breach? On this point, Plaintiffs struggle mightily to fit the square peg of their unusual facts into the round hole of the established law. Plaintiffs agree “there is generally no duty to protect others from criminal activity of third persons,” but they argue that, in this case, Airbnb voluntarily assumed such a duty of care, and as a result, “liability [was] created by the negligent breach of that duty.” (Doc. 92, p. 8, ¶ 34). Plaintiffs suggest that the Court view the relationship between Airbnb and Plaintiffs as that of innkeeper/guest or business owner/invitee. Neither duty fits the facts. Though Plaintiffs label Airbnb as an “innkeeper,” they do not claim Airbnb owns or manages any of the rental properties advertised on its online platform, nor do Plaintiffs provide the Court with an alternate, plausible framework for considering Airbnb an innkeeper. By the same token, Plaintiffs label Airbnb a “business owner” that invites guests onto its physical property—though, of course, that did not happen in this case. The Amended Complaint explains that “AIRBNB's business involves sending its ... Guests *directly into premises owned and controlled by persons unknown to the Guests*”—and not by Airbnb. (Doc. 92, p. 9, ¶ 34(b) (emphasis added)).

In the end, Plaintiffs have merely hand-waived the actual facts in their case to arrive at legal conclusions that suit their purposes. They fail to point to any law or regulation that vests Airbnb with a particular duty of care stemming from a relationship with the users of its online platform. But even if such a relationship did exist, there are no facts in the Amended Complaint to show Airbnb assumed a further duty to protect users from crimes committed by third parties. Plaintiffs pin their hopes on Airbnb's “Trust and Safety” webpage, which explains the following steps Airbnb takes to try to keep its customers safe:

Risk scoring

Every Airbnb reservation is scored for risk before it's confirmed. We use predictive analytics and machine learning to instantly evaluate hundreds of signals that help us flag and investigate suspicious activity before it happens.

Watchlist & background checks

While no screening system is perfect, globally we run hosts and guests against regulatory, terrorist, and sanctions watchlists. For hosts and guests in the United States, we also conduct background checks.

Preparedness

We run safety workshops with hosts and leading local experts and encourage hosts to provide guests with important local information. We also give any host who wants one a free smoke and carbon monoxide detector for their home.

Secure payments

Our secure platform ensures your money gets to the host—that's why we ask you to always pay through Airbnb and never wire money or pay someone directly.

Account protection

We take a number of measures to safeguard your Airbnb account, like requiring multi-factor authentication when a login is attempted from a new phone or computer and sending you account alerts when changes are made.

Scam prevention

Always pay and communicate directly through the Airbnb website or app. As long as you stay on Airbnb throughout the entire process—from communication, to booking, to payment—you're protected by our multi-layer defense strategy.

We're here if you need us

Our global team is standing by 24/7 in 11 different languages to help make things right with rebooking assistance, refunds, reimbursements, our \$1 million dollar Host Guarantee, and insurance programs for both homes and experiences.

Just reach out if there's anything you need.
<https://www.airbnb.com/trust> (accessed July 22, 2022).

Plaintiffs interpret the above language to mean that Airbnb has a special relationship with users that involves either: (1) a duty to warn of specific risks of crime at certain rental properties or (2) an assumption of joint liability with the property owners for any unforeseen crimes that may occur at the property during the users' stay. However, the "Trust and Safety" page does not explicitly or implicitly state that Airbnb understands its role in relation to its users as analogous to an innkeeper and its guests or a business owner and its business invitees. In fact, the page says nothing at all about Airbnb's legal relationship to its users. No special relationship has been adequately pleaded.

*6 Regardless, even if a special relationship *did* exist between Airbnb and its platform users, no facts in this case indicate that Airbnb voluntarily assumed a duty to protect them from unforeseen crimes. *Boren v. Worthen National Bank* stands for the proposition that "foreseeability, and thus liability, is limited to situations where the business owner is aware of the imminent probability of specific harm to its customer." 324 Ark. at 426. In particular, "there will be no duty upon business owners to guard against criminal acts of a third party unless they know or have reason to know that acts are occurring or about to occur on the premises that pose imminent probability of harm to an invitee." *Id.* (quotation marks and citation omitted). If the Court were to assume for the sake of argument that Airbnb was in the same legal position as the owners of the property Plaintiffs rented, Plaintiffs admit there is no criminal history associated with that property before the date of the home invasion. As for the Puerto Panal neighborhood at large, Plaintiffs note that three crimes occurred between 2013 and 2019: (1) an incident of aggravated theft in the neighborhood in May 2013, (2) an incident of theft in July 2016, and (3) another incident of aggravated theft in October 2016. (Doc. 92, p. 12, ¶ 45). Plaintiffs were victims of a crime in Puerto Panal more than three years after the last reported crime in that neighborhood.

"For a duty to protect invitees from criminal acts by third persons to arise from prior criminal conduct, the prior crimes must be *violent* and *sufficiently numerous* and recent to put the landowner on notice that there is a likelihood of danger...." *Boren*, 324 Ark. at 427 (quoting 3 *Premises Liability*, Second Edition, § 49 (1995)) (emphasis added). The Amended Complaint does not reveal whether violence was associated with the three theft crimes that took place in Puerto Panal before 2019. Assuming, once again, for the sake of argument that those crimes *were* violent, the Court finds as a matter

of law that three prior criminal events, occurring over the course of six years in the same general vicinity—but not in the specific location—is insufficient to place the landowner on notice of a likelihood of danger and trigger a duty to protect. The Arkansas Supreme Court in *Boren* was not persuaded that an armed robbery was reasonably foreseeable even though a similar armed robbery and shooting took place at the exact same location only three months prior. *Id.* at 426. The facts in the case at bar are insufficient—temporally and numerically—to create a duty to warn.

Assuming the facts in the Amended Complaint as true, the only individuals who may have owed Plaintiffs a duty of care were the homeowners themselves. Unfortunately for Plaintiffs, the owners live in Argentina, and this Court has no jurisdiction over them. For the reasons stated, Plaintiffs have failed to state facts to plausibly show that Airbnb was negligent. Accordingly, Counts I, III, V, VII, and IX are dismissed without prejudice for failure to state a valid claim.

B. Vicarious Liability

Plaintiffs' counsel admitted in briefing and during oral argument at the motion hearing that he was aware that "vicarious liability," as pleaded in Counts II, IV, VI, VIII, and X, was not a standalone cause of action. Plaintiffs asserted this claim in order to explain, factually and legally, why Airbnb should be held responsible for the acts and omissions of the Puerto Panal security guards, the owners of the home, and the Puerto Panal Property Owners' Association.

Though Plaintiffs contend there was an agency or employment relationship between Airbnb and some or all of these other Argentine parties, there are no facts to plausibly establish such a relationship. During oral argument, the Court asked Plaintiffs' counsel, "So, where have you factually pled the agency relationship between Airbnb and the guards at the neighborhood guard shack other than in a conclusory fashion?" And counsel responded: "Paragraph 201. We specifically stated that information provided by Airbnb was given by the security guards to the assailants."

Paragraph 201 of the Amended Complaint states:

Defendants, and each of them, violated Plaintiffs' privacy rights by allowing an unwarranted intrusion into their private concerns and interests in unlawfully disclosing and disseminating their confidential information to the security

company and guards and in turn the Assailants and in the guards' actions in sneaking up on the rental property and peering into the sliding door windows without consent.

*7 (Doc. 92, p. 46, ¶ 201). In reading Paragraph 201, one might reasonably ask why—and how—Airbnb disseminated Plaintiffs' information to the Argentine security company and guards. It appears Plaintiffs believe that Airbnb is or was the security guards' employer. Paragraph 60 of the Amended Complaint states: "On information and belief, Plaintiffs are informed and believe that the security company and the Guards were employees or independent contractors and the agents of Defendants and each of them." *Id.* at p. 17. The Amended Complaint does not explain exactly why Plaintiffs believe Airbnb, an online rental platform, directs the work of a group of Argentine security guards working at a residential neighborhood in Argentina.

At the motion hearing, the Court asked Plaintiffs' counsel to explain what facts supported Plaintiffs' claim that the guards were agents of Airbnb. Counsel responded that because "the owners—the hosts—are responsible through the homeowners' association for paying for those security guards," it must be true that Airbnb, by extension, is "responsible for [the property owners] in their role as innkeepers—shared innkeepers."

According to the Restatement (Second) of Agency, which Arkansas has adopted, an agency relationship exists where an agent is authorized to act for the principal and the agent is subject to the principal's control. *See Pledger v. Troll Book Clubs, Inc.*, 316 Ark. 195, 200 (1994). Plaintiffs allege no facts suggesting the security guards were authorized to act for Airbnb or subject to Airbnb's control. The Court finds that Plaintiffs' claims regarding the agency relationship between Airbnb and the Argentine parties are conclusory. Accordingly, Counts II, IV, VI, VIII, and X are dismissed without prejudice for failure to state a claim.

C. Invasion of Privacy

Count XII is a claim for the violation of Plaintiffs' right to privacy. The Court is still unclear—even after the hearing—about what Plaintiffs intended in bringing this claim. They allege Airbnb violated their privacy rights "by unlawfully disclosing and disseminating their confidential information to the security company and guards and in turn the Assailants." (Doc. 92, p. 46, ¶ 201). Yet, there are no facts in the Amended Complaint to show that Airbnb

disseminated any information to the security company, guards, or assailants. Plaintiffs assume the guards and assailants knew personal details about them that assisted the criminals in committing the home invasion. Plaintiffs then make the conclusory leap that it must have been *Airbnb* that supplied the criminals with that information—whatever it happened to be.

If Plaintiffs intended to state a claim for unlawful intrusion upon seclusion, the Amended Complaint never defined the nature of that intrusion. If, instead, Plaintiffs meant to state a claim for unlawful public disclosure of a private fact (whatever that private fact happens to be), they did not plead several key elements of that tort, including that the private fact was not previously known to the public, that the disclosure of the fact would be considered highly intrusive by a reasonable person, and that the defendant knew or should have known that the fact in question was private. *Duggar v. City of Springdale*, 599 S.W.3d 672, 684 (Ark. Ct. App. 2020). For all these reasons, Count XII is subject to dismissal for failure to state a claim.

D. Civil RICO

Count XI is a claim for civil RICO, which Plaintiffs agree is subject to dismissal. *See* Doc. 107, p. 35.

E. Lanham Act

Count XIII is a Lanham Act claim for false advertising under 15 U.S.C. § 1125. The Lanham Act creates a civil action against "[a]ny person who, on or in connection with any goods or services ... uses in commerce any ... false or misleading description of fact ... which ... in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of ... another person's goods, services, or commercial activities[.]" *Id.*

*8 Consumers do not have standing to bring a claim for false advertising under the Lanham Act. Only competitors or commercial entities may bring such a claim. *See Lexmark Intern., Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 131–32 (2014) ("We thus hold that to come within the zone of interests in a suit for false advertising under § 1125(a), a plaintiff must allege an injury to a commercial interest in reputation or sales. A consumer who is hoodwinked into purchasing a disappointing product may well have an injury-

in-fact cognizable under Article III, but he cannot invoke the protection of the Lanham Act—a conclusion reached by every Circuit to consider the question.”).

During the motion hearing, Plaintiffs’ counsel conceded that Plaintiffs are not competitors of Airbnb. They are consumers. As Plaintiffs lack standing to bring a claim for false advertising, the claim is dismissed under [Rule 12\(b\)\(1\)](#).

IV. CONCLUSION

IT IS THEREFORE ORDERED that the Motion to Dismiss (Doc. 95) filed by Defendants Airbnb Action LLC, Airbnb Payments, Inc., and Airbnb, Inc. is **GRANTED**. Counts I–XII are **DISMISSED WITHOUT PREJUDICE** pursuant to [Rule 12\(b\)\(6\)](#) for failure to state a claim. Count XIII is **DISMISSED WITHOUT PREJUDICE** for lack of standing pursuant to [Rule 12\(b\)\(1\)](#).

IT IS SO ORDERED on this 27th day of July, 2022.

All Citations

Slip Copy, 2022 WL 2980700

Footnotes

- 1 At the motion hearing, Plaintiffs’ counsel conceded that “vicarious liability” is not a standalone cause of action. He explained that Plaintiffs’ intent in bringing Counts II, IV, VI, VIII, and X was to explain why Airbnb should be held liable for the tortious conduct committed by the Argentine non-parties (i.e., the owners of the rental house and the property owners’ association).
- 2 Airbnb suggests in its briefing that Illinois law may yet be a third possibility in the choice-of-law analysis. However, the case’s only factual connection to Illinois stems from Plaintiff Britton Esposito’s claim that she is “domiciled” in Cook County, Illinois. (Doc. 92, p. 4, ¶ 11). At the same time, the Amended Complaint states that Britton is “a resident of Buenos Aires, Argentina where she attends school, and is the wife of Christian,” *id.* at p. 5, ¶ 17. Britton’s citizenship is unclear from the face of the Amended Complaint, but the Court sees no particular need to resolve the question of her citizenship for purposes of determining which state’s law applies—especially when neither party argues in favor of applying Illinois law to any of the claims.
- 3 Airbnb also notes that its “Terms of Service,” which is an online contract between Airbnb and its platform users, contains a choice-of-law provision. See Doc. 96-3. The contract states that its terms “will be interpreted in accordance with the laws of the State of California ... without regard to conflict-of-law provisions.” *Id.* at p. 13, § 21.1. However, the substantive provisions of this contract are not at issue in this case. Plaintiffs’ lawsuit does not allege a breach of contract. The Court therefore concludes that the choice-of-law provisions in the contract are not applicable to this dispute.

EXHIBIT 5

2022 WL 16752071

Only the Westlaw citation is currently available.

United States District Court, C.D. California.

Salomes Monik Rengifo
JACKSON, et al., Plaintiffs,

v.

AIRBNB, INC., a Delaware
Corporation; SNAP, Inc., a Delaware
corporation, etc., et al., Defendants.

CV 22-3084 DSF (JCx)

I

Signed November 4, 2022

Synopsis

Background: Co-personal representatives of decedent's estate, and others brought action against short term rental marketplace company, alleging tort claims, including negligence and products liability, arising out of fatal shooting at property rented through marketplace. Company filed motion to stay and compel arbitration and motion to dismiss.

Holdings: The District Court, [Dale S. Fischer, J.](#), held that:

[1] arbitrator had authority over the threshold question of arbitrability;

[2] whether claims fell within the scope of arbitration agreement was a question of arbitrability for the arbitrator to decide;

[3] company did not have a duty to protect decedent from shooting;

[4] there was no special relationship which would impose a duty on company to protect decedent from being shot;

[5] company did not negligently undertake to render services;

[6] *Rowland* factors did not support a finding of duty; and

[7] company did not supply a "product," and thus could not be liable under products liability law for death.

Motions granted.

West Headnotes (58)

[1] **Alternative Dispute Resolution** 🔑 Right to Enforcement and Defenses in General

By its terms, the Federal Arbitration Act (FAA) leaves no place for the exercise of discretion by a district court, but instead mandates that district courts shall direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed. 9 U.S.C.A. § 2.

[2] **Alternative Dispute Resolution** 🔑 Stay of Proceedings Pending Arbitration

Alternative Dispute Resolution 🔑 Remedies and Proceedings for Enforcement in General

The Federal Arbitration Act (FAA) provides for stays of proceedings in federal district courts when an issue in the proceeding is referable to arbitration, and for orders compelling arbitration when one party has failed or refused to comply with an arbitration agreement. 9 U.S.C.A. §§ 3, 4.

[3] **Alternative Dispute Resolution** 🔑 Proceedings

The burden to prove that a matter should not be stayed and referred to arbitration is on the party opposing arbitration.

[4] **Alternative Dispute Resolution** 🔑 Construction in favor of arbitration

Federal Arbitration Act establishes that, as matter of federal law, any doubts concerning scope of arbitrable issues should be resolved in favor of arbitration, whether problem at hand is construction of contract language itself or allegation of waiver or delay. 9 U.S.C.A. § 1 et seq.

[5] Federal Civil Procedure 🔑 Insufficiency in general

The plausibility standard for a motion to dismiss for failure to state a claim is not akin to a probability requirement, but it asks for more than a sheer possibility that a defendant has acted unlawfully.

[6] Federal Civil Procedure 🔑 Matters considered in general

When legal sufficiency of complaint's allegations is tested by motion to dismiss for failure to state claim, review is limited to complaint. *Fed. R. Civ. P. 12(b)(6)*.

[7] Federal Civil Procedure 🔑 Matters considered in general

When legal sufficiency of complaint's allegations is tested by motion to dismiss for failure to state claim, court may consider material which is properly submitted as part of complaint, and if documents are not physically attached to complaint, they may be considered if documents' authenticity is not contested and plaintiff's complaint necessarily relies on them. *Fed. R. Civ. P. 12(b)(6)*.

[8] Federal Civil Procedure 🔑 Matters considered in general

When legal sufficiency of complaint's allegations is tested by motion to dismiss for failure to state claim, court may consider matters of public record. *Fed. R. Civ. P. 12(b)(6)*.

[9] Evidence 🔑 Public records and documents in general**Federal Civil Procedure** 🔑 Matters considered in general

Records of 911 emergency calls about the subject property and county emergency order prohibiting any new bookings for short term vacation

rentals to non-essential worker were matters of public record, and thus court could take judicial notice of those documents in negligence action against short term rental marketplace company following fatal shooting at rental property. *Fed. R. Evid. 201(b)*.

[10] Evidence 🔑 Private or commercial websites
Federal Civil Procedure 🔑 Matters considered in general

Court considering motion to dismiss negligence action against short term rental marketplace company following fatal shooting at rental property would decline to take judicial notice of website links to company's global ban prohibiting parties on property listings and to company's responsible hosing policy, or to the leasing contract for the subject property, where links and contracts were not are not matters of public record, and were not necessarily relied on by the complaint, which did not refer to the documents, even implicitly. *Fed. R. Civ. P. 12(b)(6)*; *Fed. R. Evid. 201(b)*.

[11] Alternative Dispute Resolution 🔑 Arbitrability of dispute

Where an arbitration agreement clearly delegates the question of arbitrability to the arbitrator, there is no exception that allows the Court to address questions of arbitrability.

[12] Alternative Dispute Resolution 🔑 Arbitrability of dispute

When the parties' contract delegates the arbitrability question to an arbitrator, the courts must respect the parties' decision as embodied in the contract.

[13] Alternative Dispute Resolution 🔑 Existence and validity of agreement
Alternative Dispute Resolution 🔑 Arbitrability of dispute

Before referring a dispute to an arbitrator, the court determines whether a valid arbitration agreement exists, but if a valid agreement exists, and if the agreement delegates the arbitrability issue to an arbitrator, a court may not decide the arbitrability issue. 9 U.S.C.A. § 2.

[14] Alternative Dispute Resolution 🔑 Arbitrability of dispute

Language in terms of service documents for short term rental property, which stated that “If there is a dispute about whether this Arbitration Agreement can be enforced or applies to our Dispute, you and [rental company] agree that the arbitrator will decide that issue,” clearly and unmistakably gave the arbitrator authority over the threshold question of arbitrability in negligence action following fatal shooting at property, regardless of whether original or updated terms of service document applied; each terms of service document contained exactly the same provision. 9 U.S.C.A. § 2.

[15] Alternative Dispute Resolution 🔑 Arbitrability of dispute

Whether renter's negligence claims against short term rental marketplace company arising out of fatal shooting on property arose out of any use of the marketplace platform, host services, or any content, and thus whether it fell within the scope of arbitration agreement between renter and company, was a question of arbitrability for the arbitrator to decide pursuant to arbitration agreement's delegation clause, which stated that “If there is a dispute about whether this Arbitration Agreement can be enforced or applies to our Dispute, you and [company] agree that the arbitrator will decide that issue.” 9 U.S.C.A. § 2.

[16] Alternative Dispute Resolution 🔑 Conditions precedent to arbitration; procedural arbitrability

Issue of whether short term rental marketplace company waived arbitration because it knew

renter intended to pursue legal action arising from shooting death on the rented property but did not seek to compel arbitration until 11 months later was a question of procedural arbitrability for the arbitrator to decide pursuant to arbitration agreement's delegation clause, which stated that “If there is a dispute about whether this Arbitration Agreement can be enforced or applies to our Dispute, you and [company] agree that the arbitrator will decide that issue.”

[17] Alternative Dispute Resolution 🔑 Conditions precedent to arbitration; procedural arbitrability

Questions of procedural arbitrability are presumptively for the arbitrator.

[18] Alternative Dispute Resolution 🔑 Waiver, laches, or estoppel

Arbitrator should decide allegations of waiver, delay, or a like defense to arbitrability.

[19] Alternative Dispute Resolution 🔑 Suing or participating in suit

Short term rental marketplace company did not act inconsistently with its right to arbitration through its post-litigation conduct, and thus did not waive its right to arbitrate negligence and other claims arising from fatal shooting at rented property, where company filed its motion to compel arbitration approximately three months after the lawsuit was filed, and company had not yet filed an answer.

[20] Estoppel 🔑 Nature and elements of waiver

“Waiver” is intentional relinquishment or abandonment of known right.

[21] Alternative Dispute Resolution 🔑 Waiver or Estoppel

A party knowingly relinquishes the right to arbitrate, for waiver purposes, by acting inconsistently with that right.

[22] Alternative Dispute Resolution 🔑 **Suing or participating in suit**

A party acts inconsistently with exercising the right to arbitrate, and thus waives that right, when it (1) makes an intentional decision not to move to compel arbitration and (2) actively litigates the merits of a case for a prolonged period of time in order to take advantage of being in court.

[23] Alternative Dispute Resolution 🔑 **Particular cases**

Court would decline, on public policy grounds, to deny stay and compel arbitration of renter's claims against short term rental marketplace company arising out of fatal shooting on property, although there were multiple claims by multiple plaintiffs, and the actions were occurring in different courts; arbitration agreement required renter to arbitrate claims against company.

[24] Federal Courts 🔑 **Conflict of Laws; Choice of Law**

In diversity case, district court must apply choice-of-law rules of state in which it sits.

[25] Action 🔑 **What law governs**

California applies the governmental interest approach to a choice of law question.

[26] Action 🔑 **What law governs**

Under California's governmental interest approach to choice-of-law issues, court first determines whether relevant law of each potentially affected jurisdictions with regard to particular issue in question is same or different from California law; if there is difference, court examines each jurisdiction's interest in

application of its own law under circumstances of particular case to determine whether true conflict exists, and if conflict exists, then court compares nature and strength of interest of each jurisdiction to determine which state's interest would be more impaired if its policy were subordinated to policy of other state.

[27] Action 🔑 **What law governs**

Burden rests on parties advocating another state's law to show why their forum states have interest in applying their law in case at bar.

[28] Action 🔑 **What law governs**

Under California's governmental interest approach to a choice of law question if the foreign law proponent fails to identify any actual conflict or to establish the other state's interest in having its own law applied, then the Court may properly find California law applicable without analyzing comparative impairment.

[29] Negligence 🔑 **Elements in general**

In order to establish liability on a negligence theory under California law, a plaintiff must prove duty, breach, causation, and damages.

[30] Negligence 🔑 **Gross negligence**

California does not recognize a distinct common law cause of action for gross negligence apart from negligence.

[31] Negligence 🔑 **Necessity and Existence of Duty**

Under California law, duty is not universal; not every defendant owes every plaintiff duty of care.

[32] Negligence 🔑 **Public policy concerns**

Under California law, duty exists only if plaintiff's interests are entitled to legal protection against defendant's conduct.

[33] **Negligence** 🔑 Necessity and Existence of Duty

Negligence 🔑 Duty based upon statute or other regulation

Under California law, duty of care may arise through statute or by operation of common law.

[34] **Negligence** 🔑 Protection against acts of third persons

Under California law, as general matter, there is no duty to act to protect others from conduct of third parties. *Cal. Civ. Code* § 1714.

[35] **Innkeepers** 🔑 Protection against assault and other crimes

Short term rental marketplace company did not have a duty to protect individual who was shot and killed at rental place booked through marketplace. *Cal. Civ. Code* § 1714.

[36] **Negligence** 🔑 Protection against acts of third persons

Under California law, an affirmative duty to protect against third-party conduct may arise where a party comes to the aid of another or where there is a special relationship.

[37] **Negligence** 🔑 Protection against acts of third persons

Under California law, there is a two-step analysis to determine if one of the special relationship or negligent undertaking exceptions to the no-duty-to-protect-from third-parties rule applies; first, there must be an exception to the no-duty-to-protect rule, and second, if an exception is found, the court then weighs the *Rowland* duty factors to see if a duty should be imposed.

[38] **Negligence** 🔑 Protection against acts of third persons

The special relationship and negligent undertaking are exceptions that allow for a finding of duty under California law where third party misfeasance would otherwise preclude one; both exceptions are expansions of duty rules and must, in each case, pass muster under *Rowland* in order to apply.

[39] **Negligence** 🔑 Public policy concerns

Under California law, the *Rowland* test for determining whether a duty exists balances the following policy considerations: the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost, and prevalence of insurance for the risk involved.

[40] **Negligence** 🔑 Protection against acts of third persons

Under California law, a "special relationship" between the defendant and the victim is one that gives the victim a right to expect protection from the defendant, while a "special relationship" between the defendant and the dangerous third party is one that entails an ability to control the third party's conduct.

[41] **Negligence** 🔑 Protection against acts of third persons

Under California law, the existence of a special relationship with the perpetrator or victim puts the defendant in a unique position to protect the plaintiff from injury; the law requires the defendant to use this position accordingly.

[42] Negligence 🔑 Ownership, custody and control

Under California law, a “special relationship” may exist, giving rise to a duty, where the accused tortfeasor exercises control over a piece of land such that he is akin to a landowner.

[43] Negligence 🔑 Care required in general

Under California law, landowners owe a special duty to invitees on their land.

[44] Negligence 🔑 Ownership, custody and control

Under California law, control over a property creates a duty where there is a power to prevent, remedy or guard against the dangerous condition, which courts often construe as an ability to enact physical changes on a property.

[45] Negligence 🔑 Ownership, custody and control

Deriving a commercial benefit is not the dispositive factor relating to the issue of defendant's control of land, for purposes of whether that control creates a duty under California law.

[46] Negligence 🔑 Ownership, custody and control

Setting policies and providing a security patrol is not sufficient control over land to create a duty under California law.

[47] Negligence 🔑 Ownership, custody and control

Merely hosting land does not create a duty under California law.

[48] Negligence 🔑 Protection against acts of third persons in general

Under California law, that an organization or business creates an opportunity for criminal conduct against a plaintiff and thereby worsens the plaintiff's position does not render such criminal conduct a necessary component of the organization's actions, even when that conduct is foreseeable; providing such an opportunity does not constitute misfeasance triggering a duty to protect.

[49] Innkeepers 🔑 Protection against assault and other crimes

Under California law, there was no special relationship between short term rental marketplace company and either shooter or decedent, who was fatally shot at rental property, which would impose a duty on company to protect decedent from being shot; at most company provided a platform for renting and set policies for rentals, and there was nothing to establish that company exerted control over the subject property as an “operator/manager” which established a special relationship.

[50] Innkeepers 🔑 Protection against assault and other crimes

Short term rental marketplace company did not negligently undertake to render services necessary for the protection of third persons, and thus did not have a special relationship based on any negligent undertaking to protect decedent from being fatally shot at rented premises; while company prohibited partying, retained the right to conduct investigations and terminate listings, review what the host posted, and edit the listing, and required local compliance with law and ordinances, none of those actions were done negligently, and none of those actions increased risk, nor did they stop others from stepping in.

[51] Negligence 🔑 Voluntarily Assumed Duty

Under California law, the scope of any duty assumed under the negligent undertaking doctrine depends upon the nature of the undertaking.

use of listed properties by unsupervised minors and the shooting was tangential at best.

[52] Innkeepers 🔑 Protection against assault and other crimes

Under California law, *Rowland* factors did not support a finding of duty on the part of short term rental marketplace company in connection with fatal shooting at rental property; the foreseeability of the crime was low, the connection between the company's conduct, and the injury was virtually nonexistent, and the burden of preventing such an incident in the future was high.

[53] Innkeepers 🔑 Protection against assault and other crimes

Fatal shooting at rental property was not reasonably foreseeable, and thus, under California law, foreseeability factor of *Rowland* for imposition of a duty did not favor imposing duty on short term rental marketplace company in connection with the shooting; even if criminal activity was foreseeable, crimes had occurred at other rental properties listed on company's marketplace, and a burglary had taken place in prior years at the property, it was not possible to predict when criminal activity would occur, there was no connection between the other crimes and the fatal shooting, and other incidents occurred years before the shooting.

[54] Innkeepers 🔑 Protection against assault and other crimes

There was no meaningful connection between the alleged failures of short term rental marketplace company and fatal shooting at rented property which justified imposition of a duty company under *Rowland* and California law; any failure to require renters to provide photo identification would not have had any impact, company was not responsible for outlawing illegal conduct such as consumption of alcohol by minors or drug use, and any connection between company's failure to encourage landlords to make rules preventing

[55] Negligence 🔑 Foreseeability

Under California law, foreseeability is balanced against the burden of the duty to be imposed; where the burden of prevention is great, a high degree of foreseeability is usually required.

[56] Innkeepers 🔑 Protection against assault and other crimes

Burden on short term rental marketplace company to prevent shootings on properties rented through online marketplace was great when compared with foreseeability, for purposes of, whether, under California law, *Rowland* favored imposition of a duty on company; foreseeability of teenagers mishandling a firearm at the subject property was low, and there had never been a similar incident or issue at any property, and burden of requiring a landlord to protect against crime everywhere was high.

[57] Products Liability 🔑 What is a product, in general

A products liability claimant must meet a condition precedent to successfully maintain the action; he or she must show that the object or instrumentality claimed to be defective was in fact a "product" as defined or contemplated by the Restatement of Torts, legislation or case law.

[58] Products Liability 🔑 Services as distinguished from products

Products Liability 🔑 Computers and software

Short term rental marketplace company did not supply a "product," and thus could not be liable under products liability law for death suffered at rental property booked through company's marketplace; company provided a platform that connected users, and was more akin to a service than to a product.

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ORDER GRANTING AIRBNB, INC.'S MOTION TO COMPEL ARBITRATION AND STAY PROCEEDINGS AND GRANTING MOTION TO DISMISS (Dkt. 22)

[Dale S. Fischer](#), United States District Judge

*1 Airbnb Inc. moves to compel arbitration of Catherine Jackson's claims and to dismiss the claims of Salomes Monik Rengifo Jackson and Jonathan Antistian Rengifo Jackson, as Co-Personal Representatives of the Estate of Giselle Antistian Jackson Rengifo, and Antistenes Rengifo Estupinan.

For the reasons state below, Airbnb's motion to stay and compel Ms. Jackson to arbitrate is GRANTED. Airbnb's motion to dismiss the claims by the remaining Plaintiffs is GRANTED.

I. Background

On May 18, 2020, seventeen-year-old Michael McGowan shot and killed seventeen-year-old Giselle Jackson Rengifo (Decedent) at 2721 Southwest 20th Street, Miami-Dade County, Florida (subject property). Dkt 1-1 (Compl.) ¶ 9. The gun used was bought on Snapchat, a SNAP, Inc. platform, and the subject property was an Airbnb rental property. *Id.* Both Mr. McGowan and Decedent had been at the subject property for “several days” prior, “openly engaging in criminal activity,” “partying,” drinking, doing drugs, and “maintaining weapons.” ¶ 10.

II. Legal Standard

A. Arbitration

[1] [2] [3] [4] “[T]he Federal Arbitration Act (FAA) makes agreements to arbitrate ‘valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.’ ” [AT&T Mobility LLC v. Concepcion](#), 563 U.S. 333, 336, 131 S.Ct. 1740, 179 L.Ed.2d 742 (2011) (quoting 9 U.S.C. § 2). “By its terms, the [FAA] leaves no place for the exercise of discretion by a district court, but instead mandates that district 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, 105 S.Ct. 1238, 84 L.Ed.2d 158 (1985). “The FAA provides for stays of proceedings in federal district courts when an issue in the proceeding is referable to arbitration, and for orders compelling arbitration when one party has failed or refused to comply with an arbitration agreement.” [EEOC v. Waffle House, Inc.](#), 534 U.S. 279, 289, 122 S.Ct. 754, 151 L.Ed.2d 755 (2002) (citing 9 U.S.C. §§ 3, 4). The burden to prove that a matter should not be stayed and referred to arbitration is on the party opposing arbitration. [Green Tree Fin. Corp.-Alabama v. Randolph](#), 531 U.S. 79, 91, 121 S.Ct. 513, 148 L.Ed.2d 373 (2000) (“the party resisting arbitration bears the burden of proving that the claims at issue are unsuitable for arbitration”). The FAA “establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver [or] delay.” [Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth](#), 473 U.S. 614, 626, 105 S.Ct. 3346, 87 L.Ed.2d 444 (1985).

B. Motion to Dismiss

[5] [Federal Rule of Civil Procedure 12\(b\)\(6\)](#) allows an attack on the pleadings for failure to state a claim on which relief can be granted. “[W]hen ruling on a defendant's motion to dismiss, a judge must accept as true all of the factual allegations contained in the complaint.” [Erickson v. Pardus](#), 551 U.S. 89, 94, 127 S.Ct. 2197, 167 L.Ed.2d 1081 (2007). However, a complaint must “state a claim to relief that is plausible on its face.” [Bell Atlantic Corp. v. Twombly](#), 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007). This means that the complaint must plead “factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” [Ashcroft v.](#)

[Iqbal](#), 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009). “The plausibility standard is not akin to a ‘probability requirement,’ but it asks for more than a sheer possibility that a defendant has acted unlawfully.” [Id.](#)

III. Discussion

A. Request for Judicial Notice

*2 Plaintiffs request that the Court take judicial notice of five documents:

1. A public record [of] the City of Miami Police Department Calls for Service for the subject Airbnb property located at: 2721 Southwest 20th Street, Miami-Dade County, Florida for the time period of 6/1/2017-9/15/22....
 2. The Rental Agreement between O.M. Property Management, the property owner of the subject property and tenant Kip Matthew Desormeaux ...
 3. A copy of Defendant Airbnb's Global Party Ban prohibiting parties on Airbnb property listings obtained from: <https://news.airbnb.com/airbnb-announcesglobal-party-ban/>....
 4. A Copy of Defendant Airbnb's Responsible Hosting in the United States: <https://www.airbnb.com/help/article/1376/responsible-hosting-in-the-united-states> ...
 5. Miami-Dade County Emergency Order 09-20 entered on March 21, 2020, prohibiting any new bookings for short term vacation rentals to non-essential workers that was in effect at the time of the incident.
- Dkt. 28-1 (RJN) at 1-2. Airbnb opposes the request. Dkt. 31-1.

[6] [7] [8] The Court takes notice of documents one and five but declines to take notice of the other documents. [Fed. R. Evid. 201\(b\)](#) allows courts to judicially notice adjudicative facts if they are “not subject to reasonable dispute.” These documents here clearly are part of the Plaintiffs’ response to the motion to dismiss section of Airbnb’s motion. When “the legal sufficiency of a complaint’s allegations is tested by a motion under [Rule 12\(b\)\(6\)](#), review is limited to the complaint.” [Lee v. City of Los Angeles](#), 250 F.3d 668, 688 (9th Cir. 2001) (internal citation omitted). There are two exceptions. “First, a court may consider material which is properly submitted as part of the complaint If the documents are not physically attached to the complaint, they

may be considered if the documents’ authenticity is not contested and the plaintiff’s complaint necessarily relies on them.” [Id.](#) (internal quotation marks omitted). The second type of extrinsic evidence a court may consider on a 12(b)(6) motion is “matters of public record.” [Id.](#) at 689.

[9] The Court finds that documents one (records of 911 calls about the subject property) and five (Miami-Dade County Emergency Order 09-20) are matters of public record and judicial notice is proper. [Disabled Rights Action Comm. v. Las Vegas Events, Inc.](#), 375 F.3d 861, 866 n.1 (9th Cir. 2004) (finding that because a university was a state entity, its licensing records were a matter of public record and the court “may take judicial notice of the records of state agencies and other undisputed matters of public record”).

[10] The two Airbnb website links and the leasing contract, however, are not matters of public record and are not necessarily relied on by the complaint. The complaint does not refer to these three documents—even implicitly. “Plaintiffs cannot utilize [] documents to amend the complaint and defeat defendants’ motions to dismiss.” [Okla. Firefighters Pension & Ret. Sys. v. Ixia](#), 50 F. Supp. 3d 1328, 1350 (C.D. Cal. 2014) (declining to take judicial notice); *see also* [Carillo v. Citimortgage, Inc.](#), No. CV 09-02404 AHM (CWx), 2009 WL 3233534, at *3 (C.D. Cal. Sept. 30, 2009) (“The Court will not take judicial notice of Plaintiffs’ exhibits, because the contents of the exhibits are not alleged in the complaint and the complaint does not appear to necessarily rely on them.”).

B. Arbitration

*3 Airbnb moves to compel Catherine Jackson (Ms. Jackson), the Decedent’s mother, to arbitrate her claims. Airbnb argues that there is a valid and enforceable arbitration agreement that requires the question of arbitrability itself to be arbitrated. Ms. Jackson counters that staying the case and compelling arbitration is inappropriate because this dispute is not within the scope of the Airbnb Terms of Service (TOS) she signed, Airbnb waived the right to arbitrate, and it is not in the interest of judicial economy to stay the case.¹ The Court finds Ms. Jackson’s arguments unpersuasive.

[11] [12] [13] Where an arbitration agreement clearly delegates the question of arbitrability to the arbitrator there is no exception that allows the Court to address questions of arbitrability. The Supreme Court made this abundantly clear in [Henry Schein, Inc. v. Archer & White Sales, Inc.](#),

— U.S. —, 139 S. Ct. 524, 527, 202 L.Ed.2d 480 (2019). Prior to that decision, some courts used a “wholly groundless” exception “to block frivolous attempts to transfer disputes from the court system to arbitration.” *Id.* at 529. But the Supreme Court found that where arbitrability is delegated to an arbitrator, federal courts cannot “short-circuit the process and decide the arbitrability question themselves” even “if the argument that the arbitration agreement applies to the particular dispute is ‘wholly groundless.’ ” *Id.* at 527-78. Rather “[w]hen the parties’ contract delegates the arbitrability question to an arbitrator, the courts must respect the parties’ decision as embodied in the contract.” *Id.* “To be sure, before referring a dispute to an arbitrator, the court determines whether a valid arbitration agreement exists. But if a valid agreement exists, and if the agreement delegates the arbitrability issue to an arbitrator, a court may not decide the arbitrability issue.” *Id.* at 530 (citing 9 U. S. C. § 2).

Here a valid arbitration agreement exists. Ms. Jackson has not made any arguments that this arbitration agreement is an invalid contract. See *AT&T Mobility LLC*, 563 U.S. at 339, 131 S.Ct. 1740 (FAA “permits arbitration agreements to be declared unenforceable upon such grounds as exist at law or in equity for the revocation of any contract”) (internal quotation marks omitted). The only thing Ms. Jackson disputes is that Airbnb does not specify *which* valid agreement applies. This argument holds no weight. Ms. Jackson signed up for Airbnb and signed a TOS with Airbnb on September 24, 2019 (v.10). Opp’n at 2. On July 28, 2021, Ms. Jackson agreed to an updated Airbnb TOS (v.11). *Id.* at 1. Ms. Jackson signed this updated agreement after her daughter’s death on May 18, 2020, but before this lawsuit—which she filed on May 5, 2022. *Id.*; Compl. at 18. Ms. Jackson argues that Airbnb’s motion to compel should be denied because it failed “to allege which arbitration agreement was enforceable at the time of the subject incident.” Opp’n at 2. The Court need not resolve which arbitration agreement applies. As pointed out by Airbnb, v.10 and v.11 contain exactly the same provision binding the parties to an arbitration agreement and delegating questions of arbitrability to the arbitrator. Dkt. 31 (Reply) at 2 (citing Dkt. 22-12 (TOS v.10) § 19.4 and Dkt. 22-13 (TOS v.11) § 23.4). Ms. Jackson cannot reasonably claim that she is not bound by either agreement. There is no change to this Court’s arbitration analysis if v.10 applies or v.11 applies.

*4 [14] The language in both TOS documents reads: “If there is a dispute about whether this Arbitration Agreement can be enforced or applies to our Dispute, you and Airbnb agree that **the arbitrator will decide that issue.**” See TOS

v.10 § 19.4; TOS v.11 § 23.4 (emphasis added). This language clearly and unmistakably gives the arbitrator authority over the threshold question of arbitrability. *Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63, 69-70 n.1, 130 S.Ct. 2772, 177 L.Ed.2d 403 (2010) (“courts should not assume that the parties agreed to arbitrate arbitrability unless there is clear and unmistakable evidence that they did so”) (cleaned up).

[15] The remaining arguments about arbitration are questions for the arbitrator. Ms. Jackson argues that she is only

bound to arbitrate a claim arising out of, ‘any use of the Airbnb Platform, Host Services, or any Content’ thus the “plain language of the agreement renders the arbitration clause unenforceable as this case does not arise from Catherine Jackson’s use of the Airbnb Platform, Host Services, or any Content, it arises from the use of an unknown third person.

Opp’n at 2-3 (internal citations omitted). But this is clearly an arbitrability question. In *Henry Schein, Inc.*, the arbitration agreement applied to all disputes except a select few such as actions concerning injunctive relief. 139 S. Ct. at 528. The suit in question sought injunctive relief in part and thus the parties disputed whether it fell within the arbitration agreement. The Court decided that where arbitrability is delegated to the arbitrator “an arbitrator—not the court—ha[s] to decide whether the arbitration agreement applied to th[e] particular dispute.” *Id.* Whether Ms. Jackson’s claim is one that falls under the arbitration agreement is fundamentally an arbitrability question and is left for an arbitrator to decide. *Shivkov v. Artex Risk Sols., Inc.*, 974 F.3d 1051, 1065 (9th Cir. 2020) (“whether an arbitration clause in a concededly binding contract applies to a particular type of controversy” is a “gateway question[] of arbitrability”) (internal quotation marks omitted).

[16] [17] [18] Ms. Jackson also argues Airbnb waived arbitration because Airbnb knew that Ms. Jackson intended to pursue legal action as early as September 21, 2021, but did not seek to compel arbitration until eleven months later. Opp’n at 3-4. This too is a question for the arbitrator. “Questions of procedural arbitrability” are “presumptively for the arbitrator.” *Las Vegas v. Mirage Casino-Hotel, Inc.*, 911 F.3d 588, 596 (9th Cir. 2018). Thus the “arbitrator should decide allegations of waiver, delay, or a like defense to arbitrability.” *Howsam v. Dean Witter Reynolds*, 537 U.S. 79, 84, 123 S.Ct. 588, 154 L.Ed.2d 491 (2002) (internal quotation marks omitted). Many courts have distinguished this Supreme Court precedent recognizing that allegations of delay or waiver that occur *after* filing litigation concern

litigation conduct and are, therefore, an issue for the courts.² The allegations of delay and waiver here, however, are primarily based on Airbnb's attempts to engage in settlement conversations prior to the filing of the suit and a failure to comply with the arbitration agreement terms by failing to notify Ms. Jackson of an intent to arbitrate. Opp'n at 3-4. Those are arbitration procedure questions reserved for the arbitrator.

*5 [19] [20] [21] [22] Airbnb's post-litigation conduct has not waived its right to arbitrate. Waiver "is the intentional relinquishment or abandonment of a known right"; a party "knowingly relinquish[es] the right to arbitrate by acting inconsistently with that right." Morgan v. Sundance, Inc., — U.S. —, 142 S. Ct. 1708, 1713-14, 212 L.Ed.2d 753 (2022) (internal quotation marks omitted). A "party acts inconsistently with exercising the right to arbitrate when it (1) makes an intentional decision not to move to compel arbitration and (2) actively litigates the merits of a case for a prolonged period of time in order to take advantage of being in court." Newirth v. Aegis Senior Cmty., LLC, 931 F.3d 935, 938 (9th Cir. 2019). Airbnb filed this motion to compel approximately three months after Plaintiffs filed this lawsuit. Compl. at 18. Airbnb has not yet filed an answer. Airbnb's post-litigation conduct does not suggest that it intended to relinquish its right to arbitrate. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, 473 U.S. 614, 626, 105 S.Ct. 3346, 87 L.Ed.2d 444 (1985) ("any doubts concerning the scope of arbitrable issues," including allegations of waiver or delay should "be resolved in favor of arbitration").

[23] Ms. Jackson also asks this Court to deny the requested stay as a matter of public policy. Because there are multiple claims by multiple plaintiffs, and the actions are occurring in different courts, Ms. Jackson argues that compelling arbitration could result in further differing outcomes and would not be in the interest of judicial economy. These public policy arguments are unpersuasive. There is a "national policy favoring arbitration" that the Court finds persuasive. Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 443, 126 S.Ct. 1204, 163 L.Ed.2d 1038 (2006).

Airbnb's motion to stay Ms. Jackson's claims and compel arbitration is GRANTED.

C. Motion to Dismiss

The remaining Plaintiffs³ fail to allege facts to support their negligence, gross negligence, and products liability claims

against Airbnb. Somers v. Apple, Inc., 729 F.3d 953, 959 (9th Cir. 2013) ("Dismissal under Rule 12(b)(6) is proper when the complaint ... fails to allege sufficient facts to support a cognizable legal theory") (internal citation omitted).

1. Choice of Law

[24] [25] [26] "In a diversity case, the district court must apply the choice-of-law rules of the state in which it sits." Coufal Abogados v. AT&T, Inc., 223 F.3d 932, 934 (9th Cir. 2000). California applies the governmental interest approach. The first step of this approach requires determining whether "the relevant law of each of the potentially affected jurisdictions with regard to the particular issue in question is the same or different" from California law. McCann v. Foster Wheeler LLC, 48 Cal. 4th 68, 87-88, 105 Cal.Rptr.3d 378, 225 P.3d 516 (2010). "[I]f there is a difference, the court examines each jurisdiction's interest in the application of its own law under the circumstances of the particular case to determine whether a true conflict exists." Id. If a conflict exists, then the court "compares the nature and strength of the interest of each jurisdiction" to determine which "state's interest would be more impaired if its policy were subordinated to the policy of the other state." Id.

[27] [28] The "burden rests on" the parties advocating another state's law "to show why their forum states have an interest in applying their law in the case at bar." Certain Underwriters at Lloyd's v. Expeditors Int'l of Washington, Inc., 584 F. Supp. 3d 860, 876 (C.D. Cal. 2022). And if "the foreign law proponent fails to identify any actual conflict or to establish the other state's interest in having its own law applied, then the Court may properly find California law applicable without analyzing comparative impairment." Id. (internal quotation marks omitted). Here, while the events happened in Florida, both parties apply California law. Neither has argued that Florida law applies or that there is a conflict between California law and Florida law. There is no need for the Court to perform a comparative analysis, California law applies. Washington Mut. Bank, FA v. Superior Ct., 24 Cal. 4th 906, 919, 103 Cal.Rptr.2d 320, 15 P.3d 1071 (2001).

2. Negligence

*6 [29] [30] "In order to establish liability on a negligence theory, a plaintiff must prove duty, breach, causation, and

damages.” [Conroy v. Regents of Univ. of Cal.](#), 45 Cal. 4th 1244, 1250, 91 Cal.Rptr.3d 532, 203 P.3d 1127 (2009). Airbnb argues that the Plaintiffs have failed to allege that Airbnb owed a duty and failed to allege causation. The Court agrees. The negligence claim is dismissed. And because “California does not recognize a distinct common law cause of action for gross negligence apart from negligence,” the gross negligence claim fails as well. [Jimenez v. 24 Hour Fitness USA, Inc.](#), 237 Cal. App. 4th 546, n.3, 188 Cal.Rptr.3d 228 (2015).

[31] [32] [33] [34] [35] “Duty is not universal; not every defendant owes every plaintiff a duty of care. A duty exists only if the plaintiff's interests are entitled to legal protection against the defendant's conduct.... A duty of care may arise through statute or by operation of the common law.” [Sheen v. Wells Fargo Bank, N.A.](#), 12 Cal. 5th 905, 920, 290 Cal.Rptr.3d 834, 505 P.3d 625 (2022) (internal quotation marks omitted). Under California law, “[e]veryone is responsible, not only for the result of his or her willful acts, but also for an injury occasioned to another by his or her want of ordinary care or skill in the management of his or her property or person.” Cal. Civ. Code § 1714. But “it also is well established that, as a general matter, there is no duty to act to protect others from the conduct of third parties.” [Delgado v. Trax Bar & Grill](#), 36 Cal. 4th 224, 235, 30 Cal.Rptr.3d 145, 113 P.3d 1159 (2005). Here Michael McGowan, not Airbnb, pulled the trigger. Airbnb had no duty to protect Decedent from Mr. McGowan's malfeasance.

[36] [37] [38] [39] There are common law doctrines, however, that may hold a party liable for the conduct of a third party. For example, an affirmative duty to protect against third-party conduct may arise where a party comes to the aid of another or where there is a special relationship. [Brown v. USA Taekwondo](#), 11 Cal. 5th 204, 216, 276 Cal.Rptr.3d 434, 483 P.3d 159 (2021). The California Supreme Court has established a two-step analysis to determine if one of these exceptions applies. First, there must be an exception to the no-duty-to-protect rule. Second, if an exception is found, the court then weighs the [Rowland](#) factors to see if a duty should be imposed. [Id.](#) at 212-13, 276 Cal.Rptr.3d 434, 483 P.3d 159; see [Rowland v. Christian](#), 69 Cal. 2d 108, 70 Cal.Rptr. 97, 443 P.2d 561 (1968). The [Rowland](#) factors are “a means for deciding whether to limit a duty derived from other sources.” [Brown](#), 11 Cal. 5th at 217, 276 Cal.Rptr.3d 434, 483 P.3d 159. Put differently, the special relationship and negligent undertaking are exceptions that allow for a finding of duty where third party misfeasance would otherwise preclude one. Both exceptions are expansions of duty rules and must, in

each case, pass muster under [Rowland](#) in order to apply. The [Rowland](#) test balances the following policy considerations:

the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost, and prevalence of insurance for the risk involved.

[Id.](#) (citing [Rowland](#), 69 Cal. 2d at 112-13, 70 Cal.Rptr. 97, 443 P.2d 561). Plaintiffs’ arguments fail at both steps. No exception applies here, and the [Rowland](#) factors preclude the finding of a duty.

[40] [41] “A special relationship between the defendant and the victim is one that gives the victim a right to expect protection from the defendant while a special relationship between the defendant and the dangerous third party is one that “entails an ability to control the third party's conduct.” [Brown](#), 11 Cal. 5th at 216, 276 Cal.Rptr.3d 434, 483 P.3d 159 (internal quotation marks omitted). The existence of a special relationship with the perpetrator or victim “puts the defendant in a unique position to protect the plaintiff from injury. The law requires the defendant to use this position accordingly.” [Id.](#) Classic examples of this relationship include parent to child, employer to employee, landlord to invitee, and common carrier to passenger. Where the defendant has neither performed an act that increases the risk of injury to the plaintiff nor sits in a relation to the parties” California courts “have uniformly held the defendant owes no legal duty to the plaintiff.” [Id.](#)

*7 [42] [43] [44] [45] [46] [47] [48] A special relationship may exist where the accused tortfeasor exercises control over a piece of land such that he is akin to a landowner. Landowners owe a special duty to invitees on their land. Airbnb does not exercise sufficient control over the subject property to support finding a special relationship here. Control over a property creates a duty where there is a “power to prevent, remedy or guard against the dangerous condition,” which courts often construe as an ability to enact physical changes on a property. [Colonial Van & Storage, Inc. v. Superior Court](#), 76 Cal. App. 5th 487, 498, 291 Cal.Rptr.3d 581 (2022). “[D]eriving a commercial benefit [is] not the dispositive factor relating to the issue of defendant's control” of land. [Id.](#) at 499, 291 Cal.Rptr.3d 581 (internal citation omitted). Setting policies and providing a security patrol is not sufficient control to create a duty. [Univ. of So. Cal. v.](#)

Superior Court, 30 Cal. App. 5th 429, 449, 241 Cal.Rptr.3d 616 (2018), overruled on other grounds by Brown, 11 Cal. 5th at 212, 276 Cal.Rptr.3d 434, 483 P.3d 159. And merely hosting the opportunity for the misconduct on one's land does not create a special relationship. As California courts have found, "there are 'many commonplace commercial activities' that provide an opportunity for, and thus theoretically increase the risk of, criminal conduct by third parties." Doe No. 1 v. Uber Techs., Inc., 79 Cal. App. 5th 410, 428, 294 Cal.Rptr.3d 664 (2022) (citing Sakiyama v. AMF Bowling Centers, Inc., 110 Cal. App. 4th 398, 409, 1 Cal.Rptr.3d 762 (2003)).

Countless bars and restaurants, for example, are open late and provide patrons with the opportunity to drink alcohol, become intoxicated, and then drive. Rock concerts are advertised to and attended by teenagers who thereafter drive home, sometimes under the influence of alcohol and/or drugs. Annual New Year's Eve parties routinely are celebrated until early morning hours, with partygoers driving home either impaired or extremely fatigued. All-night parties, complete with a variety of alcoholic beverages, are an inescapable aspect of college life. Courts have refused to hold business owners and hosts in these situations liable for negligence.

Sakiyama, 110 Cal. App. 4th at 409, 1 Cal.Rptr.3d 762 (collecting cases). In "cases against youth organizations that negligently provide the opportunity for an adult to molest a child, courts have analyzed the organization's liability for resulting harm under a paradigm of nonfeasance (failure to protect) and special relationships." Uber Techs., Inc., 79 Cal. App. 5th at 428, 294 Cal.Rptr.3d 664. In sum, that an organization or business "creates an opportunity for criminal conduct against a plaintiff and thereby worsens the plaintiff's position does not render such criminal conduct a necessary component of the organization's actions—even when that conduct is foreseeable. Providing such an opportunity does not constitute misfeasance triggering a duty to protect." Id. at 428-29, 294 Cal.Rptr.3d 664.

[49] The Complaint has not alleged sufficient facts to support that there was a special relationship – either between Airbnb and Decedent or between Airbnb and McGowan. At most, there are claims that Airbnb provides a platform for renting and sets policies for rentals. Compl. ¶ 13. This is insufficient. There is one naked allegation that Airbnb "owed decedent several duties to decedent as an operator/manager of the subject property." Id. ¶ 30. But there are no allegations fleshing out Airbnb's "operator/manager" role that would plausibly allege Airbnb exerted control over the subject property such that a special relationship exists. Esposito v.

Airbnb Action, LLC, No. 5:20-CV-5204, 2022 WL 2980700, at *5 (W.D. Ark. July 27, 2022), although applying Arkansas law, is instructive. The case involved a lawsuit against Airbnb for a burglary and assault that took place on an Airbnb property. The plaintiffs argued that there was a special relationship akin to a "innkeeper/guest or business owner/invitee." Id. But the court found neither analogy convincing because Airbnb did not control the land and did not "own[] or manage[] any of the rental properties advertised on its online platform." Id.

[50] [51] There was also no negligent undertaking. "To establish a duty of care to [Decedent] based on the negligent undertaking doctrine," Plaintiffs must first show that Airbnb "undertook to render services" to Decedent and that those "services were of the kind [Airbnb] should have recognized as necessary for the protection of third persons." Barenborg v. Sigma Alpha Epsilon Fraternity, 33 Cal. App. 5th 70, 83-84, 244 Cal.Rptr.3d 680 (2019). Plaintiffs must then show that Airbnb's failure to exercise reasonable care in the undertaking either "increased the risk of harm beyond what existed without the undertaking," or that others would have taken on the undertaking or stepped in, but relied instead on Airbnb. Id. The Plaintiffs have not plausibly alleged a negligent undertaking. They claim that Airbnb "undertook measures to protect guests and third parties from crime" by "prohibiting partying, retain[ing] the right to conduct investigations and terminate listings," reviewing "what the host posted and edit[ing] the listing," and "require[ing] local compliance with law and ordinances." Opp'n at 15. But it is not clear that any of these actions were done negligently. For example, Plaintiffs do not suggest that incorrect information was posted thereby increasing the risk of danger. Plaintiffs instead seem to suggest that this undertaking was negligent because Airbnb did not do more. Id. But the "scope of any duty assumed depends upon the nature of the undertaking.... For example, merely because a supermarket chooses to have a security program that includes a roving security guard does not signify that the proprietor has assumed a duty to protect invitees from third party violence." Id. (internal quotation marks omitted). None of Airbnb's actions increased risk, nor did they stop others from stepping in. The facts alleged do not support that Airbnb saw a risk, stepped in, and, in doing so, increased the risk of harm.

*8 [52] Even if there were some exception to the limitations on duty that applied here, the Rowland factors do not support a finding of duty. Specially, (1) the foreseeability of the crime was low, (2) the connection between Airbnb's conduct, and

the injury is virtually nonexistent, and (3) the burden of preventing this sort of incident in the future is high. [Brown](#), 11 Cal. 5th at 217, 276 Cal.Rptr.3d 434, 483 P.3d 159 (citing [Rowland](#), 69 Cal. 2d at 112-13, 70 Cal.Rptr. 97, 443 P.2d 561).

[53] This crime was not reasonably foreseeable. The remaining Plaintiffs claim that Airbnb is “abundantly aware of the incessant criminal activity taking place in all areas of its operations” and that “[c]rime is so foreseeable at AIRBNB properties that it pays an ‘elite trust-and-safety team’ to cover up the crimes.” Compl. ¶ 23. To support the claims that crime is foreseeable and frequent, the Complaint points to two past crimes at Airbnb properties, one in 2015 in California and one at some other point in New York. Compl. ¶¶ 19-20. Per Plaintiff's request, this Court has also taken judicial notice of the record of police calls concerning the subject property. This call log shows that there was a call concerning burglary at the property in 2018, a disturbance call in 2019, and a conduct call five days before Decedent's death. Dkt. 28-3.

None of this makes Decedent's death foreseeable. “[I]t is difficult if not impossible in today's society to predict when a criminal might strike.” [Wiener v. Southcoast Childcare Centers, Inc.](#), 32 Cal. 4th 1138, 1150, 12 Cal.Rptr.3d 615, 88 P.3d 517 (2004). Plaintiffs have not alleged any connection to these other crimes—i.e., they have not alleged that the other Airbnb crimes resulted because of a similar policy issue or that the burglary on the property revealed security flaws that contributed to Decedent's death. These other incidents also occurred years earlier than Decedent's death. It would have taken something near the level of psychic powers to foresee the May 18, 2020, events at the subject property even with knowledge of these other crimes. See [Jefferson v. Qwik Korner Market, Inc.](#), 28 Cal. App. 4th 990, 996, 34 Cal.Rptr.2d 171 (1994) (“on a clear judicial day, you can foresee forever” but if “the law imposed a duty to protect against every conceivable harm, nothing could function”). The facts pleaded simply do not support the conclusion that Decedent's death was foreseeable.

[54] Additionally, there is no meaningful connection between the alleged failures of Airbnb and the incident at the subject property. Most of the allegations of Airbnb's failures are conclusory claims that the app is “negligently designed” and that Airbnb took no “reasonable safety measures.” See, e.g., Compl. ¶¶ 26-29. Where the Complaint provides specific allegations of Airbnb's failures, the failures are unrelated to the tragedy at issue. For example, Plaintiffs state Airbnb failed to require renters to provide photo identification, but the

Complaint never specifies who rented the subject property or that such a policy would have had any impact on the situation. Compl. ¶ 32. Plaintiffs also allege that Airbnb was negligent by not requiring owners to promulgate rules “prohibiting the consumption of drugs” or “prohibiting the consumption of alcohol by minors” on the property. Compl. ¶ 34. These are things that are already illegal. Airbnb is not responsible for not outlawing illegal conduct. Airbnb is responsible only if it encourages it. [Sakiyama](#), 110 Cal. App. 4th at 408, 1 Cal.Rptr.3d 762 (“Unlike the radio contest, in which hazardous driving by teenagers was a necessary component of the game, the rave party was simply a party attended by teenagers. While drugs may have been anticipated, the teenagers did not need to use drugs to attend the party. AMF did not promote drug use,” therefore “AMF had no such direct link to the unfortunate accident in this case”). The Complaint also alleges that Airbnb should have made rules or encouraged landowners to make rules preventing minors from being on the property unsupervised. Compl. ¶¶ 34-36. The connection between unsupervised minors and the events that occurred is tangential at best. The Complaint does not plausibly allege that Airbnb's alleged failures contributed to Decedent's death.

*9 [55] [56] “Foreseeability is balanced against the burden of the duty to be imposed. Where the burden of prevention is great, a high degree of foreseeability is usually required.” [Melton v. Boustred](#), 183 Cal. App. 4th 521, 532, 107 Cal.Rptr.3d 481 (2010) (internal quotation marks omitted). The burden that Plaintiffs want to place on Airbnb is great. For example, Plaintiffs state that Airbnb should “ensure persons do not bring guns and weapons onto subject premises” and should “prevent criminal activity” on Airbnb properties. Compl. ¶ 31. But the foreseeability of teenagers mishandling a firearm at the subject property was low. Plaintiffs have not pointed to a similar incident or issue at the subject property—or any Airbnb property. And the California Supreme Court has found that “the burden of requiring a landlord to protect against crime everywhere has been considered too great in comparison with the foreseeability of crime occurring at a particular location to justify imposing an omnibus duty on landowners to control crime.” [Wiener](#), 32 Cal. 4th at 1150, 12 Cal.Rptr.3d 615, 88 P.3d 517 (internal quotation marks omitted) (finding pre-meditated murder committed by driving into children at a pre-school was not foreseeable because there had been no similar prior incidents, rejecting the lower court's reasoning that it was foreseeable because there had been a prior traffic accident where a car also drove onto the property, and finding the landlord owed

no duty “to create a fortress to protect the children”); see also [Melton](#), 183 Cal. App. 4th at 529-32, 107 Cal.Rptr.3d 481 (finding that a homeowner was not responsible for an assault on his property after he sent out an open invitation to his house on MySpace because the foreseeability was minimal but the burden to prevent the assault would have been high).

Salomes Monik Rengifo Jackson, Jonathan Christian Rengifo Jackson, and Antistenes Rengifo Estupinan's claims of negligence and gross negligence are DISMISSED with leave to amend.

3. Products Liability

[57] [58] Airbnb disputes the products liability claims because Airbnb is “a marketplace” and not a product. Mot. at 18. The Court agrees. A “products liability claimant must meet a condition precedent to successfully maintain the action. He or she must show that the object or instrumentality claimed to be defective was in fact a ‘product’ as defined or contemplated by the Restatement of Torts, legislation or case law.” [Brooks v. Eugene Burger Management Corp.](#), 215 Cal. App. 3d 1611, 1626, 264 Cal.Rptr. 756 (1989). “A product is tangible personal property distributed commercially for use or consumption Services, even when provided commercially, are not products.” *Restatement (Third) of Torts, Products Liability*, § 19 (Am. L. Inst. 1998). The California Supreme Court has echoed the Restatement and has found that “strict products liability law does not apply to services” and “those who sell services [are] not liable in absence of negligence or intentional misconduct.” [Jimenez v. Superior Court](#), 29 Cal. 4th 473, 479, 127 Cal.Rptr.2d 614, 58 P.3d 450 (2002) (internal quotation marks omitted) (emphasis added) (“law of negligence, not strict liability, governs services”); [Merrill v. Navegar, Inc.](#), 26 Cal. 4th 465, 470, 110 Cal.Rptr.2d 370, 28 P.3d 116 (2001) (the purpose of products liability is to hold liable “those who supply goods or products for the use of others to purchasers, users, and bystanders for losses resulting from defects in those products”). Airbnb is a platform that connects users; it is more akin to a service than to a product. [Jane Doe No. 1 v. Uber Technologies, Inc.](#), 79 Cal. App. 5th 410, 419, 294 Cal.Rptr.3d 664 (2022) (“the court concluded the Uber app was not a product, and thus a products liability theory of recovery was not legally viable.”).

The cases cited by Plaintiffs are not persuasive. Plaintiffs first argue that the Ninth Circuit recognized a products liability claim in [Lemmon v. Snap](#), 995 F.3d 1085 (9th Cir. 2021). But

there the circuit addressed only whether Snap was immune to liability under the Communications Decency Act, 47 U.S.C. § 230(c)(1). *Id.* at 1087. The circuit declined to address whether there was a failure to plead a negligent design claim, stating that “the district court dismissed the Parents’ amended complaint based entirely on the CDA, and we refrain from deciding an issue that the district court has not had the opportunity to evaluate.” *Id.* at 1095 (internal quotation marks omitted). On remand, the lower court analyzed negligence claims that were based on the design. The analysis was an ordinary negligence analysis, not a products liability analysis. [Lemmon v. Snap, Inc.](#), No. CV 19-4504-MWF (KSX), 2022 WL 1407936, at *5 (C.D. Cal. Mar. 31, 2022) (denying a motion to dismiss the negligent design theories because the court “previously determined that Plaintiffs have sufficiently alleged a duty,” and the court was satisfied the “allegations, accepted as true, are sufficient to allege causation”).

*10 The second case the remaining Plaintiffs rely on is equally unpersuasive. In [Bolger v. Amazon.com, LLC](#), 53 Cal. App. 5th 431, 440, 267 Cal.Rptr.3d 601 (2020), the court found that even though Amazon was not “the seller of the replacement battery,” its involvement in shipping, marketing, producing, and ensuring the safety of the product made it akin to a retailer and it was still responsible when the end product was not safe. There was still a tangible product for which there was liability. Here Plaintiffs “are not seeking to hold Defendant liable solely based on the ‘house’ as the end product but are pursuing a negligent design theory based on the design of the platform itself.” Opp’n at 18. There are no allegations in the complaint that there was an issue with the house itself—only allegations that the service or platform was negligently designed. [Bolger](#) is not analogous.

The remaining Plaintiffs’ product liability claim is DISMISSED without prejudice.

* * *

For the foregoing reasons, Airbnb's motion to stay Ms. Jackson's case and compel arbitration is GRANTED. Airbnb's request to dismiss the negligence and product liability claims of Salomes Monik Rengifo Jackson and Jonathan Christian Rengifo Jackson as representatives of the decedent's estate and Antistenes Rengifo Estupinan is GRANTED.⁴ They are granted leave to amend the Complaint in conformity with this Order if they can do so consistent with [Rule 11 of the Federal Rules of Civil Procedure](#). An amended complaint may be filed and served no later than December 6, 2022. Failure to file

an amended complaint by that date will waive their right to do so and the Complaint will be dismissed with prejudice as to them. If they choose to file an amended complaint, they should carefully consider the other issues raised by Airbnb's motion and amend their claims where appropriate. Plaintiffs must provide a redlined version of the amended complaint to the Court's generic chambers email.

IT IS SO ORDERED.

All Citations

--- F.Supp.3d ----, 2022 WL 16752071

Footnotes

- 1 Beneath the surface of the parties' briefings is a disagreement about what law should apply. Airbnb primarily relies on federal law, while Ms. Jackson's opposition cites only one federal case, but cites several California state cases and a section of the California Civil Procedure Code. Compare Mot. at 4-8 with Opp'n at 1-6. To be clear, the Federal Arbitration Act (FAA) pre-empts any state law governing arbitration. Viking River Cruises, Inc. v. Moriana, — U.S. —, 142 S. Ct. 1906, 1917-18, 213 L.Ed.2d 179 (2022); AT&T Mobility LLC, 563 U.S. at 343, 131 S.Ct. 1740 ("Although § 2's saving clause preserves generally applicable contract defenses, nothing in it suggests an intent to preserve state-law rules that stand as an obstacle to the accomplishment of the FAA's objectives").
- 2 Courts interpreting Howsam find that post-litigation conduct waiver is still a question for the courts to decide. Sabatelli v. Baylor Scott & White Health, 832 Fed. Appx. 843, 848 (5th Cir. 2020) ("waiver of arbitration based on litigation conduct is an issue for the court, rather than the arbitrator, to decide."); Ehleiter v. Grapetree Shores, Inc., 482 F.3d 207, 219 (3d. Cir. 2007) (finding that Howsam "[p]roperly considered within the context of the entire opinion ... was referring only to waiver, delay, or like defenses arising from non-compliance with contractual conditions precedent to arbitration, such as the NASD time limit rule at issue in that case, and not to claims of waiver based on active litigation in court. As the Appellate Division recognized, this latter type of waiver implicates courts' authority to control judicial procedures or to resolve issues ... arising from judicial conduct."); Madorskaya v. Frontline Asset Strategies, LLC, 2021 WL 3884177, at *13 n.9, 2021 U.S. Dist. LEXIS 164995, *35 n.9 (E.D.N.Y. Aug. 31, 2021) ("The Court is mindful that the Supreme Court has said, in dicta, that 'the presumption is that the arbitrator should decide allegations of waiver, delay, or a like defense to arbitrability.' Howsam, 537 U.S. at 84, 123 S.Ct. 588. Yet, despite this statement in Howsam, courts in this Circuit and elsewhere have continued to decide waiver disputes, particularly those that—like here—involve allegations of waiver due to litigation conduct.") (cleaned up); Sheet Metal Workers Local No. 20 Welfare & Ben. Fund v. CVS Pharm., Inc., 540 F. Supp. 3d 182, 193 (D.R.I. 2021) (finding the Supreme Court in Howsam did not "alter [the] traditional rule that courts presumptively decide issues of litigation-conduct waiver."); see, also, Tech. in P'ship v. Rudin, 538 Fed. Appx. 38, 39 (2d. Cir. 2013).
- 3 All future references to Plaintiffs exclude Ms. Jackson.
- 4 Because all claims of the remaining Plaintiffs have been dismissed, the Court declines to address at this time causation issues with the claims, the request to strike punitive damages, or the request to stay the case until the completion of other proceedings.

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EXHIBIT 6

CAUSE NO. 296-00503-2021

JOCELYN MADUAGWU, et al.

Plaintiffs,

v.

AIRBNB, INC. et al.,

Defendants.

IN THE DISTRICT COURT

296th JUDICIAL DISTRICT

COLLIN COUNTY, TEXAS

**ORDER GRANTING DEFENDANT AIRBNB, INC.'S TRADITIONAL AND
NO-EVIDENCE MOTION FOR SUMMARY JUDGMENT**

On January 14, 2022, came before the Court Defendant Airbnb, Inc.'s traditional and no-evidence motion for summary judgment on the issue of duty. The Court having considered the motion, response, and reply, and the summary judgment evidence, finds and concludes that the motion should be granted. Accordingly,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Airbnb, Inc.'s traditional and no-evidence motion for summary judgment on the issue of duty is GRANTED and all of Plaintiffs' claims against Airbnb, Inc. are hereby DISMISSED WITH PREJUDICE.

SIGNED this ____ day of _____, 2022.

2/15/2022



John Roach, Jr.
296th District Court Judge

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Associated Case Party: Marquel Ellis

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FILED
San Francisco County Superior Court

SEP 01 2021

CLERK OF THE COURT

BY: [Signature] Deputy Clerk

11 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
12 **COUNTY OF SAN FRANCISCO**

14 BRIAN RAMIREZ,

15 Plaintiff,

16 vs.

17 AIRBNB, INC.; DAVID TOMA; BRENDA
18 TORRES; ANNA DUITRUK; NEAL
LOHNER; ANNETA REALTY GROUP, LP;
19 ANNETA REALTY, LLC; ANNETA & KAL
20 REALTY GROUP, LP; and DOES 6 to 100,
inclusive,

21 Defendants.

Case No. CGC-21-590076

**[PROPOSED] ORDER SUSTAINING
DEFENDANT AIRBNB, INC.'S
DEMURRER TO FIRST AMENDED
COMPLAINT WITHOUT LEAVE
TO AMEND** (um)

Action Filed: March 2, 2021
Hearing Date: September 1, 2021 at 9:30 a.m.
Department: 302

[PROPOSED] ORDER

Defendant (AIRBNB, INC.'s) demurrer to plaintiff's First Amended Complaint ("FAC") is sustained without leave to amend. (See Code Civ. Proc. § 430.10(e).) The adduced claims fail to state a cause of action and plaintiff fails to show any reasonable likelihood that it can allege additional facts that could overcome the defects in the FAC.

Despite defendant's failure to meet and confer in compliance with Code of Civil Procedure section 430.41, the court will hear this demurrer on the merits as it is apparent that the meet and confer process will not resolve plaintiff's claims given the parties' prior filings.

On January 9, 2021, Plaintiff attended a party at a house rented by a third party from Defendant AirBNB, where he was allegedly assaulted by co-defendant Toma and sustained injuries as a result. (FAC, ¶¶ 15-19, 21, 23.) The negligence, premises liability, and negligence infliction of emotional distress claims fail because plaintiff fails to allege sufficient facts to show that defendant owed a duty of care to plaintiff. Plaintiff alleges that defendant breached its "duty to provide adequate safety and/or security for their guests." (FAC, ¶ 29; see also ¶ 57.) Plaintiff further alleges that defendant owed a "duty to protect their guests from harm." (*Id.* ¶ 55.) The FAC does not elaborate regarding the scope of defendant's purported duty, e.g., to retain security guards, install metal detectors, surveillance cameras, etc. In any event, plaintiff does not allege facts to implicate any sort of duty and certainly not a duty for defendant to post security guards at the host property.

Plaintiff's allegation that all of the defendants "owned, managed, and operated [the] real property" where the attack occurred is conclusory. (*Id.* ¶ 10.) Plaintiff's specific allegations and judicially noticeable facts show that defendant is a platform/intermediary between property owners/hosts and renters. (See FAC ¶¶ 31-35, 77-79; Defendant's RJN, Ex. A; *Michaels v. Turk* (2015) 239 Cal.App.4th 1411, 1414 n.2 (2015) [judicially noticing a company's "terms of service"]; see *Airbnb, Inc. v. City and County of San Francisco* (N.D. Cal. 2016) 217 F.Supp.3d 1066, 1069 [noting that "Airbnb does not own, manage or operate any of the host properties, and is not a party to the rental agreements"].

"The existence of a duty is a question of law for the court." (*Ann M. v. Pac. Plaza Shopping*

1 *Ctr.* (1993) 6 Cal.4th 666, 674 (disapproved on other grounds in *Reid v. Google, Inc.* (2010) 50
2 Cal.4th 512).) In general, “one owes no duty to control the conduct of another, nor to warn those
3 endangered by such conduct. A person who has not created a peril is not liable in tort merely for
4 failure to take affirmative action to assist or protect another unless there is some relationship
5 between them which gives rise to a duty to act.” (*Regents of University of California v. Superior*
6 *Court* (2018) 4 Cal.5th 607, 619 (citations and internal quotations omitted);

7 *Delgado v. Trax Bar & Grill* (2005) 36 Cal.4th 224, 235-236 [“as a general matter, there is
8 no duty to act to protect others from the conduct of third parties.”].) Courts have recognized
9 exceptions to the general rule, one of which is if the defendant has a “special relationship” with the
10 other person, such as landlord/tenant or property owner/invitee. (*Ann M.*, 6 Cal.4th at 674-676;
11 *Regents of University of California*, 4 Cal.5th at 619 [“a duty to control may arise if the defendant
12 has a special relationship with the foreseeably dangerous person that entails an ability to control
13 that person’s conduct”]; *Delgado*, 36 Cal.4th at 235-236.) Nevertheless, the touchstone of the duty
14 analysis is foreseeability. “[A]s frequently recognized, a duty to take affirmative action to control
15 the wrongful acts of a third party will be imposed only where such conduct can be reasonably
16 anticipated.” (*Ann M.*, 6 Cal.4th at 676.) “[W]e conclude that a high degree of foreseeability is
17 required in order to find that the scope of a landlord’s duty of care includes the hiring of security
18 guards. We further conclude that the requisite degree of foreseeability rarely, if ever, can be proven
19 in the absence of prior similar incidents of violent crime on the landowner’s premises.” (*Id.* at 679.)

20 In this case, the FAC’s allegations merely show that defendant has promulgated various
21 policies to prevent misuse of host properties, but those facts do not give rise to a duty. (See *Univ.*
22 *of S. Cal. v. Superior Court* (2018) 30 Cal.App.5th 429, 446-48 [setting policies related to land
23 does not constitute control necessary to establish duty], disapproved on other grounds by *Brown v.*
24 *USA Taekwondo* (2021) 11 Cal. 5th 204.) Plaintiff does not plead any facts showing that defendant
25 actually owned, managed, or controlled the host property. There are no allegations showing a
26 special relationship or that the attack on plaintiff was reasonably foreseeable. Plaintiff adduces no
27 facts showing prior similar incidents or other facts demonstrating heightened
28 foreseeability. Plaintiff simply alleges that parties had previously occurred at the property, not that

1 an attack on plaintiff was likely or imminent. Heightened foreseeability may be established by a
2 showing of “prior *similar* incidents or other indications of a reasonably foreseeable risk of violent
3 criminal assaults in that location,” but the mere existence of *some* criminal activity or prior
4 dissimilar crimes is insufficient to establish heightened foreseeability. (*Delgado*, 36 Cal.4th at 239-
5 240, 245; *Williams v. Fremont Corners, Inc.* (2019) 37 Cal.App.5th 654, 668-669 [shopping
6 center’s general knowledge of possibility of violent criminal conduct on premises was not in itself
7 enough to create duty to provide protection from foreseeable third party crime to musician, who
8 performed in shopping center bar and was assaulted in parking lot upon leaving bar].)

9 Two cases are instructive. In *Melton v. Boustred* (2010) 183 Cal.App.4th 521, the court
10 sustained a demurrer without leave to amend and held that the host of a party owed no duty of care
11 to prevent “an out-of-control and dangerous MySpace party.” (*Id.* at 533.) Likewise, in
12 *Hanouchian v. Steele* (2020) 51 Cal.App.5th 99, the court sustained a demurrer without leave to
13 amend, holding that plaintiff partygoer who was assaulted at an off-campus sorority party failed to
14 establish a high degree of foreseeability necessary for the hosts of the party to have a duty to take
15 measures to prevent third-party criminal attacks. (*Id.* at 113-114.) As in *Melton* and *Hanouchian*,
16 the violence that plaintiff experienced was not a necessary component of the party and defendant
17 took no action to stimulate the criminal conduct. Indeed, defendant’s relationship to plaintiff’s
18 injury is even more attenuated than the defendants in those cases since defendant did not actually
19 host the party. As noted, defendant merely acted as an intermediary between the party host/renter
20 and property owner. “Where the defendant has neither performed an act that increases the risk of
21 injury to the plaintiff nor sits in a relation to the parties that creates an affirmative duty to protect
22 the plaintiff from harm, however, our cases have uniformly held the defendant owes no legal duty
23 to the plaintiff.” (*Brown v. USA Taekwondo* (2021) 11 Cal. 5th 204, 216.) Plaintiff fails to address,
24 much less distinguish, any of these cases.

25 Defendant’s demurrer to the products liability cause of action is sustained without leave to
26 amend. As stated, defendant operates a website/platform and it does not sell/distribute
27 “products.” (See *Brooks v. Eugene Burger Mgmt. Corp.* (1989) 215 Cal.App.3d 1611, 1626
28 [whether object or instrumentality is a “product” is a legal issue and an apartment complex is not a

1 product[.]) Products are tangible, physical articles that result from manufacturing. (See *Johnson v.*
2 *U.S. Steel Corp.* (2015) 240 Cal.App.4th 22, 31 [“A ‘product’ is broadly defined to include any
3 ‘tangible personal property distributed commercially for use or consumption.’” (quoting Rest. 3d
4 Torts, Products Liability, § 19, subd. (a) (emphasis added))].) In *Peterson v. Superior Ct.* (1995) 10
5 Cal.4th 1185, 1188-1189, the court held that “neither landlords nor hotel proprietors are strictly
6 liable on a products liability theory for injuries...caused by a defect in the premises.” That same
7 reasoning mandates dismissal of the products liability claim. Plaintiff’s citation to *Bolger v.*
8 *Amazon.com, LLC* (2020) 53 Cal.App.5th 431, 448 is inapposite. There, the injury producing
9 “product” was a laptop battery, not a piece of real property or a website/platform that facilitates the
10 rental of real property.

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IT IS SO ORDERED.

Dated: Sept. 1, 2021

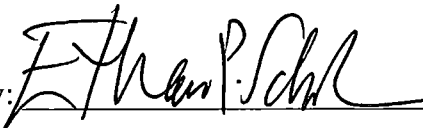
By: 
ETHAN P. SCHULMAN

EXHIBIT 8

FILED
OCT 12 2021

K. DIEKER CLERK OF THE COURT
SUPERIOR COURT OF CALIFORNIA
COUNTY OF CONTRA COSTA
By _____
C. Fanning, Deputy Clerk

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Attorneys for Defendant
AIRBNB, INC.

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF CONTRA COSTA

PAUL DIER, MEGAN LOWE, AND
NGUYEN NGUYEN

Plaintiffs,

vs.

JOSHUA PAUL ARMBRUSTER, KENT
JAMES FARNEY, JEFFREY GAILE,
AIRBNB, INC., and DOES 1-10, inclusive,

Defendants.

Case No. MSC20-01742

**ORDER SUSTAINING DEFENDANT
AIRBNB, INC.'S DEMURRER TO
PLAINTIFFS' FIRST AMENDED
COMPLAINT**

Action Filed: September 4, 2020
Hearing Date: September 24, 2021 at 9:00 am
Department: 7

ORDER

Defendant Airbnb, Inc.'s Demurrer to Plaintiffs' First Amended Complaint came before the Honorable Judge Barry Baskin in Department 7 of the Contra Costa County Superior Court on September 24, 2021, at 9:00 a.m. James Kim appeared on behalf of Plaintiffs. Damali Taylor and Jennifer Cardelús appeared on behalf of Airbnb, Inc. After considering all papers and evidence filed in support of and in opposition to Airbnb, Inc.'s demurrer, and all papers and records on file in this action, the Court adopts the Tentative Ruling posted on September 23, 2021, as follows:

Before the Court is Defendant Airbnb, Inc. (“Defendant” or “Airbnb”)’s Demurrer. The Demurrer relates to Plaintiff Paul Dier, Megan Lowe, and Nguyen (collectively, “Plaintiffs”)’s First Amended Complaint for (1) assault, (2) battery, and (3) negligence. Only negligence is pled against Defendant Airbnb.

Defendant Airbnb demurs to Plaintiffs' negligence cause of action pursuant to Code of Civil Procedure ("CCP") § 430.10(e) on the grounds that Plaintiffs have failed to allege Airbnb owed them a duty. As a threshold issue, the Court declines to overrule the demurrer on the grounds of perceived violations of the California Rules of Court and reaches the merits of the Defendants argument.

For the following reasons, the Demurrer is sustained, without leave to amend.

Legal Standard

“The function of a demurrer is to test the sufficiency of the complaint as a matter of law.” (*Holiday Matinee, Inc. v. Rambus, Inc.* (2004) 118 Cal.App.4th 1413, 1420.) A complaint “is sufficient if it alleges ultimate rather than evidentiary facts” (*Doe v. City of Los Angeles* (2007) 42 Cal.4th 531, 550 (“*Doe*”)), but the plaintiff must set forth the essential facts of his or her case “with reasonable precision and with particularity sufficient to acquaint [the] defendant with the nature, source and extent” of the plaintiff’s claim. (*Doheny Park Terrace Homeowners Assn., Inc. v. Truck Ins. Exchange* (2005) 132 Cal.App.4th 1076, 1099.) Legal conclusions are insufficient. (*Id.* at 1098–1099; *Doe* at 551, fn. 5.) The Court “assume[s] the truth of the allegations in the

1 complaint, but do[es] not assume the truth of contentions, deductions, or conclusions of law.”
 2 (*California Logistics, Inc. v. State of California* (2008) 161 Cal.App.4th 242, 247.)

3 Brief Factual Background

4 Plaintiffs allege that Defendant Armbruster rented a residence near them, 2013 Marina
 5 Lake Dr., Richmond CA, from Defendant Kent James Farney. (FAC at ¶ 15.) Defendant Farney
 6 rented out his residence through Defendant Airbnb’s service. (*Id.*)

7 Plaintiffs allege that on December 30, 2018 they were awoken by screams for help outside
 8 of their apartment. (FAC at ¶ 18.) Plaintiff Dier and Plaintiff Lowe saw Defendant Armbruster
 9 assaulting two individuals with a fire extinguisher. (*Id.* at ¶ 19.)

10 Plaintiff Lowe yelled to Armbruster’s two assault victims to come into the apartment for
 11 shelter and they entered the house. (FAC at ¶ 21.) Defendant Armbruster then forced his way into
 12 the apartment, spraying Plaintiffs in the face with the fire extinguisher and assaulting Plaintiffs.
 13 (*Id.* at ¶¶ 22, 24.) He was ultimately stopped by the Police when they arrived on scene. (*Id.* at ¶
 14 24.)

15 Analysis

16 This Court previously sustained a demurrer by Airbnb to Plaintiffs original complaint on
 17 the grounds that Plaintiffs failed to allege that Airbnb, who operates a rental property listing
 18 service, owed a duty to the Plaintiffs, three persons staying in an apartment in the same complex
 19 where a residence had been rented through Airbnb’s service.

20 Here the Plaintiffs duty allegations are once again at issue. As the Court noted on the prior
 21 demurrer, whether Airbnb has a duty to the Plaintiffs “is a question of law to be resolved by the
 22 court.” (*Artiglio v. Corning Inc.* (1998) 18 Cal.4th 604, 614 [quoting *Bily v. Arthur Young & Co.*
 23 (1992) 3 Cal.4th 370, 397].)

24 Though unclear, Plaintiffs argument now appears to be that it is in privity of contract with
 25 Airbnb. (See Opp. at 5:25.) However, this argument directly conflicts with their allegation that
 26 “Plaintiffs Paul Dier, Megan Lowe and Nguyen were neither ‘hosts,’ nor ‘guests’ to the
 27 December 30, 2018 short-term rental transaction.” (FAC at ¶ 16.) Nevertheless, the Plaintiffs later
 28 allege that “Plaintiffs are subject to [Airbnb’s] June 19, 2017 TOS” and as a consequence

1 “Airbnb are in privity of contract and Airbnb was therefore under a duty to exercise due care to
2 protect plaintiffs from injury.” (*Id.* at ¶ 60.) The factual allegation in support of this legal
3 conclusion would appear to be Plaintiffs’ allegation at paragraph 26 that Airbnb demanded they
4 engage in arbitration pursuant to Airbnb’s TOS. (*Id.* at ¶ 26.) It is manifestly unclear whether
5 Plaintiffs have Airbnb accounts unrelated to the Airbnb account that is at issue in this case, and
6 whether it is through those personal accounts that they are allegedly in privity of contract with
7 Airbnb.

8 First, even if Airbnb had adopted policies regarding the underlying claims at issue in this
9 case, that does not support an assumption of duty. (See *Univ. of S. Cal. v. Superior Court* (2018)
10 30 Cal.App.5th 429, 449-50 [“by adopting policies regarding alcohol use and social events and
11 providing a security patrol both on and off campus, USC did not assume a duty to protect invitees
12 from third party conduct at fraternity parties.”], *disapproved on other grounds by Brown v. USA*
13 *Taekwondo* (2021) 11 Cal.5th 204.) And, as the Defendant notes in its moving papers, Airbinb
14 expressly disclaims any warranties as to safety or the conduct of third parties. (See FAC Ex. C at
15 6.)

16 So, in the absence of contractual privity forming the basis for duty, Plaintiffs must allege
17 an exception to the general rule that there is no duty to act to protect others from the conduct of
18 third parties. (*Tarasoff v. Regents of University of California* (1976) 17 Cal.3d 425, 435; see also
19 *Paz v. State of California* (2000) 22 Cal.4th 550, 558; *Williams v. State of California* (1983) 34
20 Cal.3d 18, 23.) Once again, Plaintiffs have failed to meaningfully engage with Defendant’s
21 authority regarding the absence of a special relationship in their Opposition. In fact, there is not a
22 single citation to any of the authorities underlying Defendant’s Demurrer in Plaintiffs’
23 Opposition, leaving Airbnb’s arguments essentially unopposed.

24 In the absence of any factual allegations supporting the legal conclusion that Airbnb has a
25 duty to the Plaintiffs, Plaintiffs have failed to state a cause of action for negligence against
26 Airbnb.
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28

1 IT IS SO ORDERED.

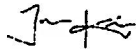
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3 Dated: 10/5/, 2021

By: STEVEN K. AUSTIN

Honorable ~~Barry Baskin~~ Steven K. Austin

**PRESIDING JUDGE
PER C.C.P. 635**

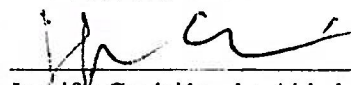
6 APPROVED AS TO FORM:

7 

8
9 James Kim, obo Plaintiffs

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11 Damali Taylor, obo Airbnb, Inc.

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13 Jennifer Cardelus, obo Airbnb, Inc.

STATE OF SOUTH CAROLINA
COUNTY OF AIKEN

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

JULIANNE FOSTER,

Plaintiff,

v.

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

Defendants.

**REPLY IN SUPPORT OF
DEFENDANT AIRBNB, INC.'S
MOTION TO DISMISS
AMENDED COMPLAINT**

Airbnb, Inc., by and through its undersigned counsel, submits the following reply in support of its motion to dismiss the Amended Complaint under Rule 12(b)(6) of the South Carolina Rules of Civil Procedure.

INTRODUCTION

Plaintiff ignores binding South Carolina precedent throughout her Response to Airbnb's Motion to Dismiss. She refuses to acknowledge or address more than a dozen cited South Carolina cases that compel dismissal of her Amended Complaint and instead attempts to reframe the deficiencies in her pleadings into "factual disputes." Response to MTD ("Resp.") at 8 & n.4. This is inaccurate: *even taking as true* Plaintiff's factual (as opposed to her conclusory) allegations,¹ Airbnb's cited authorities foreclose each of her claims for relief against Airbnb. For this reason, the Court should grant Airbnb's Motion to Dismiss.

¹ At the motion-to-dismiss stage, courts must accept "facts well pleaded in a complaint but do[] not admit conclusions of law" or "conclusory" allegations. *Jones v. Gilstrap*, 288 S.C. 525, 529, 343 S.E.2d 646, 648 (Ct. App. 1986).

ARGUMENT

Plaintiff's arguments would require this Court to accept conclusory allegations as facts and to ignore decades of binding South Carolina precedent. The Court should decline to do either.

I. Plaintiff's Negligence Claim Should Be Dismissed.

Plaintiff admits that the rule in South Carolina is that one has no duty to protect against third-party criminal conduct. Resp. at 4. But she argues that her claims fit into three of the limited exceptions to the rule courts have recognized: (i) that she had a *special* relationship with Airbnb (even though she does not allege that she had an Airbnb account or ever communicated with Airbnb), (ii) that Airbnb had a special relationship with Riviere and Katherine Thomas (who merely listed their property on Airbnb's website like any other user), or (iii) that Airbnb voluntarily undertook to identify all past or future criminal behavior or predilections of hosts and to ensure that no hidden devices would be present at any of the millions of properties listed on its platform worldwide. Plaintiff also argues that her alleged injury was foreseeable to Airbnb (even though the perpetrator is not alleged to have any criminal conviction). She is wrong on all counts.

Indeed, every other court to hear nearly identical arguments against Airbnb has rejected those claims at the motion-to-dismiss stage. Airbnb's Memorandum in Support of its Motion to Dismiss (filed Feb. 23, 2023) ("Mem.") at 5-6; Mem. Exs. 1-8. South Carolina negligence law—which is virtually identical to those other jurisdictions—dictates the same result here. Plaintiff argues—without any support—that the claims in those cases are somehow different from her core claims here, but that is false: the plaintiffs in those cases made the same (often conclusory) allegations about Airbnb—frequently using the same exact language that Plaintiff used in her own Amended Complaint. For example, in *Jackson v. Airbnb, Inc.*, the plaintiffs alleged that Airbnb:

- “acted as a manager/operator of the subject property”;

- “controlled how the subject property was used [and] retained the right to monitor and control the content posted by hosts”;
- “conducted investigations into properties, had the right to suspend properties, and punish properties for failure to comply with its rules”; and
- “prohibits partying on Airbnb properties and exerts control over how a property can be used.”

First Am. Compl. (Dkt. 39) ¶ 26, *Jackson v. Airbnb, Inc.*, Case No. 2:22-cv-03084 (C.D. Cal. Dec. 6, 2022). And in *Esposito v. Airbnb Action LLC*, the plaintiffs alleged:

- “Airbnb advertises, ... “Your safety is our priority”;
- “Airbnb holds itself out as ‘a trusted community marketplace’ and in its advertising uses the words ‘safety,’ ‘trust,’ ‘home’ and ‘trusted community’ repeatedly on its website expecting customers to ‘trust’ that ‘safety’ measures actually exist and to create a false sense of security”;
- “Airbnb also represents that it conducts risk scoring of each Airbnb reservation”; and
- “Airbnb’s business involves sending its innkeeper business invitee Guests directly into premises owned and controlled by persons unknown to the Guests, thus Guests can only rely upon Airbnb’s representations of trust and safety, a cornerstone of its business.”

First Am. Compl.(Dkt. 92) ¶¶ 28-29, 32, 34-35, *Esposito v. Airbnb Action LLC*, Case No. 5:20-cv-05204 (W.D. Ark. March 3, 2022).

Plaintiff’s Amended Complaint mirrors these allegations—sometimes word for word, *see*, *e.g.*, Am. Compl. ¶ 4-5, 59-69, 76-77, 126-27. She claims they are sufficient to establish duty, in contravention of every other court that has ruled on the issue. The courts that have considered the exact language on which Plaintiff relies have rejected similar claims on motions to dismiss because, under well-accepted principles of negligence law, they do not establish a duty. The law is no different in South Carolina.

Nor should the Court heed Plaintiff’s suggestion that this case involves “questions of novel impression” that cannot be properly resolved at the motion-to-dismiss stage simply because she

has made some unique allegations. Resp. at 7-8. The established contours of South Carolina’s duty law—which “will not be extended beyond reasonable limits”—are well equipped to resolve Plaintiff’s threadbare allegations of duty. *Huggins v. Citibank, N.A.*, 355 S.C. 329, 333, 585 S.E.2d 275, 277 (2003) (dismissing complaint because allegations “too attenuated” to establish a duty, despite foreseeability of injury).

A. Plaintiff’s Allegations Do Not Support Any Exception to South Carolina’s General No-Duty-to-Protect Rule.

No Special Relationship Existed Between Plaintiff and Airbnb. Plaintiff has never been an Airbnb user; she does not dispute this. Only her friend had an Airbnb account and she—not Plaintiff—booked a stay at Riviere’s property. Resp. at 8; Am. Compl. ¶¶ 93, 95, 121. Yet Plaintiff claims that merely accompanying her friend to the stay is enough to establish a *special* relationship with Airbnb—even though Airbnb had no knowledge of Plaintiff’s existence—because Airbnb has publicly asserted that its online platform is a “trusted community marketplace.” Resp. at 8. Plaintiff cites no authority for this expansive “special relationship” theory because there is none. Rather, South Carolina courts prudently recognize special relationships only in the limited contexts of (1) professional duties (like lawyers or accountants and clients), (2) supervisory relationships (like general contractors and subcontractors), and (3) physical custody and control (like innkeepers and guests or couriers and passengers). See *Bahringer v. ADT Sec. Servs., Inc.*, 942 F. Supp. 2d 585, 590 (D.S.C. 2013); *Courtney v. Remler*, 566 F. Supp. 1225, 1232 & n.2 (D.S.C. 1983). None of those contexts apply here. And South Carolina law does not recognize typical business-customer relationships as special relationships giving rise to a duty to protect. *Kraft Real Est. Invs. v. HomeAway.com, Inc.*, 2012 WL 220271, at *18 (D.S.C. Jan. 24, 2012) (membership to website insufficient); *Laidlaw Env’t Servs., (TOC)*,

Inc. v. Honeywell, Inc., 966 F. Supp. 1401, 1414 (D.S.C. 1996) (“buyer-seller” and “vendor-vendee” relationships insufficient).

Plaintiff argues that she had a special relationship with Airbnb merely because she “was a guest in an Airbnb rental.” Resp. at 8. But Airbnb is not an innkeeper. Plaintiff’s own complaint makes clear that Riviere owned the property and Thomas managed it. Am. Compl. ¶¶ 18, 89-91, 95-96. Airbnb is an online platform on which hosts like Riviere and Thomas list their properties, *id.* ¶ 62, and there is no factual allegation to support the contention that Airbnb owned or controlled the property itself. Control of an online platform simply does not equate to innkeeper-like control of the property itself—which is precisely why multiple courts have rejected this very argument as to Airbnb. See Mem. Ex. 3, *Jackson v. Airbnb, Inc.*, Order Granting Airbnb, Inc.’s Motion to Dismiss (C.D. Cal. Feb. 2, 2023)²; Mem. Ex. 5, *Jackson v. Airbnb, Inc.*, --- F. Supp. 3d ----, 2022 WL 16752071, at *7 (C.D. Cal. Nov. 4, 2022); Mem. Ex. 4, *Esposito v. Airbnb Action, LLC*, 2022 WL 2980700, at *5 (W.D. Ark. July 27, 2022); Mem. Ex. 2, *Carroll v. Am. Empire Surplus Lines Ins.*, 289 F. Supp. 3d 767, 771 (E.D. La. 2017).

No Special Relationship Existed Between Airbnb and Riviere or Thomas. South Carolina law is clear that Plaintiff can satisfy this exception only if she alleges **both** that: (i) the defendant had “the ability to monitor, supervise and control an individual’s conduct” **and** (ii) “the individual made a specific threat of harm directed at a specific individual.” *Doe v. Marion*, 373 S.C. 390, 400-01, 645 S.E.2d 245, 250 (2007); see also *Scibek v. Gilbert*, No. 2:20-CV-2638-DCN, 2022 WL 1121001, at *3 (D.S.C. Apr. 14, 2022) (special relationship can arise only when both elements

² Now available at *Jackson v. Airbnb, Inc.*, --- F. Supp. 3d. -----, 2023 WL 2292598, at *3 (C.D. Cal. Feb. 2, 2023).

are satisfied). The Amended Complaint is utterly devoid of any allegation for the second element—and the Response ignores it completely. Accordingly, this exception does not apply.³

Airbnb Did Not Voluntarily Undertake A Duty to Plaintiff. Plaintiff asserts that “Airbnb undertook a duty to provide a safe rental without any disclosed cameras through a vetted and safe host.” Resp. at 9. Plaintiff cites Paragraphs 4, 5, 65, and 68 of the Amended Complaint, but those paragraphs do not demonstrate the undertaking she has asserted. Those paragraphs allege that:

- “Airbnb touts itself as a company that prioritizes guest privacy and safety,” “informs its guests that ‘Your safety is our priority’ and that ‘Airbnb Is designed with safety – both online and off – in mind,” Am. Compl. ¶ 4;
- “Airbnb promises that ‘[e]very Airbnb reservation is scored for risk before it’s confirmed,’ claiming they are ‘flag[ging] and investigat[ing] suspicious activity before it happens,’” *id.*;
- “Airbnb guests reasonably expect that they can rely on Airbnb to have adequately vetted the properties and Hosts it promotes and advertises,” *id.* ¶ 5,
- “Airbnb ... does not conduct adequate reviews on its Hosts or properties,” *id.*;
- “Airbnb is fully aware that its guests routinely find hidden cameras,” *id.*;
- “[C]ameras are ‘allegedly’ strictly forbidden by Airbnb,” *id.*;

³ Although the Court need not reach the first element, Plaintiff’s arguments about the first element are also unconvincing and unsupported. Resp. at 9. Her arguments and allegations only show that Airbnb sets standards of conduct *for use of the platform*—not that Airbnb can control how hosts use their properties when they are not renting out their properties via its platform—or at any other time, considering that Airbnb provides a platform for which users voluntarily sign up and list properties at their own discretion, while retaining the ability to list and rent their properties out via other websites and methods (like Thomas and Riviere did here). FAC ¶¶ 21, 43, 115. This is nothing like the level of control in special relationships recognized under South Carolina law. *See Roe v. Bibby*, 410 S.C. 287, 294, 763 S.E.2d 645, 648 (Ct. App. 2014) (listing relationships found sufficient under South Carolina law, including Department of Mental Health and involuntarily-committed patient, psychiatrist and patient, and Department of Juvenile Justice and dangerous juvenile over whom it had custody).

- “Airbnb controls all aspects of the customers’ interactions with its Hosts, from what information is presented in a rental listing to how Hosts are required to respond to rental inquiries and how quickly,” *id.* ¶ 65;
- “Airbnb can penalize Hosts for failing to follow its policies, including the failure to disclose the existence of cameras” in various ways, *id.* ¶ 68.

Not one of these paragraphs—which are representative of the Amended Complaint as a whole—includes an allegation that Airbnb undertook to discover surreptitious recording devices at all properties listed on its platform, nor to unearth all past, present, and future misconduct of Airbnb users. At most, Plaintiff alleges that Airbnb has set policies and some measures to enforce them, but this is not an undertaking to ensure that the rules are followed and does not create a duty. *See* Mem. at 10-11 (citing, *e.g.*, *Allen v. Choice Hotels Int’l*, 276 F. App’x 339, 344 (4th Cir. 2008) (hotel franchisor’s policies requiring franchisees to have fire safety systems does not establish franchisor’s voluntary undertaking)). An undertaking must be specific, *Wright v. PRG Real Estate Mgmt., Inc.*, 426 S.C. 202, 213, 826 S.E.2d 285, 290 (2019) (duty “will apply only to the extent of the undertaking”), and Plaintiff’s broad allegations about Airbnb’s general representations are inadequate.

Wright v. PRG Real Estate, on which Plaintiff relies, supports Airbnb’s position. In that case, an apartment complex *expressly told* the plaintiff before she moved in that “there were security officers on duty,” even though it did not employ security officers. 426 S.C. at 207, 826 S.E.2d at 287. The Court found that, given this express statement, there was a triable issue as to whether the apartment complex voluntarily undertook a duty to provide security officers. *Id.* at 219-20. But unlike in *Wright*, Plaintiff does not allege that Airbnb *told* users or Plaintiff that it would detect or prevent hidden cameras at properties listed on its website, or that it would uncover

all past, present, and future misconduct of hosts who list properties on its platform.⁴ Further, even if Airbnb allegedly undertook what Plaintiff asserts, she does not allege that she knew about the undertaking such that the undertaking could have “increased the risk of harm [to her]” or caused her to “suffer[] harm because she relied upon [it].” *Id.* at 213. Accordingly, this exception does not apply.

B. Plaintiff’s Allegations Do Not Show That Riviere’s Illegal Recording Was Foreseeable.

Plaintiff concedes that any duty would only extend to foreseeable injuries. Resp. at 11; *see also Lord v. D&J Enters., Inc.*, 407 S.C. 544, 555, 757 S.E.2d 695, 700 (2014) (duty extends only to “foreseeable risk of physical harm”). But, in attempting to allege foreseeability in this case, she can only point to alleged hidden camera incidents at unrelated listings involving unrelated hosts and unrelated guests in other cities throughout the country—some a decade old.⁵ There is nothing in her Amended Complaint or her Response to the instant motion that explains how *Rhett Riviere’s* conduct in Aiken, South Carolina, could have been foreseeable to Airbnb. Resp. at 11-12.

As Airbnb explained in its Motion, Plaintiff’s all-encompassing conception of foreseeability has no basis in the law. *See* Mem. at 13 (citing *Jenkins v. CEC Ent. Inc.*, 421 F. Supp. 3d 257, 263 (D.S.C. 2019); *Nelson v. Piggly Wiggly Cent., Inc.*, 390 S.C. 382, 393-94, 701 S.E.2d 776, 782 (Ct. App. 2010)). Plaintiff exclusively relies upon premises-liability cases, in which courts *may* consider similar crimes occurring *at or nearby the subject property* in addition to knowledge of a specific wrongdoer’s past conduct. Resp. at 5, 11-12. But this is not a valid

⁴ Nor can Plaintiff make any such allegation: she admitted during her deposition that she never looked at Airbnb’s website before the stay and has never communicated with Airbnb.

⁵ Plaintiff also knowingly miscites the number of complaints that have been made to Airbnb about this issue since December 2013. Resp. at 12. As Airbnb’s 30(b)(6) witness repeatedly explained, the number Plaintiff now cites refers to the number of contacts to Airbnb’s customer service regarding any surveillance device issue, which could include anything from a Ring doorbell issue to an iPhone left behind in a listing.

premises liability case because Airbnb did not own or control Riviere's property. *See infra* at 11-12. And even if it were, premises-liability caselaw does not support considerations of misconduct committed with no geographic or personal connection to the subject property. *See Hiller v. Wal-Mart Stores E., LP*, 2022 WL 686793, at *3 (D.S.C. Mar. 8, 2022) (analyzing whether there were similar prior shooting incidents *at the particular* Walmart store, not if shootings had occurred at any Walmart location or whether shooting crimes at Walmart stores were conceivable); *Easterling v. Burger King Corp.*, 416 S.C. 437, 449-50, 786 S.E.2d 443, 450 (Ct. App. 2016) (analyzing incidents for which the police were called to "*this* Burger King" and finding expert testimony unconvincing where expert "had no knowledge of any physical assaults taking place at *this* Burger King" (emphasis added)).

C. Plaintiff's Gross Negligence Claim Should Be Dismissed.

Plaintiff's Response has a section titled "Plaintiff has sufficiently pled a claim for gross negligence," but it contains no argument. *See* Resp. at 12. The Court should dismiss her gross negligence claim.

II. Plaintiff's Vicarious Liability and Negligent Hiring, Supervision, and Retention Claims Should Be Dismissed.

Negligent hiring, supervision, and retention. Plaintiff's negligent hiring, supervision, and retention claim fails for multiple reasons. First, Plaintiff pleads no facts for her conclusory allegation that Riviere and Thomas were Airbnb employees—they are not, and her own Amended Complaint refutes this. *See* Am. Compl. ¶¶ 98, 142, 153 (alleging that Riviere and Thomas were "Hosts" who registered on Airbnb's platform to offer their own properties for rent); *see also Campbell v. Int'l Paper Co.*, 2013 WL 1874850, at *6 (D.S.C. May 3, 2013) (rejecting "conclusory assertion that [plaintiff] 'was hired and maintained his employment with [defendant] on the basis' of these policies"); *Battle v. Nikanth, LLC*, 2013 WL 4874976, at *3 (D.S.C. Sept. 11, 2013)

(similar). Plaintiff points only to her general allegations of “control,” but, as described above, these allegations merely establish that Airbnb set rules for its users’ use of the platform—not that it employed anyone. Resp. at 14. Further, Plaintiff does not sufficiently allege, as she must, that Airbnb had knowledge or reason to know of Riviere’s prior misconduct. Her allegations about unrelated hidden-camera cases are irrelevant to Airbnb’s knowledge about *Riviere*. See *id.* As for Riviere himself—who was not even the host of the Property—she asserts that he had a “history of voyeurism” and “voyeuristic tendencies” that Airbnb should have discovered in an “adequate background check.” *Id.* at 14-15. However, Plaintiff does not allege in the Amended Complaint that Riviere had any prior criminal conviction for any crime related to voyeurism that Airbnb could have discovered, nor does she explain how a background check could have detected Riviere’s alleged local reputation in Aiken. Am. Compl. ¶¶ 15-16. The Amended Complaint therefore does not allege facts from which the Court can infer that Airbnb should have known about Riviere’s alleged criminal propensities.

Vicarious Liability. Plaintiff’s vicarious liability claim fails because she has not alleged a single fact demonstrating that Riviere was acting “within the scope” of his purported employment—*i.e.*, that his actions were “reasonably necessary to accomplish the purpose of his [purported] employment and in furtherance of [Airbnb’s] business.” *Armstrong v. Food Lion, Inc.*, 371 S.C. 271, 276, 639 S.E.2d 50, 52 (2006). She ignores the case law rejecting this very claim under South Carolina law. See *Park v. S.E. Serv. Corp.*, 771 F. Supp. 2d 588, 593 (D.S.C. 2011) (holding company not vicariously liable for employee’s “surreptitious videotaping” of plaintiff because that misconduct in no way “further[ed] [its] business” of providing janitorial services). She points instead to an unpublished opinion in which an alleged “caretaker [of a] property” was found to be acting within the scope of his employment when he shot someone “walk[ing] in front

of” the property for which he was responsible. *Watkins v. Hall*, 2017 WL 4810799, at *1 (S.C. Ct. App. July 19, 2017) (unpublished). *Watkins* is completely distinguishable: it is reasonable to infer that shooting a perceived intruder is within the scope of employment of a caretaker tasked with overseeing a property. On the other hand, as reflected in *Park v. Southeast Service Corp.*, illegally recording someone with a hidden camera cannot possibly be viewed as within the scope of hosting a property via Airbnb’s platform or in furtherance of Airbnb’s business—even if Airbnb had been Riviere or Thomas’s employer (it was not). Plaintiff’s conclusory allegations that Riviere was acting within the scope of any purported employment therefore do not suffice. Resp. at 14.

III. Plaintiff’s Premises Liability Claim Should Be Dismissed.

In defense of her premises liability claim, Plaintiff’s sole argument is that Airbnb purportedly controls the properties listed on its platform “through its many policies and standards.” Resp. at 16. This argument has already been foreclosed in South Carolina, where courts have declined to find control despite far greater indicia of control over the subject premises than Plaintiff alleges in the Amended Complaint. *See Bass v. Gopal, Inc.*, 384 S.C. 238, 248, 680 S.E.2d 917, 922 (Ct. App. 2009) (franchisor held not to control motel despite (1) “inspect[ing] the motel every three months to determine how the property is run”; (2) during inspections, “check[ing] the components of nine rooms, including the bed, television, lock systems, peep holes, and tubs”; (3) “provid[ing] a checklist of changes to be made”; and (4) “requir[ing] owners to attend training” because these facts did not establish “sufficient control over the motel’s daily operations”); *Allen* 276 F. App’x at 343 (under South Carolina law, quality and operational standards and policies “simply ensure uniformity” and do not establish “sufficient control over the operations of the hotel to create a duty”). Plaintiff’s allegations that Airbnb “controls” listed properties by implementing various rules and standards for using the platform are far less extensive than the indicia of control

in *Bass* and *Allen*. See, e.g., Am. Compl. ¶¶ 144, 146, 200. And although, as Plaintiff points out, those cases were decided on summary judgment, a plaintiff who cannot even *allege* sufficient facts to support cognizable claims for relief is not entitled to try to prove those futile claims later in the litigation.

Plaintiff also tries to distinguish *Jackson v. Airbnb*, selectively quoting the court’s statement that the plaintiff there did not “flesh[] out Airbnb’s ‘operator/manager’ role.” Resp. at 15-16 (citing Mem. Ex. 5, *Jackson v. Airbnb, Inc.*, 2022 WL 16752071, at *7 (C.D. Cal. Nov. 4, 2022)). But in a subsequent ruling, which Airbnb cited and which Plaintiff pointedly ignores, the *Jackson* court expressly considered—and rejected—allegations identical to Plaintiff’s: *i.e.*, that Airbnb “sets policies related to the use of its platform, maintained the ability to prevent the rental of subject property, ... banned parties,” “require[s] users to comply with local laws and allow[s] Airbnb to review member content.” Mem. Ex. 3, *Jackson v. Airbnb, Inc.*, 2023 WL 2292598, at *3 (C.D. Cal. Feb. 2, 2023) (“The TOS and Global Party Ban are simply policies that allow Airbnb to regulate its platform; they did not allow Airbnb to make physical changes to rental properties. The [alleged] facts show that Airbnb can remove listings and revoke memberships, not that it paves walkways and puts up fences.”).

IV. Plaintiff’s Claims Based on Alleged Misrepresentations Should Be Dismissed.

Constructive Fraud. In her response, Plaintiff contends that “Airbnb has knowingly made numerous material false statements or representations about the presence and disclosure of cameras in Airbnb rentals; its vetting of all Hosts and verifying they are who they say they are; and that safety is a top priority.” Resp. at 17. But this argument is not supported by any allegation in the Amended Complaint itself, which does not and cannot allege that Airbnb represented that listings would be free from undisclosed devices or that its background checks capture all past misconduct or can predict future misconduct.

Airbnb also argued that Plaintiff failed to plead her fraud claim with the requisite particularity under Rule 9(b), SCRCF. Yet Plaintiff's Response fails to identify any particularized allegations. For example, Plaintiff must allege "either knowledge of [a statement's] falsity or a reckless disregard of *its truth or falsity*," *Armstrong v. Collins*, 366 S.C. 204, 219, 621 S.E.2d 368, 375 (Ct. App. 2005) (emphasis added); but she points only to her general allegation that "Defendants acted in reckless and conscious disregard of *Plaintiff's rights*," Resp. at 18 (citing Am. Compl. ¶ 229) (emphasis added). Nor does Plaintiff respond to Airbnb's point that she does not allege which statements she allegedly heard or when she heard them—necessary for her reliance element of this claim. Mem. at 20. Without such allegations, this claim cannot proceed.

SCUTPA. Of the three cases Airbnb cited where South Carolina courts rejected SCUTPA claims based on statements about general safety and security (Mem. at 21), Plaintiff only addresses *Wright v. PRG Real Estate Management*—and only to argue that *Wright* was decided on "the facts of this case" at the summary-judgment stage. Resp. at 17. This difference in posture is a red herring; Plaintiff's allegations, even if taken as true, still do not rise to the level of the facts in *Wright*, in which the court *rejected* the plaintiff's SCUTPA claim. *Wright*, 413 S.C. 276, 289-90, 775 S.E.2d 399, 401, 406 (Ct. App. 2019), *reversed on different grounds*, 426 S.C. 202 (2019) (rejecting SCUTPA claim in which plaintiff "argu[ed] a [apartment complex] employee ... ma[de] statements concerning the safety and security of the apartment complex when [plaintiff] filled out her rental application"). Further, one of Airbnb's other cited authorities, which Plaintiff ignores, was a dismissal at the motion-to-dismiss stage. *See Williams v. Preiss-Wal Pat III, LLC*, 17 F. Supp. 3d 528, 538 (D.S.C. 2014) (dismissing SCUTPA claims in part because "conclusory" allegations that apartment complex's marketing was "deceptive and unfair" insufficient).

V. Plaintiff's Claims Based on an Alleged Violation of South Carolina's Real Estate Licensing Statute Should Be Dismissed.

Plaintiff has not alleged facts to sustain her negligence per se claim or the second theory of her SCUTPA claim, which are premised on an alleged violation of South Carolina Code Ann. § 40-57-20. As Plaintiff concedes, this real estate licensing statute applies only to individuals and not corporations. Resp. at 19. This concession is fatal to both claims.

Plaintiff's negligence per se claim fails for additional reasons. First, Plaintiff does not dispute that the statute, which merely defines the requirements to obtain a real estate license, does not "set[] forth a standard of care." *Hurst v. Sandy*, 329 S.C. 471, 479-80 & n.5, 494 S.E.2d 847, 851 & n.5 (Ct. App. 1997) (statutes that do not "set forth a standard of care" "will not ordinarily provide a basis for a negligence per se action"). Nor can Plaintiff establish that the "essential purpose" of the statute is to "protect from the kind of harm the plaintiff has suffered." *Whitlaw v. Kroger Co.*, 306 S.C. 51, 53, 410 S.E.2d 251, 252 (1991). She argues that the statute's purpose "is to regulate the real estate industry so as to protect the public's interest when involved in real estate transactions." Resp. at 19 (citing S.C. Code Ann. § 40-57-10). This general purpose is limited to protection for *transactions*, has nothing to do with criminal voyeurism, and cannot support negligence per se. See *In re Blackbaud, Inc., Customer Data Breach Litig.*, 567 F. Supp. 3d 667, 683 (D.S.C. 2021) (rejecting negligence per se claim where statute was "enacted for the protection of the public and not with the protection of an individual private right in mind").

VI. The Court Should Dismiss Plaintiff's Prayer for Punitive Damages Against Airbnb.

Plaintiff makes two deficient arguments in support of her punitive damages prayer. First, she asserts that the Amended Complaint "alleges that her injury was caused by Defendants' willful, wanton and/or reckless conduct." Resp. at 19. These are legal conclusions unsupported by her factual allegations and need not be accepted by the Court. Second, she argues that the Amended

Complaint alleges “that Airbnb willfully misrepresents that safety and trust are its priority [and] that it has adequately vetted Hosts.” Resp. at 20 (citing Am. Compl. ¶¶ 4-5). As Airbnb explained (Mem. at 20), general representations of safety are not actionable in tort, much less to support punitive damages, and Plaintiff cannot allege that Airbnb represented it would detect all hidden recording devices or uncover all past, present, and future misconduct of hosts. Am. Compl. ¶¶ 4-5 (alleging only that “Airbnb guests reasonably *expect* that they can rely on Airbnb to have adequately vetted the properties and Hosts it promotes and advertises” (emphasis added)). Even if she had made such an allegation, however, she cites no authority for the contention that alleged negligence in detecting hidden cameras or uncovering prior or future misconduct amounts to willfulness, wantonness, or reckless disregard as required for punitive damages. *Fairchild v. S.C. Dep’t of Transp.*, 398 S.C. 90, 99 (2012) (these terms “import a greater degree of culpability than mere negligence”).

CONCLUSION

Airbnb respectfully requests that the Court dismiss all causes of action against Airbnb. Rule 12(b)(6), SCRCp. Plaintiff requests leave to amend, but she identifies no new allegations she could make in a second amended complaint that would change the foregoing analysis. Leave to amend would therefore be futile. *Skydive Myrtle Beach, Inc. v. Horry Cnty.*, 426 S.C. 175, 182-83, 826 S.E.2d 585, 588-89 (2019). Airbnb respectfully requests that the Court strike Plaintiff’s prayer for punitive damages.

Dated this 3rd day of April, 2023.

Respectfully submitted,

/s/ Beattie B. Ashmore

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Attorney for Defendant Airbnb, Inc.

STATE OF SOUTH CAROLINA
COUNTY OF AIKEN

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

JULIANNE FOSTER,

Plaintiff,

v.

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

Defendants.

**DEFENDANT AIRBNB, INC.'S
MOTION FOR A PROTECTIVE
ORDER**

TO: THE HONORABLE COURT AND ALL COUNSEL OF RECORD

PLEASE TAKE NOTICE that Defendant Airbnb, Inc. ("Airbnb"), by and through its undersigned counsel, moves this Honorable Court, under Rule 26(c) of the South Carolina Rules of Civil Procedure and applicable law, for a protective order barring or otherwise limiting the corporate-representative deposition Plaintiff unilaterally noticed to occur on July 12, 2022 pursuant to South Carolina Rule of Civil Procedure 30(b)(6). To the extent Airbnb will require time to prepare one or more witnesses to give corporate deposition testimony based on the Court's potential ruling, Airbnb requests that the deposition date of July 12, 2022 be postponed to a mutually agreeable date chosen between the parties once this Motion is heard and ruled upon. This Motion is based on the following grounds:

1. On March 20, 2022, Plaintiff sent to Airbnb, Inc. an unduly burdensome proposed notice of deposition nearly identical to the one challenged in this Motion. (Ex. 1 (March 20 Letter)). Airbnb responded with a detailed letter objecting to each of Plaintiff's proposed topics and offering to meet and confer and make a corporate witness available on a more targeted set of topics. (Ex. 2 (Response).) Plaintiff all but ignored Airbnb's correspondence and on May 26,

2022 served a barely modified 30(b)(6) deposition notice, summoning one or more Airbnb witnesses to her counsel's office in South Carolina to testify on 24 overly broad topics. (Ex. 3 (Dep notice).)

2. Plaintiff never bothered with meeting and conferring over Airbnb's objections or even asking Airbnb—a California-based company—when or where it could reasonably make witnesses available. This is not the first time Plaintiff has wasted this Court's time on a discovery dispute that could have been narrowed or avoided entirely by meeting and conferring. Two weeks ago, this Court ordered Plaintiff to meet and confer with Airbnb on the spot after she failed to do so before the hearing on her motion to compel. (Ex. 4 (Hearing Tr.) at 8:17-9:9.)¹

3. Every one of Plaintiff's 24 noticed topics is overly broad and would impose undue burden and expense upon Airbnb, given the needs of the case. *See* SCRCP 26(a), (c). Plaintiff apparently does not appreciate that Airbnb is a global company and that millions of hosts list millions of properties on its platform. Plaintiff seeks to force Airbnb to educate witnesses about nearly a decade of Airbnb global policies and practices (e.g., Request 16), while others require it to prepare witnesses to memorize and recite lists of lawsuits (e.g., Request 19) and employees (e.g., Request 22) over a similar time period and geographic scope. But "Rule 30(b)(6) is not designed to be a memory contest." *See, e.g., Atanassova v. Gen. Motors LLC*, 2021 WL 1946520, at *3 (D.S.C. Mar. 12, 2021). Airbnb does not even know how to begin to collect much of the requested information, much less how to educate witnesses so as to satisfy Plaintiff's requests. And the Plaintiff's requests would require a witness to memorize copious amounts of

¹ Plaintiff's counsel and Airbnb's counsel expressly conferred about this Motion for Protective Order while at the hearing on May 31, 2022, and remain available to continue to meet and confer about this Motion prior to any hearing upon it, in compliance with the South Carolina Rules of Civil Procedure.

Electronically Stored Information—a discovery tactic whose burden obviously “outweighs its likely benefit.” *See* SCRCP 26(b)(6).

4. Plaintiff compounds her error by propounding requests as to topic areas that are vague, ambiguous, insufficiently described, or otherwise unintelligible in the context of Airbnb’s business—something Plaintiff again could have remedied if she had bothered to call Airbnb’s counsel and conferred in good faith. Rule 30(b)(6) “puts certain burdens on both parties,” with the “initial burden . . . fall[ing] on the Plaintiffs . . . to “describe[] with reasonable particularity the matters on which examination is requested.” *Tuition Payer 100 v. Bishop of Charleston*, 2021 WL 3611936, at *2 (D.S.C. Aug. 11, 2021); *see also* SCRCP 30(b)(6) (requiring party to “describe with reasonable particularity the matters on which examination is requested”). Asking for testimony, for example, on “[a]ll non-privileged information of Airbnb, Inc. regarding the factual allegations in the case of *Foster v. Riviere*” (Request 2) or does not come close to meeting Plaintiff’s burden. This is particularly problematic in a 30(b)(6) deposition where Airbnb has an obligation to educate its witnesses to respond to the topics. Vague topics leave Airbnb with the impossible task of guessing what information Plaintiff actually seeks, wasting everyone’s time and effort and setting up further disputes when Plaintiff is inevitably disappointed by the testimony she receives.

5. Many of Plaintiff’s requests suffer from the deeper flaw that they are not reasonably calculated to lead to relevant information—and many just seek to harass or embarrass Airbnb. *See* SCRCP 26(b)(1) (limiting discovery to information “relevant to the subject matter involved”); 26(c) (authorizing protective order to prevent harassment). Plaintiff is not entitled to a decade’s worth of information in *other* lawsuits (Requests 19 & 20), and Airbnb’s host-insurance program has no bearing on Airbnb’s liability here (Request 10).

6. Additionally, some of Plaintiff's requests would require Airbnb's witness to testify about privileged information or information that Airbnb cannot disclose under the Stored Communications Act or other applicable confidentiality obligations.

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

8. Airbnb expects to file a memorandum in support of this Motion under South Carolina Rule of Civil Procedure Rule 26 and in compliance with applicable law.

9. Lastly, Airbnb seeks Court permission to appear by virtual means for its deposition, at a date mutually convenient once this Motion is ruled upon, rather than appear in person in Aiken, SC, on a unilaterally chosen date by Plaintiff.

DATED this 14th day of June, 2022.

BUTLER WEIHMULLER KATZ CRAIG LLP

By /s/ L. Andrew Watson

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF AIKEN	)	2nd JUDICIAL CIRCUIT
Julianne Foster,	)	Case No: 2021-CP-02-00889
Plaintiff,	)	
vs.	)	PLAINTIFF'S NOTICE OF DEPOSITION
Rhett Riviere, Katherine A. Thomas,	)	OF DEFENDANT AIRBNB INC. UNDER
Chase Enterprises, LLC of South Carolina,	)	RULE 30(B)(6), SCRCP
and AIRBNB Inc.,	)	
Defendants.	)	

TO: L. ANDREW WATSON, COUNSEL TO AIRBNB, INC.:

PLEASE TAKE NOTICE, that, under Rule 30 and also Rule 30(b)(6), SCRCP, Plaintiff, Julianne Foster ("Foster") will examine Defendant, AIRBNB, Inc., ("AIRBNB") in a stenographic deposition which will be taken before qualified Notary Public in-person or via Zoom video conference beginning at 9:00 a.m. _____, 2022.

Under Rule 30(b)(6), AIRBNB, must designate and prepare one or more officers, directors, managing agents or other persons who consent to testify on behalf of AIRBNB and whom AIRBNB will prepare to testify regarding all information known or reasonably available to AIRBNB's organization regarding the following designated matters.

Matters of Examination

1. The organizational, leadership and management structure of Airbnb, Inc. during the time period of January 1, 2019 through the present.



2. All information of Airbnb, Inc. in the case of *Foster v. Riviere, et al* – 2021-CP-02-00889.
3. All agreements and/or contracts between Rhett Riviere, Chase Enterprises, LLC of South Carolina, and/or Katherine Thomas with Airbnb.
4. All records, reports, documents, correspondence, handwritten notes or otherwise, materials of any kind that concern, reference or relate to any of the following: Rhett Riviere, Chase Enterprises, LLC of South Carolina, Katherine Thomas and/or Julianne Foster.
5. All facts, information, and opinions upon which AIRBNB's online booking program notifies potential hosts of policies and procedures related to background checks performed by approved background check providers.
6. All facts and information upon which AIRBNB, through approved background check providers, checks databases of public state and county criminal records as well as state and national sex offender registries including specific detail regarding how AIRBNB processes findings from these third-party checks.
7. All facts and information upon which AIRBNB's background check practices caused a host to be rejected from utilizing AIRBNB's online booking program or guest(s) reservation(s) canceling due to background check findings.
8. All facts and information upon which AIRBNB agrees to filters for background checks with approved providers (i.e. canvassing public records whereby an arrest took place in addition to any convictions that followed).
9. All facts, information, and opinions upon which AIRBNB executes removal, reinstatement, criteria for eligibility, and appeals associated with implications AIRBNB's background check policies have for hosts and guests.
10. All facts and information related to the AirCover protection, including all audiences to

which it is presented (i.e. limited to hosts, available to hosts and guests) and whether hosts can opt out of AirCover protection.

11. All facts and information related to AIRBNB's governance of their privacy policies as they relate to disclosed or concealed monitoring devices including data supporting removal, reinstatement, and appeals of hosts who violate the policy.
12. All facts and information to AIRBNB's notification of state statutes related to real estate property management licensure to hosts and potential hosts including links to outside sources for assistance.
13. All communications between "Michele" and Defendant Katherine Thomas via AIRBNB's online booking program since April 12, 2019.
14. All Protocols, manuals, memoranda, or other written standards of care or instructions that reference or concern the safety of guests while staying in an Airbnb property during the time period of December 1, 2013 through the present.
15. All Protocols, manuals, memoranda, or other written standards of care or instructions that reference or concern the vetting of hosts by Airbnb during the time period of December 1, 2013 through the present.
16. All Protocols, manuals, memoranda, or other written standards of care or instructions that reference or concern the inspection of host properties by Airbnb during the time period of December 1, 2013 through the present.
17. All Protocols, manuals, memoranda, or other written standards of care or instructions that reference or concern the use of video cameras by Airbnb hosts during the time period of December 1, 2013 through the present.
18. All reports and/or complaints made to Airbnb of guests being secretly videotaped while

staying in an Airbnb during the time period of December 1, 2013 through the present.

19. All lawsuits filed against Airbnb related to guests being secretly videotaped during the time period of December 1, 2013 through the present.
20. All settlements entered into by Airbnb related to guests being secretly videotaped during the time period of December 1, 2013 through the present.
21. The employee training record(s) for all employees of Airbnb, Inc. that have responsibilities related to guest safety during the time period of December 1, 2013 through the present.
22. The identity of all Airbnb employee(s) involved in the vetting of Airbnb hosts during the time period of December 1, 2013 through the present.
23. The internal reports and/or external reports and/or audits during the last ten years of Airbnb that relate to guest safety during the time period of December 1, 2013 through the present.
24. The assets and liabilities of Airbnb, Inc.

AIRBNB's Duties and Obligations for this Deposition

AIRBNB must produce a knowledgeable witness about the facts, issues, and designations of documents referenced in this Notice. Complying with Rule 30(b)(6) may require the designation of more than one person to respond to the areas of inquiry stated in this Notice. For this Notice and/or the requested deposition, please consider these precedential cases to be a summary of the requirements applicable to AIRBNB's corporate designee(s).

Answers and testimony given by AIRBNB's designee(s) bind AIRBNB. Covol Fuels No. 4, LLC v. Pinnacle Min. Co., LLC, 785 F.3d 104, 113 n.13 (4th Cir. 2015); Ethox Chem., LLC v. Coca-Cola Co., No. 6:12-CV-01682-TMC, 2014 WL 2719214, at *2 (D.S.C. June 16, 2014) ("It follows that, in order to comply with the rule, the corporation has an affirmative duty to ensure that its designee has knowledge of all information on the noticed topics reasonably

available to the corporation and is prepared to provide complete, binding answers on that information.”); Career Counseling, Inc. v. Amsterdam Printing & Litho, Inc., No. 3:15-CV-05061-JMC, 2018 WL 3037106, at *7 (D.S.C. June 19, 2018).

The corporate designee need not have firsthand knowledge of the events in question, but to make the deposition meaningful, the designee must be prepared to provide “complete, knowledgeable, and binding answers on behalf of the corporation.” Marker v. Union Fidelity Life Inc. Co., 125 F.R.D. 121, 126 (M.D.N.C. 1989); see also In re Vitamins Antitrust Litig., 216 F.R.D.168 (D.D.C. 2003). The designee’s preparation should include a review of prior fact witness deposition testimony and documents and deposition exhibits, even if that review would be burdensome. Calzaturificio S.C.A.R.P.A. s.p.a. v. Fabiano Shoe Co., Inc., 201 F.R.D. 33, 36-37 (D. Mass. 2001). The primary objective of discovery is to ensure that lawsuits are decided by what the facts reveal, not by what facts are concealed. In Re Anonymous Member of the S.C. Bar, 346 S.C. 177, 193, 552 S.E.2d 10, 18 (2001).

Where Rule 30(b)(6) depositions are noticed after previous corporate depositions have been taken and the Rule 30(b)(6) notice includes topics partially covered in the previous corporate depositions, the courts have denied motions for protective orders seeking preclusion or limitation on the later Rule 30(b)(6) deposition. See e.g., Foster-Miller, Inc. vs. Babcock & Wilcox Canada, 201 F.3d 1 (1st Cir. 2000) (explaining the burden is on company to determine best designee to testify for corporation and prior deposition of corporate fact witness did not preclude Rule 30(b)(6) deposition). The case law is also clear that Rule 30(b)(6) cannot be used to limit what is asked of the designated witness at a deposition. King v. Pratt & Whitney, 161 F.R.D. 475 (S.D. Fla. 1995).

The descriptions and/or topics within the Rule 30(b)(6) notice simply identifies the

minimum to which a witness must be prepared to testify, not the maximum. Detoy v. City & County of San Francisco, 196 F.R.D. 362, 366 (N.D. Cal. 2000); King v. Pratt & Whitney, 161 F.R.D. at 475. Under South Carolina law, generally, evidence objected to shall be taken subject to objection. Instructions not to answer questions at a deposition are improper. See Rule 30(c), SCRCF. Finally, if an examining party asks a question arguably outside the scope of the matters described in the Notice, the general provisions of Rule 26(b)(1), SCRCF would apply. (“Parties may object discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action”).

Opinions

Rule 30(b)(6) requires that an organization “must not only testify about facts within [its] knowledge, but also its subjective beliefs and opinions ... its interpretation of documents and events.” U.S. v. Taylor, 166 F.R.D. 356, 361-63 (M.D.N.C. 1996) affirmed, 166 F.R.D. 367 (M.D.N.C. 1996).

Knowledge of Organization

Rule 30(b)(6) is intended to prevent serial depositions of various organizational witnesses without the proper knowledge and to eliminate “bandying,” which is when several people are deposed but each disclaims knowledge of facts clearly known to persons in the organization and thereby known by the organization itself. FED. R. CIV. P. 30(b)(6), Advisory Committee Note: 1970 Amendment. “[T]he purpose of a Rule 30(b)(6) deposition is to get answers on the subject matter described with reasonable particularity by the noticing party, not to simply get answers limited to what the deponent happens to know.” Alexander v. F.B.I., 186 F.R.D. 148, 152 (D.D.C. 1999). The testimony elicited at the Rule 30(b)(6) deposition represents the knowledge of the corporation, not the individual deponents. U.S. v. Taylor, 166 F.R.D. 356 (M.D.N.C. 1996). “[I]f

it becomes obvious during the course of a deposition that the designee is deficient, the [organization] is obligated to provide a substitute.” Prokosch v. Catalina Lighting, 193 F.R.D. 633 (D. Minn. 2000).

Duty to Prepare

An organization cannot avoid its Rule30(b)(6) obligations by “sticking its head in the sand,” refusing to look for the answers, and then saying it does not know the answer. In re Independent Service Orgs Antitrust Litig., 168 F.R.D. 651, 653 (D. Kan.1996). If the representative(s) cannot testify as to the corporation’s collective information on the matters requested, then the corporation and/or its attorneys must collect the information and prepare the representative(s) so that the representative(s) can give complete, knowledgeable, and binding testimony. Starlight Int’l Inc. v. Herlihy, 186 F.R.D. 626, 638 (D. Kan. 1999). A thorough, “reasonable” investigation may require an organization to rely on business records, other documents, interviews with present and former employees. U.S. v. Taylor, 166 F.R.D. at 361.

Imposing a duty to prepare its representative(s) ensures that an organization will not ambush an opponent by conducting half-hearted inquiry before the deposition but a thorough and vigorous one before trial. Id. at 362. “If that preparation means tracking much the same investigative ground that counsel and the risk management / peer review committee have already traversed, but independently of that investigation, so be it.” Wilson v. Lakner, 228 F.R.D. 524 (D. Md. 2005). The company must produce, a knowledgeable deponent competently prepared to fully and responsibly address the questions posed by the requesting party. Prokosch v. Catalina Lighting, 193 F.R.D. 633 (D. Minn. 2000). “Defendant must prepare deponents by having them review prior fact witness deposition testimony as well as documents and deposition exhibits.” Id. Unless it can provide that the information was not known or was inaccessible, a corporation cannot

later proffer new or different allegations that could have been made at the time of the 30(b)(6) deposition. Rainey v. American Forest & Paper Assoc., 26 F. Supp. 2d 82 (D.D.C. 1998). Defendant will be precluded from offering any testimony at trial on the subjects, which its designee was unable or unwilling to testify about at the 30(b)(6) deposition. QBE v. Jorda, 277 F.R.D. 676 (S.D. Fla. 2012).

Areas of Inquiry

Areas of inquiry seek the discovery of facts and the source of information that are clearly relevant and discoverable. BEOC v. Caesars Entertainment, Inc., 237 F.R.D. 428, 434 (D. Nev. 2006). “A party which intends to assert claims and defenses in litigation must adequately prepare an individual to testify as to those claims and defenses.” In Re Classicstar Mare Lease Litigation, 2009 WL1313311 (E.D. KY. 2009). Discovery of facts and the source of information about the defendants’ claims and defenses are relevant and discoverable. EEOC v. Caesars Entertainment, Inc., 237 F.R.D. 534, 541 (D. Nev. 2008). “Clients cannot refuse to disclose facts which their attorneys conveyed to them and which the attorneys obtained from independent sources.” Id. Rule 30(b)(6) cannot be used to limit what is asked of a designated witness at a deposition. Rather, the Rule simply defines a corporation’s obligations regarding whom they must produce for such a deposition and what that witness must be able to answer. King v. Pratt & Whitney, 161 F.R.D. 475, 476 (S.D. Fla. 1995). Rule 30(b)(6) is not a limitation -- 30(b)(6) defines minimum, not maximum scope of inquiry -- and Rule 26(b)(1) seeks anything leading to relevant information. Id.

No Objection if Difficult to Prepare

An organization cannot simply object to a Rule 30(b)(6) deposition because the required investigation would be “difficult” or “time consuming.” Buycks-Robertson v. Citibank Fed. Sav.

Bank, 162 F.R.D. 338, 343 (N.D. Ill. 1995). Even if corporate documents are voluminous and the review of those documents would be burdensome, a representative is still required to review them to prepare for the deposition; such preparation is necessary because the individuals so deposed must testify to the knowledge of the corporation, not the individual. See Calzaturificio S.C.A.R.P.A, s.p.a. v. Fabiano Shoe Co., 201 F.R.D. 33 (D.Mass.2001).

Sanctions

Failure to provide knowledgeable designees who can answer on behalf of Plaintiff shall be treated as contempt of court under Rule 37(b), and in such a circumstance Plaintiff's designee(s) and counsel may be jailed until the matters are testified to properly. Pioneer Drive, LLC v. Nissan, 262 F.R.D. 552 (D.MX. 2009). Preparing a designated witness with only the self-serving half of the story that is the subject of his testimony is not an act of good faith. Sciarietta v. Lincoln Nat. Fus. Co., No.13-12559 (11th Cir. 2015). Instructions not to respond that neither shielded a privilege nor supplied time to apply for a protective order were unprofessional and violated the Federal Rules of Civil Procedure and the ethical rule. Redwood v. Dobson, 476 F.3d 462 (7th Cir. 2007).

Former Employees

If the corporation no longer employs individuals with memory of distant events or such individuals are deceased, this still does not relieve the corporation from preparing its designee(s) for the deposition of the corporation to extent matters are reasonably available, whether from documents, past employees, or other sources; while the corporation may plead lack of memory, if it wishes to assert positions based on testimony from third parties, or their documents, the designee still must present opinions as to why the corporation believes the facts should be so construed. U.S. v. Taylor, 166 F.R.D. at 361.

More Than One Designee

The corporation must designate more than one deponent if it would be necessary to do so to respond to the areas of inquiry specified with reasonable particularity. Alexander v. F.B.T., 186 F.R.D. 148, 151 (D.D.C. 1999). “The corporation then must not only produce such number of persons as will satisfy the request, but more importantly, prepare them so that they may give complete, knowledgeable and binding answers on behalf of the corporation.” Marker v. Union Fidelity Life, Inc., 125 F.R.D.121 (M.D.N.C. 1989).

TABLE OF DEFINITIONS / ABBREVIATIONS

This section defines various words and phrases in this Notice. This information is provided to clarify the means of terms in this Notice to assist AIRBNB in understanding the objectives of Plaintiff’s discovery efforts, and to help locate and furnish the information and materials.

1. “AIRBNB” or “**Defendant**,” - Refers to AIRBNB, Inc., its subsidiaries, divisions, or any other entity (by whatever name and/or denomination), which is/was an owner, a predecessor or successor in interest, including any entity which may have merged or consolidated with AIRBNB’s designee may also be asked questions potentially known by another party, other contracting entities, or their agents or employees. By acceptance of this Notice, and production of a responsive witness thereto. AIRBNB acknowledges it will produce someone knowledgeable about such matters. To the extent any other party, agent, or employee of AIRBNB can provide answers or responses unknown to AIRBNB’s designated representative, be prepared to explain why that is the case.

2. The phrase “**writing and recording**” shall be defined under South Carolina Rules of Evidence Rule 1001(1), which specifically includes all electronic communications and electronically recorded information such as word processing files, e-mails, and computer /

network backup media.

3. The term “**photograph**” shall be defined under South Carolina Rules of Evidence Rule 1001(2).

4. Where originals and/or non-identical copies are not available, “**writing and recording**” also means identical copies of original writing or recording and copies of non-identical copies.

5. “**Information**” - This term should include reference to both facts and applicable principles. This word should not be construed to be limited to any method of acquisition or compilation and should, therefore, be construed to include oral information and documents or other tangible objects.

[signature on following page]

Respectfully submitted,

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March 20, 2022
Greenville, South Carolina

April 13, 2022

Via Email Only

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Re: *Julianne Foster v. Rhett Riviere, Katherine A. Thomas, et al.*
C/A Number: 2021-CP-02-00889
Our File Number: 2105306

Dear Debbie:

We write to respond to your March 20, 2022 e-mail requesting depositions of:

- 1) Airbnb, Inc. under South Carolina Rule of Civil Procedure 30(b)(6) spanning twenty-four (24) broad proposed topic areas;
- 2) Brian Chesky, Airbnb's Chief Executive Officer;
- 3) Tara Bunch, Airbnb's Head of Global Operations; and
- 4) Nick Shapiro, Airbnb's former Head of Trust and Risk Management.

Airbnb will discharge its discovery obligations under South Carolina law and make its employees reasonably available for depositions, but Plaintiff, too, must follow the Rules. Harassing Airbnb with threats to notice the depositions of senior executives that have nothing to do with any of the underlying events giving rise to this lawsuit is a non-starter. As is a demand that Airbnb produce witnesses to memorize and recite lists of employee names, publicly available lawsuits, and nearly a decade's worth of policies unrelated to Plaintiff's suit. Airbnb is willing to offer a corporate designee to offer testimony on the topics as described below, and we are of course willing to meet and confer concerning these issues.

Depositions of Current and Former Airbnb, Inc. Executives

Airbnb objects to Plaintiff's demand to go straight to the top of Airbnb's corporate ladder and depose CEO Mr. Chesky, Head of Global Operations Ms. Bunch and former senior executive Mr. Shapiro. These are some of the highest ranking officers and executives (and former executive) in a global, publicly traded corporation. There has been

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no showing that any of the proposed deponents have any personal knowledge regarding what happened to Ms. Foster at one property in one city on one weekend in May 2019, and they are almost certain to have none. Beyond pure harassment value, there is no valid basis to even notice such depositions.

First, deposing Airbnb's senior executives would not likely lead to relevant testimony. See SCRCP 26(b)(1). Plaintiff's claims against Airbnb center largely around Airbnb's allegedly deficient background check of Rhett Riviere. According to its latest 10-K, Airbnb's community has grown to over 4 million hosts with listings in over 100,000 cities across the globe. Airbnb's senior executives are not—nor have they ever been—responsible for running individual background checks, including the ones at issue here. Nor are they responsible for the details of the various policies Plaintiff's Complaint discusses or how such policies could have applied to 115 Third Avenue, Aiken, South Carolina. There is no legitimate reason to depose them.

Moreover, taking the deposition of any senior executive would be unreasonably burdensome, disproportionate to the needs of the case, and harassing. See SCRCP 26(a), (b)(1). Courts have recognized that "apex" depositions of senior executives "creates a tremendous potential for abuse or harassment." See, e.g., *In re Lipitor (Atorvastatin Calcium) Marketing*, 2014 WL 12621613, at *2 (D.S.C. 2014) (J. Gergel). A party requesting the deposition of senior executives must therefore first show that (1) the executive has unique or special knowledge of the facts at issue; and (2) other less burdensome avenues for obtaining the information sought have been exhausted. *Id.*

Plaintiffs cannot meet either prong of this test. Plaintiffs cannot show the required unique or special knowledge of the facts at issue in this case. And Plaintiffs have not even tried to exhaust less burdensome avenues. This request is improper on its face. Airbnb respectfully requests that Plaintiffs not pursue these depositions, to avoid burdening the court with unnecessary motion practice.

Airbnb's Corporate 30(b)(6) Deposition

Airbnb also objects to Plaintiff's request to take a corporate deposition, as currently framed, as unduly burdensome. Plaintiff has not even attempted to get any of the information she seeks from individual deponents, and instead asks Airbnb to undertake the costly task of educating corporate witnesses on 24 broad and disparate topics ranging from Airbnb's guest safety issues to its financial statements. Most of these topics have no relationship to the specific events at issue in Plaintiff's complaint, and some of them appear intended to elicit information solely to attempt to embarrass or harass Airbnb. For example, some topics would require Airbnb to educate witnesses about nearly a decade of Airbnb

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policies, while others require it to prepare witnesses to memorize and recite lists of employees and settlement amounts over a similar time period. Rule 30(b)(6) depositions are not meant to be a memory test or a fishing expedition. Each of the noticed topics are irrelevant or otherwise objectionable, as Airbnb explains in more detail below.

In the interest of compromise, Airbnb is nevertheless willing to make a corporate witness available for a 30(b)(6) deposition on the following topics:

- **The existence of agreements or contracts between Airbnb, on one hand, and Rhett Riviere, Chase Enterprises, LLC, and/or Katherine Thomas that were in effect on May 17 and 18, 2019.**
- **The process by which Airbnb generally conducted background checks of potential hosts in the summer of 2016, how Airbnb located vendors used at that time to conduct these background checks, and what information and records Airbnb understood those vendors to generally check in the summer of 2016.**
- **Airbnb's policies (if any) regarding the use of video cameras by Airbnb hosts that were in effect in May 2019.**
- **Whether and if so, to what extent, Airbnb conducted inspections of the property located at 115 Third Ave., Aiken, South Carolina between the summer of 2016, when Katherine Thomas signed up as a Host, and May 2019.**

This offer is made while preserving the objections Airbnb has raised in this letter and any others it may raise should Plaintiff serve deposition notices. Airbnb's willingness to make a corporate witness available to testify to these topics is contingent on Plaintiff dropping her harassing request to depose Airbnb's current and former corporate executives and her request for a corporate witness on the other, irrelevant topics. Finally, Airbnb objects to what Plaintiff sets out as Airbnb's "duties and obligations" for the 30(b)(6) deposition on pages 4-12 of the proposed Notice of Deposition as inaccurate. Airbnb will comply with applicable law in preparing and producing any corporate witness.

Matters of Inquiry

1. The organizational, leadership and management structure of Airbnb, Inc. during the time period of January 1, 2019 through the present.

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Airbnb objects to Topic 1 as overbroad, unduly burdensome, and not proportionate to the needs of the case. Some or all of this information is publicly available in Airbnb's public filings. Airbnb also objects to Topic 1 as not likely to be related to a claim or defense of any party in this case. Airbnb's organizational, leadership, or management structure has nothing to do with Plaintiff's claims, which are about Airbnb's research into Katherine Thomas, Rhett Riviere, and the property at 115 Third Ave SW, Aiken, South Carolina, as well as policies and procedures applying thereto.

2. All information of Airbnb, Inc. in the case of *Foster v. Riviere*, et al – 2021-CP-02 00889.

Airbnb objects to Topic 2 as vague and ambiguous. Airbnb does not understand what Plaintiff means by the phrase "[a]ll information of Airbnb Inc. in the case of *Foster v. Riviere*." Airbnb also objects to Topic 2 as overbroad, unduly burdensome, and not proportionate to the needs of the case. No witness could reasonably prepare to testify knowledgeably about "[a]ll information" in this case. Airbnb also objects to Topic 2 to the extent it encompasses material protected from discovery by the attorney-client privilege, work product doctrine, or any other doctrine. Nor could Airbnb be reasonably expected to educate a corporate witness on information in the hands of plaintiff or a third party.

3. All agreements and/or contracts between Rhett Riviere, Chase Enterprises, LLC of South Carolina, and/or Katherine Thomas with Airbnb.

Airbnb objects to Topic 3 as overbroad, unduly burdensome, and not proportionate to the needs of the case to the extent it sweeps in agreements or contracts not involving Airbnb and to the extent it addresses agreements and/or contracts that were not in effect during the events of May 17 and 18, 2019, that form the basis of Plaintiff's claims. None of that information is related to a claim or defense of any party in this case.

Subject to the foregoing objections and conditioned on acceptance of Airbnb's offer above, Airbnb will agree to produce a witness to testify about the existence of any agreements or contracts between Airbnb, on one hand, and Rhett Riviere, Chase Enterprises, LLC, and/or Katherine Thomas that were in effect on May 17 and 18, 2019.

4. All records, reports, documents, correspondence, handwritten notes or otherwise, materials of any kind that concern, reference or relate to any of the following: Rhett Riviere, Chase Enterprises, LLC of South Carolina, Katherine Thomas and/or

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Julianne Foster.

Airbnb objects to Topic 4 as overbroad, unduly burdensome, and not proportionate to the needs of the case. A witness cannot reasonably be prepared to testify about every “material[] of any kind” that Airbnb may have that “concern[s], reference[s] or relate[s] to” every single other party to the case. Nor are “[a]ll” such documents, no matter the author or subject, relevant to the specific claim or defense the parties have raised in this case. Finally, Airbnb objects to the undefined phrase “concern, reference or relate” as vague and ambiguous. Airbnb also objects to Topic 4 to the extent it encompasses material protected from discovery by the attorney-client privilege, work product doctrine, or any other doctrine.

5. All facts, information, and opinions upon which AIRBNB’s online booking program notifies potential hosts of policies and procedures related to background checks performed by approved background check providers.

Airbnb objects to Topic 5 as seeking information not reasonably calculated to lead to evidence related to the claim or defense of any party in this case. Hosts’ knowledge of policies and procedures related to background checks are irrelevant to Plaintiff’s claims, which relate to the sufficiency of the background checks of Ms. Thomas and Mr. Riviere that actually took place. Airbnb also objects to Topic 5 as overbroad, unduly burdensome, and not proportionate to the needs of the case by seeking “[a]ll facts, information, and opinions” and without any limitation as to time period. Airbnb also objects to the undefined term “opinion” as vague and ambiguous. Airbnb also objects to the phrase “[a]ll facts, information, and opinions upon which AIRBNB’s online booking program notifies” as unintelligible. Airbnb also objects to Topic 5 as seeking private information protected by the Stored Communications Act or other applicable statute or regulation to the extent it calls for communications from third parties, or personally identifiable or otherwise sensitive information about third parties.

6. All facts and information upon which AIRBNB, through approved background check providers, checks databases of public state and county criminal records as well as state and national sex offender registries including specific detail regarding how AIRBNB processes findings from these third-party checks.

Airbnb objects to Topic 6 as overbroad, unduly burdensome, and not proportionate to the needs of the case by seeking “[a]ll facts and information”

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and without any limitation as to time period. Airbnb also objects to Topic 6 as overbroad, unduly burdensome, and not proportionate to the needs of the case to the extent it seeks information about specific background checks beyond those of Ms. Thomas and Mr. Riviere. Airbnb also objects to the undefined terms “databases of public state and county criminal records,” “state and national sex offender registries,” and “third-party checks,” all of which are vague and ambiguous. Airbnb also objects to the phrase “[a]ll facts and information upon which AIRBNB . . . checks databases” as unintelligible.

Subject to the foregoing objections and conditioned on acceptance of Airbnb’s offer above, Airbnb will agree to produce a witness to testify about The process by which Airbnb’s generally conducted background checks of potential hosts in the summer of 2016, how Airbnb located vendors used in the summer of 2016 to conduct these background checks, and what information and records Airbnb understands those vendors to have generally checked in 2016.

7. All facts and information upon which AIRBNB’s background check practices caused a host to be rejected from utilizing AIRBNB’s online booking program or guest(s) reservation(s) canceling due to background check findings.

Airbnb objects to Topic 7 as overbroad, unduly burdensome, and not proportionate to the needs of the case by seeking “[a]ll” facts and information about any time a host was denied from using Airbnb’s platform due to a background check and without any limitation as to time period. The only specific background checks that are relevant here are those of Ms. Thomas and Mr. Riviere. Airbnb also objects to topic 7 as seeking information not reasonably calculated to lead to relevant information. Airbnb also objects to the phrase “guest(s) reservation(s) canceling due to background check findings” as vague and ambiguous. Airbnb also objects to the phrase “[a]ll facts and information upon which AIRBNB’s background check practices caused a host to be rejected . . . or guest(s) reservation(s) canceling” as unintelligible. Airbnb also objects to Topic 5 as seeking private information protected by the Stored Communications Act or other applicable statute or regulation to the extent it calls for communications from third parties, or personally identifiable or otherwise sensitive information about third parties.

Subject to the foregoing objections and conditioned on acceptance of Airbnb’s offer above, Airbnb will agree to produce a witness to testify about the process by which Airbnb generally conducted background checks of potential hosts in

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the summer of 2016.

8. All facts and information upon which AIRBNB agrees to filters for background checks with approved providers (i.e. canvassing public records whereby an arrest took place in addition to any convictions that followed).

Airbnb objects to Topic 8 as overbroad, unduly burdensome, and not proportionate to the needs of the case by seeking “[a]ll” facts and opinions Airbnb uses to filter for background checks. Airbnb also objects to Topic 8 as seeking information not reasonably calculated to lead to relevant information. Airbnb also objects to the undefined phrase “filters for background checks” as vague and ambiguous. Airbnb does not understand what Plaintiff means. Airbnb also objects to the phrase “[a]ll facts and information upon which AIRBNB agrees to filters” as unintelligible.

Subject to the foregoing objections, Airbnb will agree to produce a witness to testify about the process by which Airbnb generally conducted background checks of potential hosts in the summer of 2016.

9. All facts, information, and opinions upon which AIRBNB executes removal, reinstatement, criteria for eligibility, and appeals associated with implications AIRBNB’s background check policies have for hosts and guests.

Airbnb objects to Topic 9 as overbroad, unduly burdensome, and not proportionate to the needs of the case by seeking “[a]ll” facts, information, and opinions any time a host was denied from using Airbnb’s platform due to a background check and without any limitation as to time period. The only specific background checks that are relevant here are those of Ms. Thomas and Mr. Riviere. Airbnb also objects to Topic 9 as seeking information not reasonably calculated to lead to relevant information. Plaintiff’s claims have nothing to do with reinstatements, appeals, or guest background checks. Airbnb also objects to the undefined phrase “associated with implications” as vague and ambiguous. Airbnb also objects to the phrase “[a]ll facts, information, and opinions upon which AIRBNB executes removal, reinstatement, criteria for eligibility, and appeals” as unintelligible. Airbnb also objects to Topic 9 as seeking private information protected by the Stored Communications Act or other applicable statute or regulation to the extent it calls for communications from third parties, or personally identifiable or otherwise sensitive information about third parties.

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Subject to the foregoing objections, Airbnb will agree to produce a witness to testify about the process by which Airbnb generally conducted background checks of potential hosts in the summer of 2016.

10. All facts and information related to the AirCover protection, including all audiences to which it is presented (i.e. limited to hosts, available to hosts and guests) and whether hosts can opt out of AirCover protection.

Airbnb objects to Topic 10 as seeking information not reasonably calculated to lead to relevant information. Airbnb also objects to Topic 10 as overbroad, unduly burdensome, and not proportionate to the needs of the case by seeking “[a]ll” facts and information “related” to AirCover protection for “all audiences.”

11. All facts and information related to AIRBNB’s governance of their privacy policies as they relate to disclosed or concealed monitoring devices including data supporting removal, reinstatement, and appeals of hosts who violate the policy.

Airbnb objects to Topic 11 as seeking information not reasonably calculated to lead to relevant information. Airbnb also objects to Topic 11 as overbroad, unduly burdensome, and not proportionate to the needs of the case by seeking “[a]ll” facts and information—including data—“related” to any type of monitoring device. Nor does this case involve any reinstatement or appeal of a host who violated a privacy policy. Airbnb also objects to the phrase “governance of their privacy policies” as vague and undefined.

Subject to the foregoing objections and conditioned on acceptance of Airbnb’s offer above, Airbnb will agree to produce a witness to testify about Airbnb’s policies (if any) regarding the use of video cameras by Airbnb hosts that were in effect in May 2019.

12. All facts and information to AIRBNB’s notification of state statutes related to real estate property management licensure to hosts and potential hosts including links to outside sources for assistance.

Airbnb objects to Topic 12 as seeking information not reasonably calculated to lead to relevant information. Airbnb does not provide legal advice to Hosts, nor does it have any responsibility to keep abreast of state and local properties where Hosts maintain properties, which is the responsibility of Hosts alone. Airbnb also objects to the undefined phrase “state statutes

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related to real estate property management licensure.” Airbnb does not understand the specific statutes about which Plaintiff means to ask. Airbnb also objects to Topic 12 as overbroad, unduly burdensome, and not proportionate to the needs of the case by seeking “[a]ll” facts and information regarding the statutes in all 50 states and without any limitation as to time period.

13. All communications between “Michele” and Defendant Katherine Thomas via AIRBNB’s online booking program since April 12, 2019.

Airbnb objects to the undefined name “Michele” as vague and ambiguous. For the purpose of this response, Airbnb interprets “Michele” to mean Michelle Jain, the guest who booked a stay at 115 Third Ave SW, Aiken, South Carolina on May 17 and 18, 2019. Airbnb also objects to Topic 13 as seeking information not reasonably calculated to lead to relevant information. Airbnb does not understand what relevant testimony its corporate representative could offer about the communications between two parties who are not employed by Airbnb; questions about those communications should be directed to Ms. Jain and Ms. Thomas. Airbnb also objects to Topic 13 as overbroad, unduly burdensome, and not proportionate to the needs of the case by seeking testimony about “[a]ll” communications between a guest and a host. Airbnb also objects to Topic 13 as seeking information protected by the Stored Communications Act or other applicable statute or regulation to the extent it calls for communications from third parties, or personally identifiable or otherwise sensitive information about third parties.

14. All Protocols, manuals, memoranda, or other written standards of care or instructions that reference or concern the safety of guests while staying in an Airbnb property during the time period of December 1, 2013 through the present.

Airbnb objects to Topic 14 as overbroad, unduly burdensome, and not proportionate to the needs of the case by seeking “[a]ll” instructions that “reference or concern” the “safety of guests” for nearly a decade. Airbnb objects to the phrase “safety of guests” as vague and ambiguous. Airbnb also objects to Topic 14 as seeking information not reasonably calculated to lead to relevant information. Airbnb also objects to the term “Airbnb property” because Airbnb does not own, control, or manage the properties hosts list via its online platform. Airbnb also objects to Topic 14 to the extent it encompasses material protected from discovery by the attorney-client privilege, work product doctrine, or any other doctrine. Airbnb also objects to

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the phrase “Protocols, manuals, memoranda, or other written standards of care” as vague and ambiguous. Airbnb also objects to Topic 14 as seeking private information protected by the Stored Communications Act or other applicable statute or regulation to the extent it calls for communications from third parties, or personally identifiable or otherwise sensitive information about third parties.

Subject to the foregoing objections and conditioned on acceptance of Airbnb’s offer above, Airbnb will agree to produce a witness to testify about Airbnb’s policies (if any) regarding the use of video cameras by Airbnb hosts that were in effect in May 2019.

15. All Protocols, manuals, memoranda, or other written standards of care or instructions that reference or concern the vetting of hosts by Airbnb during the time period of December 1, 2013 through the present.

Airbnb objects to Topic 15 as overbroad, unduly burdensome, and not proportionate to the needs of the case by seeking testimony about “[a]ll” policies that “reference or concern” any forms of “vetting” hosts for nearly a decade. Airbnb also objects to Topic 15 as seeking information not reasonably calculated to lead to relevant information. Airbnb also objects to the use of the undefined term “vetting” as vague and ambiguous. Airbnb also objects to Topic 15 to the extent it encompasses material protected from discovery by the attorney-client privilege, work product doctrine, or any other doctrine. Airbnb also objects to Topic 15 as seeking private information protected by the Stored Communications Act or other applicable statute or regulation to the extent it calls for communications from third parties, or personally identifiable or otherwise sensitive information about third parties.

Subject to the foregoing objections and conditioned on acceptance of Airbnb’s offer above, Airbnb will agree to produce a witness to testify about the process by which Airbnb’s general conducted background checks of potential hosts in the summer of 2016.

16. All Protocols, manuals, memoranda, or other written standards of care or instructions that reference or concern the inspection of host properties by Airbnb during the time period of December 1, 2013 through the present.

Airbnb objects to Topic 16 as overbroad, unduly burdensome, and not proportionate to the needs of the case by seeking testimony about “[a]ll”

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policies that “reference or concern” host property inspection, regardless of the reason, over the course of nearly a decade. Airbnb also objects to Topic 16 as seeking information not reasonably calculated to lead to relevant information. Airbnb also objects to Topic 16 to the extent it encompasses material protected from discovery by the attorney-client privilege, work product doctrine, or any other doctrine.

Subject to the foregoing objections and conditioned on acceptance of Airbnb’s offer above, Airbnb will agree to produce a witness to testify about whether and if so, to what extent Airbnb conducted inspections of the property located at 115 Third Ave., Aiken, South Carolina between the summer of 2016 and May 2019.

17. All Protocols, manuals, memoranda, or other written standards of care or instructions that reference or concern the use of video cameras by Airbnb hosts during the time period of December 1, 2013 through the present.

Airbnb objects to Topic 17 as overbroad, unduly burdensome, and not proportionate to the needs of the case by seeking testimony about “[a]ll” policies that “reference or concern” policies governing the use of video cameras, over the course of nearly a decade. Airbnb also objects to Topic 17 as seeking information not reasonably calculated to lead to relevant information. Airbnb also objects to Topic 17 to the extent it encompasses material protected from discovery by the attorney-client privilege, work product doctrine, or any other doctrine.

Subject to the foregoing objections, Airbnb will agree to produce a witness to testify about Airbnb’s written policies (if any) regarding the use of video cameras by Airbnb hosts that were in effect in May 2019.

18. All reports and/or complaints made to Airbnb of guests being secretly videotaped while staying in an Airbnb during the time period of December 1, 2013 through the present.

Airbnb objects to Topic 18 as overbroad, unduly burdensome, and not proportionate to the needs of the case by seeking testimony about every single “report[] and/or complaint[]” over the course of nearly a decade without any limitation in geographic scope. Airbnb also objects to Topic 18 as seeking information not reasonably calculated to lead to relevant information. Airbnb

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also objects to Topic 18 to the extent it encompasses material protected from discovery by the attorney-client privilege, work product doctrine, or any other doctrine. Airbnb also objects to Topic 18 as seeking private information protected by the Stored Communications Act or other statute or regulation to the extent it calls for communications from third parties, or personally identifiable or otherwise sensitive information about third parties.

19. All lawsuits filed against Airbnb related to guests being secretly videotaped during the time period of December 1, 2013 through the present.

Airbnb objects to Topic 19 as overbroad, unduly burdensome, and not proportionate to the needs of the case by seeking testimony about every single lawsuit filed against Airbnb over the course of nearly a decade without any limitation in geographic scope. This information is publicly available. Airbnb also objects to Topic 19 as seeking information not reasonably calculated to lead to relevant information. Airbnb also objects to Topic 19 to the extent it encompasses material protected from discovery by the attorney-client privilege, work product doctrine, or any other doctrine.

20. All settlements entered into by Airbnb related to guests being secretly videotaped during the time period of December 1, 2013 through the present.

Airbnb objects to Topic 20 as overbroad, unduly burdensome, and not proportionate to the needs of the case by seeking highly confidential information about every single lawsuit filed against Airbnb over the course of nearly a decade without any limitation in geographic scope. Airbnb also objects to Topic 20 as seeking information not reasonably calculated to lead to relevant information. Airbnb also objects to Topic 20 to the extent it encompasses material protected from discovery by the attorney-client privilege, work product doctrine, or any other doctrine. Airbnb also objects to Topic 20 as seeking private information protected by the Stored Communications Act or other applicable statute or regulation to the extent it calls for communications from third parties, or personally identifiable or otherwise sensitive information about third parties.

21. The employee training record(s) for all employees of Airbnb, Inc. that have responsibilities related to guest safety during the time period of December 1, 2013 through the present.

Airbnb objects to Topic 21 as overbroad, unduly burdensome, and not

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proportionate to the needs of the case by seeking testimony about confidential employee records for anyone whose responsibilities touch on any type of “guest safety” for a period of almost ten years. Airbnb objects to the undefined phrase “responsibilities related to guest safety” as vague and ambiguous. Airbnb also objects to Topic 21 as seeking information not reasonably calculated to lead to relevant information. Airbnb also objects to Topic 21 to the extent it encompasses material protected from discovery by the attorney-client privilege, work product doctrine, or any other doctrine.

22. The identity of all Airbnb employee(s) involved in the vetting of Airbnb hosts during the time period of December 1, 2013 through the present.

Airbnb objects to Topic 22 as overbroad, unduly burdensome, and not proportionate to the needs of the case by seeking testimony about a broad swath of employees with no geographic limitation for a period of almost ten years. Airbnb objects to the undefined term “vetting” as vague and ambiguous. Airbnb also objects to Topic 22 as seeking information not reasonably calculated to lead to relevant information.

23. The internal reports and/or external reports and/or audits during the last ten years of Airbnb that relate to guest safety during the time period of December 1, 2013 through the present.

Airbnb objects to Topic 23 as overbroad, unduly burdensome, and not proportionate to the needs of the case by seeking testimony about every “internal and/or external report[] and/or audit[]” relating to any form of “guest safety” for the past decade. Airbnb also objects to the phrase “relate to guest safety” as vague and ambiguous. Topic 23 is also unintelligible; a “report” from April 2012 could not possibly relate to guest safety in December 2013, and neither category is relevant to this May 2019 incident. Airbnb also objects to Topic 23 as seeking information not reasonably calculated to lead to relevant information. Airbnb also objects to Topic 23 to the extent it encompasses material protected from discovery by the attorney-client privilege, work product doctrine, or any other doctrine.

24. The assets and liabilities of Airbnb, Inc.

Airbnb objects to the undefined terms “assets and liabilities” as vague and ambiguous. Airbnb also objects to Topic 24 as overbroad, unduly burdensome, and not proportionate to the needs of the case by seeking

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information that is either publicly available through Airbnb's SEC filings, or else highly confidential, and without any limitation as to time period. Airbnb also objects to Topic 24 as seeking information not reasonably calculated to lead to relevant information and is designed to harass. Airbnb also objects to Topic 24 to the extent it encompasses material protected from discovery by the attorney-client privilege, work product doctrine, or any other doctrine.

Good Faith Meet and Confer

As noted herein, Airbnb wishes to meet and confer with the Plaintiff about the topic areas and the individual witnesses requested for deposition, in good faith, before any discovery motion practice ensues. Please advise if and when you wish to do so and we can schedule it for a mutually convenient time. Thank you for your cooperation.

Should you have any questions, please do not hesitate to contact me.

With kindest regards,

BUTLER WEIHMULLER KATZ CRAIG LLP



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LAW/zh

CC: Kevin O'Brien
Julie Moose
John Harte

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF AIKEN	)	2nd JUDICIAL CIRCUIT
Julianne Foster,	)	Case No: 2021-CP-02-00889
Plaintiff,	)	
vs.	)	PLAINTIFF'S NOTICE OF DEPOSITION
Rhett Riviere, Katherine A. Thomas,	)	OF DEFENDANT AIRBNB INC. UNDER
Chase Enterprises, LLC of South Carolina,	)	RULE 30(B)(6), SCRCP
and AIRBNB Inc.,	)	
Defendants.	)	

TO: L. ANDREW WATSON, COUNSEL TO AIRBNB, INC.:

PLEASE TAKE NOTICE, that, under Rule 30 and also Rule 30(b)(6), SCRCP, Plaintiff, Julianne Foster ("Foster") will examine Defendant, AIRBNB, Inc., ("AIRBNB") in a stenographic deposition which will be taken before qualified Notary Public in-person in Aiken, South Carolina beginning at 9:00 a.m. July 12, 2022 at the law offices of Young & Thurmond, 409 Park Avenue SW, Aiken, South Carolina 29801.

Under Rule 30(b)(6), AIRBNB, must designate and prepare one or more officers, directors, managing agents or other persons who consent to testify on behalf of AIRBNB and whom AIRBNB will prepare to testify regarding all information known or reasonably available to AIRBNB's organization regarding the following designated matters.

Matters of Examination

1. The organizational, leadership and management structure of Airbnb, Inc. during the time



period of January 1, 2013 through the present.

2. All non-privileged information of Airbnb, Inc. regarding the factual allegations in the case of *Foster v. Riviere, et al* – 2021-CP-02-00889.
3. All agreements and/or contracts between Rhett Riviere, Chase Enterprises, LLC of South Carolina, and/or Katherine Thomas with Airbnb.
4. All records, reports, documents, correspondence, handwritten notes or otherwise, materials of any kind that concern, reference or relate to any of the following: Rhett Riviere, Chase Enterprises, LLC of South Carolina, Katherine Thomas and/or Julianne Foster.
5. All facts, information, and opinions upon which AIRBNB's online booking program notifies potential hosts of policies and procedures related to background checks performed by approved background check providers.
6. All facts and information upon which AIRBNB, through approved background check providers, checks databases of public state and county criminal records as well as state and national sex offender registries including specific detail regarding how AIRBNB processes findings from these third-party checks.
7. All facts and information upon which AIRBNB's background check practices caused a host to be rejected from utilizing AIRBNB's online booking program or guest(s) reservation(s) canceling due to background check findings.
8. All facts and information upon which AIRBNB agrees to filters for background checks with approved providers (i.e. canvassing public records whereby an arrest took place in addition to any convictions that followed).
9. All facts, information, and opinions upon which AIRBNB executes removal, reinstatement, criteria for eligibility, and appeals associated with implications AIRBNB's background

check policies have for hosts and guests.

10. All facts and information related to audiences to whom AirCover protection is offered, including the circumstances under which hosts can opt out of AirCover protection.
11. All facts and information related to AIRBNB's governance of their privacy policies as they relate to disclosed or concealed monitoring devices including data supporting removal, reinstatement, and appeals of hosts who violate the policy.
12. All facts and information related to AIRBNB and its hosts' compliance with state statutes concerning real estate property management licensure to hosts and potential hosts.
13. All communications between "Michele" and Defendant Katherine Thomas via AIRBNB's online booking program since April 12, 2019.
14. All Protocols, manuals, memoranda, or other written standards of care or instructions that reference or concern the safety of guests while staying in an Airbnb property during the time period of December 1, 2013 through the present.
15. All Protocols, manuals, memoranda, or other written standards of care or instructions that reference or concern the vetting of hosts by Airbnb during the time period of December 1, 2013 through the present.
16. All Protocols, manuals, memoranda, or other written standards of care or instructions that reference or concern the inspection of host properties by Airbnb during the time period of December 1, 2013 through the present.
17. All Protocols, manuals, memoranda, or other written standards of care or instructions that reference or concern the use of video cameras by Airbnb hosts during the time period of December 1, 2013 through the present.
18. All reports and/or complaints made to Airbnb of guests being secretly videotaped while

staying in an Airbnb during the time period of December 1, 2013 through the present.

19. All lawsuits filed against Airbnb related to guests being secretly videotaped during the time period of December 1, 2013 through the present.
20. All settlements entered into by Airbnb related to guests being secretly videotaped during the time period of December 1, 2013 through the present.
21. All information related to the employee training program for all employees of Airbnb, Inc. that have responsibilities related to guest safety during the time period of December 1, 2013 through the present.
22. The identity of all Airbnb employee(s) involved in the vetting of Airbnb hosts during the time period of December 1, 2013 through the present.
23. The internal reports and/or external reports and/or audits during the last ten years of Airbnb that relate to guest safety during the time period of December 1, 2013 through the present.
24. The assets and liabilities of Airbnb, Inc.

AIRBNB's Duties and Obligations for this Deposition

AIRBNB must produce a knowledgeable witness about the facts, issues, and designations of documents referenced in this Notice. Complying with Rule 30(b)(6) may require the designation of more than one person to respond to the areas of inquiry stated in this Notice. For this Notice and/or the requested deposition, please consider these precedential cases to be a summary of the requirements applicable to AIRBNB's corporate designee(s).

Answers and testimony given by AIRBNB's designee(s) bind AIRBNB. Covol Fuels No. 4, LLC v. Pinnacle Min. Co., LLC, 785 F.3d 104, 113 n.13 (4th Cir. 2015); Ethox Chem., LLC v. Coca-Cola Co., No. 6:12-CV-01682-TMC, 2014 WL 2719214, at *2 (D.S.C. June 16, 2014) ("It follows that, in order to comply with the rule, the corporation has an affirmative duty

to ensure that its designee has knowledge of all information on the noticed topics reasonably available to the corporation and is prepared to provide complete, binding answers on that information.”); Career Counseling, Inc. v. Amsterdam Printing & Litho, Inc., No. 3:15-CV-05061-JMC, 2018 WL 3037106, at *7 (D.S.C. June 19, 2018).

The corporate designee need not have firsthand knowledge of the events in question, but to make the deposition meaningful, the designee must be prepared to provide “complete, knowledgeable, and binding answers on behalf of the corporation.” Marker v. Union Fidelity Life Inc. Co., 125 F.R.D. 121, 126 (M.D.N.C. 1989); see also In re Vitamins Antitrust Litig., 216 F.R.D.168 (D.D.C. 2003). The designee’s preparation should include a review of prior fact witness deposition testimony and documents and deposition exhibits, even if that review would be burdensome. Calzaturificio S.C.A.R.P.A. s.p.a. v. Fabiano Shoe Co., Inc., 201 F.R.D. 33, 36-37 (D. Mass. 2001). The primary objective of discovery is to ensure that lawsuits are decided by what the facts reveal, not by what facts are concealed. In Re Anonymous Member of the S.C. Bar, 346 S.C. 177, 193, 552 S.E.2d 10, 18 (2001).

Where Rule 30(b)(6) depositions are noticed after previous corporate depositions have been taken and the Rule 30(b)(6) notice includes topics partially covered in the previous corporate depositions, the courts have denied motions for protective orders seeking preclusion or limitation on the later Rule 30(b)(6) deposition. See e.g., Foster-Miller, Inc. vs. Babcock & Wilcox Canada, 201 F.3d 1 (1st Cir. 2000) (explaining the burden is on company to determine best designee to testify for corporation and prior deposition of corporate fact witness did not preclude Rule 30(b)(6) deposition). The case law is also clear that Rule 30(b)(6) cannot be used to limit what is asked of the designated witness at a deposition. King v. Pratt & Whitney, 161 F.R.D. 475 (S.D. Fla. 1995).

The descriptions and/or topics within the Rule 30(b)(6) notice simply identifies the minimum to which a witness must be prepared to testify, not the maximum. Detoy v. City & County of San Francisco, 196 F.R.D. 362, 366 (N.D. Cal. 2000); King v. Pratt & Whitney, 161 F.R.D. at 475. Under South Carolina law, generally, evidence objected to shall be taken subject to objection. Instructions not to answer questions at a deposition are improper. See Rule 30(c), SCRCF. Finally, if an examining party asks a question arguably outside the scope of the matters described in the Notice, the general provisions of Rule 26(b)(1), SCRCF would apply. (“Parties may object discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action”).

Opinions

Rule 30(b)(6) requires that an organization “must not only testify about facts within [its] knowledge, but also its subjective beliefs and opinions ... its interpretation of documents and events.” U.S. v. Taylor, 166 F.R.D. 356, 361-63 (M.D.N.C. 1996) affirmed, 166 F.R.D. 367 (M.D.N.C. 1996).

Knowledge of Organization

Rule 30(b)(6) is intended to prevent serial depositions of various organizational witnesses without the proper knowledge and to eliminate “bandying,” which is when several people are deposed but each disclaims knowledge of facts clearly known to persons in the organization and thereby known by the organization itself. FED. R. CIV. P. 30(b)(6), Advisory Committee Note: 1970 Amendment. “[T]he purpose of a Rule30(b)(6) deposition is to get answers on the subject matter described with reasonable particularity by the noticing party, not to simply get answers limited to what the deponent happens to know.” Alexander v. F.B.I., 186 F.R.D. 148, 152 (D.D.C. 1999). The testimony elicited at the Rule 30(b)(6) deposition represents the knowledge of the

corporation, not the individual deponents. U.S. v. Taylor, 166 F.R.D. 356 (M.D.N.C. 1996). “[I]f it becomes obvious during the course of a deposition that the designee is deficient, the [organization] is obligated to provide a substitute.” Prokosch v. Catalina Lighting, 193 F.R.D. 633 (D. Minn. 2000).

Duty to Prepare

An organization cannot avoid its Rule30(b)(6) obligations by “sticking its head in the sand,” refusing to look for the answers, and then saying it does not know the answer. In re Independent Service Orgs Antitrust Litig., 168 F.R.D. 651, 653 (D. Kan.1996). If the representative(s) cannot testify as to the corporation’s collective information on the matters requested, then the corporation and/or its attorneys must collect the information and prepare the representative(s) so that the representative(s) can give complete, knowledgeable, and binding testimony. Starlight Int’l Inc. v. Herlihy, 186 F.R.D. 626, 638 (D. Kan. 1999). A thorough, “reasonable” investigation may require an organization to rely on business records, other documents, interviews with present and former employees. U.S. v. Taylor, 166 F.R.D. at 361.

Imposing a duty to prepare its representative(s) ensures that an organization will not ambush an opponent by conducting half-hearted inquiry before the deposition but a thorough and vigorous one before trial. Id. at 362. “If that preparation means tracking much the same investigative ground that counsel and the risk management / peer review committee have already traversed, but independently of that investigation, so be it.” Wilson v. Lakner, 228 F.R.D. 524 (D. Md. 2005). The company must produce, a knowledgeable deponent competently prepared to fully and responsibly address the questions posed by the requesting party. Prokosch v. Catalina Lighting, 193 F.R.D. 633 (D. Minn. 2000). “Defendant must prepare deponents by having them review prior fact witness deposition testimony as well as documents and deposition exhibits.” Id.

Unless it can provide that the information was not known or was inaccessible, a corporation cannot later proffer new or different allegations that could have been made at the time of the 30(b)(6) deposition. Rainey v. American Forest & Paper Assoc., 26 F. Supp. 2d 82 (D.D.C. 1998). Defendant will be precluded from offering any testimony at trial on the subjects, which its designee was unable or unwilling to testify about at the 30(b)(6) deposition. QBE v. Jorda, 277 F.R.D. 676 (S.D. Fla. 2012).

Areas of Inquiry

Areas of inquiry seek the discovery of facts and the source of information that are clearly relevant and discoverable. BEOC v. Caesars Entertainment, Inc., 237 F.R.D. 428, 434 (D. Nev. 2006). “A party which intends to assert claims and defenses in litigation must adequately prepare an individual to testify as to those claims and defenses.” In Re Classicstar Mare Lease Litigation, 2009 WL1313311 (E.D. KY. 2009). Discovery of facts and the source of information about the defendants’ claims and defenses are relevant and discoverable. EEOC v. Caesars Entertainment, Inc., 237 F.R.D. 534, 541 (D. Nev. 2008). “Clients cannot refuse to disclose facts which their attorneys conveyed to them and which the attorneys obtained from independent sources.” Id. Rule 30(b)(6) cannot be used to limit what is asked of a designated witness at a deposition. Rather, the Rule simply defines a corporation’s obligations regarding whom they must produce for such a deposition and what that witness must be able to answer. King v. Pratt & Whitney, 161 F.R.D. 475, 476 (S.D. Fla. 1995). Rule 30(b)(6) is not a limitation -- 30(b)(6) defines minimum, not maximum scope of inquiry -- and Rule 26(b)(1) seeks anything leading to relevant information. Id.

No Objection if Difficult to Prepare

An organization cannot simply object to a Rule 30(b)(6) deposition because the required

investigation would be “difficult” or “time consuming.” Buycks-Robertson v. Citibank Fed. Sav. Bank, 162 F.R.D. 338, 343 (N.D. Ill. 1995). Even if corporate documents are voluminous and the review of those documents would be burdensome, a representative is still required to review them to prepare for the deposition; such preparation is necessary because the individuals so deposed must testify to the knowledge of the corporation, not the individual. See Calzaturificio S.C.A.R.P.A, s.p.a. v. Fabiano Shoe Co., 201 F.R.D. 33 (D.Mass.2001).

Sanctions

Failure to provide knowledgeable designees who can answer on behalf of Plaintiff shall be treated as contempt of court under Rule 37(b), and in such a circumstance Plaintiff’s designee(s) and counsel may be jailed until the matters are testified to properly. Pioneer Drive, LLC v. Nissan, 262 F.R.D. 552 (D.MX. 2009). Preparing a designated witness with only the self-serving half of the story that is the subject of his testimony is not an act of good faith. Sciarietta v. Lincoln Nat. Fus. Co., No.13-12559 (11th Cir. 2015). Instructions not to respond that neither shielded a privilege nor supplied time to apply for a protective order were unprofessional and violated the Federal Rules of Civil Procedure and the ethical rule. Redwood v. Dobson, 476 F.3d 462 (7th Cir. 2007).

Former Employees

If the corporation no longer employs individuals with memory of distant events or such individuals are deceased, this still does not relieve the corporation from preparing its designee(s) for the deposition of the corporation to extent matters are reasonably available, whether from documents, past employees, or other sources; while the corporation may plead lack of memory, if it wishes to assert positions based on testimony from third parties, or their documents, the designee still must present opinions as to why the corporation believes the facts should be so construed.

U.S. v. Taylor, 166 F.R.D.at 361.

More Than One Designee

The corporation must designate more than one deponent if it would be necessary to do so to respond to the areas of inquiry specified with reasonable particularity. Alexander v. F.B.T., 186 F.R.D. 148, 151 (D.D.C. 1999). “The corporation then must not only produce such number of persons as will satisfy the request, but more importantly, prepare them so that they may give complete, knowledgeable and binding answers on behalf of the corporation.” Marker v. Union Fidelity Life, Inc., 125 F.R.D.121 (M.D.N.C. 1989).

TABLE OF DEFINITIONS / ABBREVIATIONS

This section defines various words and phrases in this Notice. This information is provided to clarify the means of terms in this Notice to assist AIRBNB in understanding the objectives of Plaintiff’s discovery efforts, and to help locate and furnish the information and materials.

1. “AIRBNB” or “**Defendant**,” - Refers to AIRBNB, Inc., its subsidiaries, divisions, or any other entity (by whatever name and/or denomination), which is/was an owner, a predecessor or successor in interest, including any entity which may have merged or consolidated with AIRBNB’s designee may also be asked questions potentially known by another party, other contracting entities, or their agents or employees. By acceptance of this Notice, and production of a responsive witness thereto. AIRBNB acknowledges it will produce someone knowledgeable about such matters. To the extent any other party, agent, or employee of AIRBNB can provide answers or responses unknown to AIRBNB’s designated representative, be prepared to explain why that is the case.

2. The phrase “**writing and recording**” shall be defined under South Carolina Rules of Evidence Rule 1001(1), which specifically includes all electronic communications and

electronically recorded information such as word processing files, e-mails, and computer / network backup media.

3. The term “**photograph**” shall be defined under South Carolina Rules of Evidence Rule 1001(2).

4. Where originals and/or non-identical copies are not available, “**writing and recording**” also means identical copies of original writing or recording and copies of non-identical copies.

5. “**Information**” - This term should include reference to both facts and applicable principles. This word should not be construed to be limited to any method of acquisition or compilation and should, therefore, be construed to include oral information and documents or other tangible objects.

[signature on following page]

Respectfully submitted,

WESLEY D. FEW, LLC

/s/Wesley D. Few

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-and-

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ATTORNEYS FOR PLAINTIFF JULIANNE FOSTER

May 26, 2022
Greenville, South Carolina

STATE OF SOUTH CAROLINA)
) COURT OF COMMON PLEAS
COUNTY OF AIKEN)
) 2021-CP-02-00889
)
)
)
)
)
)
JULIANNE FOSTER,)
)
) PLAINTIFF,)
)
)
vs.)
) TRANSCRIPT OF RECORD
)
)
RHETT RIVIERE, KATHERINE A.)
)
THOMAS, CHASE ENTERPRISES,)
)
LLC OF SOUTH CAROLINA, AND)
)
AIRBNB, INC.,)
)
) DEFENDANTS.)

May 31, 2022
Aiken South Carolina

B E F O R E:

THE HONORABLE MARKLEY R. DENNIS, JUDGE.

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

WES FEW, ESQ.
DEBORAH BARBIER, ESQ.
Attorneys for the Plaintiff

JULIE MOOSE, ESQ.
DAMON WLODARCZYK, ESQ.
RYAN DUFFY, ESQ.
Attorney for the Defendants

Proceedings Recorded by DCRP
Transcribed by Penny M. Johnson

EXHIBIT

4

I N D E X

(There were no witnesses called.)

E X H I B I T S

(There were no exhibits submitted.)

P R O C E E D I N G S

THE COURT: The next one is Foster vs. Riviere, et al. It looks like two matters: A Rule to Show Cause and Motion to Compel.

If you will identify yourselves, please, for purposes of the record, and the parties you represent.

MR. FEW: Thank you, Your Honor. Wes Few, I represent the Plaintiff, Julianne Foster, and this is Deb Barbier, who represents the Plaintiff as well.

MS. BARBIER: Good morning, Your Honor.

THE COURT: Good morning.

MS. MOOSE: Good morning, Your Honor, Julie Moose for Defendants Riviere and Chase Enterprises.

THE COURT: Okay.

MR. DUFFY: Good morning, Your Honor. Ryan Duffy for Defendant Airbnb, Inc.

MR. WLODARCZYK: Good morning, Your Honor. Damon Wlodarczyk on behalf of Katherine Thomas. My notice of appearance was just filed this morning.

THE COURT: Thank you so much. Glad to have you.

All right. We have a Motion to Compel and a Motion for Rule to Show Cause.

MR. FEW: Your Honor, we'll focus on the Motion to Compel first --

THE COURT: I figured you might.

1 MR. FEW: -- if it please the Court. We do have one
2 issue remaining with the Rule to Show Cause and nobody is
3 here on that, but, basically, we've asked that they give us
4 an Affidavit of, basically, a records custodian saying that
5 this is a complete response to the subpoena, and we haven't
6 gotten a response to that.

7 THE COURT: We'll definitely accommodate and help you
8 on that.

9 MR. FEW: Thank you, Your Honor.

10 May it please the Court, Wes Few again on behalf of the
11 Plaintiff, Julianne Foster. I don't know how much Your
12 Honor has had a chance starting off after the holiday
13 weekend to look at our Motion --

14 THE COURT: I've reviewed your Motion and Memo. In
15 fact, I have that right here in front of me.

16 MR. FEW: We filed my consultation letter this morning.

17 THE COURT: I haven't seen that.

18 MR. FEW: May I approach?

19 THE COURT: Sure. Absolutely.

20 MR. FEW: Your Honor, the reason we don't have a lot of
21 filings to go with this is one of the things that you're
22 going to hear about here as we argue today is that there's
23 been -- this is really not so much before the Court directly
24 as it is indirectly, but there's been some abuses of the
25 discovery process, specifically, with over-designating

1 confidentiality. And in an abundance of caution, that's why
2 we didn't file this letter with our initial Motion because
3 the confidentiality was being used as a sword and not a
4 shield.

5 So my client, Julianne Foster, is a mother of two,
6 lives in Greenville, South Carolina, plays on a tennis team.
7 In April of 2019, one of the members of her tennis team got
8 some information about coming to the tennis tournament down
9 here. I believe it was a state championship, I'm not sure
10 what level, 3/5, 4/5, whatever. So Julianne discussed with
11 Michelle, who booked the Airbnb, that they would stay at
12 this Airbnb, so that's what they did and they Venmoed back
13 and forth. My client, basically, knew that they had booked
14 a place through Airbnb.

15 Well, she came into town and she dropped -- I'm going
16 to summarize it because this is not -- she, basically,
17 dropped her stuff off. I don't know if she changed clothes
18 at that point in time, went and played a tennis match. Came
19 back, took a shower, changed clothes and ended up being
20 there really only one night. Well, it turns out -- and some
21 people ask well, how in the world, Mr. Few, did your client
22 find out about the secret recordings that were made of her?
23 Well, that's a good question.

24 So my client, it's important to know for the Court,
25 didn't know any of these people. Didn't contract with them.

1 All she did was come and stay to play in a tennis tournament
2 on May 17th, 18th of 2019. And then sometime in September,
3 Michelle Jane gets contacted by SLED about the fact that
4 there were these secret recordings made during the time that
5 Michelle Jane had the Airbnb rental through the Defendants.

6 My client then gets a call from her friend, Michelle
7 Jane, and says, you know, you need to talk to this guy with
8 SLED. The guy from SLED comes and meets with her and says
9 we have these recordings of you completely naked, getting
10 dressed, getting undressed. There's 13 videos that have
11 been produced. These are not our videos. This is
12 information that we had to get from SLED in order to
13 produce.

14 So I think it's important for the Court to understand
15 the significance of this case in terms of what has happened
16 in the last 20 years to the Peeping Tom statute. The
17 Peeping Tom statute, I looked at it this morning, was last
18 amended in 2001. I remember getting a Nokia nonflip phone
19 in around 2004, so even though we knew things were going
20 towards electronics, in 2001, I don't think the legislature
21 had in mind that someone would have the ability to take
22 something about this size, put it on a counter and video
23 record people and then shoot it out by way of Bluetooth and
24 have it recorded whenever, however that they wanted to do.
25 And Mr. Riviere is experienced in all this because we've

1 seen where he talks on Facebook about how he set these
2 cameras up on his boat.

3 So, Your Honor, Airbnb didn't even exist until 2008.
4 We put some stuff in our memorandum. They boast about
5 having 150 million users. They're a billion-dollar company.
6 They're running advertisements during the Super Bowl,
7 they're running advertisements now. They are a new huge
8 company. And they have given us, basically, nothing in
9 discovery. I can summarize what --

10 THE COURT: Why do they say they won't give it to you?

11 MR. FEW: Well, here's the timeline, Your Honor --

12 THE COURT: I appreciate that, Mr. Few. I have long
13 since established my rule because I had this happen years
14 ago and it just hit me. I was doing a Motion to Compel and
15 arguing and I said let's take the first up issue. And he
16 states, not as specifically as you did, but he rambles on
17 and the lawyer stood up and said if that's what you want,
18 I'll give you that.

19 MR. FEW: Yes, sir.

20 THE COURT: And he said, let's go to number two. I
21 said, whoa, whoa, you want to talk about this? And I said,
22 I tell you what you do, I've got other hearings, y'all go
23 outside and y'all talk among yourselves and what you can't
24 resolve, come back in and I'll deal with that. You know
25 what happened? They came back in and said, Judge, we've

1 resolved this.

2 And I started -- that triggered something and I started
3 doing that and came up with my three questions: What is it
4 you want? Why do they say they won't give it to you, not
5 why you think they won't? And why are you entitled to it?

6 I understand to some extent. What is it you want? You
7 want all -- what are you looking for?

8 MR. FEW: So, Your Honor --

9 THE COURT: I don't need the history, I just want to
10 know what you're looking for.

11 MR. FEW: We just want complete discovery responses --

12 THE COURT: Complete discovery defined as what? What
13 is it you think they have that they haven't given to you?

14 MR. FEW: Airbnb, they have not identified one single
15 witness. We got their documents on April 1st of this year
16 --

17 THE COURT: Have y'all talked about this?

18 MS. MOOSE: Your Honor, if I may, I represent Riviere
19 and Chase. I don't know why we're here today.

20 THE COURT: Well, I tell you what y'all do, y'all go
21 out and talk among yourselves and then you come back in and
22 I'll be happy to hear you both. In the meantime, I'll take
23 the next case. Y'all talk to each other.

24 MR. FEW: Your Honor --

25 THE COURT: Mr. Few, don't push this envelope, sir.

1 MR. FEW: Well, I just wanted to say one thing, and
2 we'll do that --

3 THE COURT: You can say anything you want, but I want
4 you to talk to them because you said they haven't given you
5 any list of anything and they say well, we don't know what
6 we're here for. So y'all talk about it. Thank you.

7 MS. MOOSE: Thank you, Your Honor.

8 MR. FEW: Thank you, Your Honor.

9 THE COURT: Thank you.

10 (Hearing was adjourned at 10:05 a.m.)

11 (Hearing was reconvened at 10:53 a.m.)

12 THE COURT: Thank y'all for talking. Where are we?
13 What do we need to do?

14 MR. FEW: Your Honor, I'll be glad to give a summary of
15 what we accomplished. I completely understand the Court's
16 position on this. I just want to say for the record, we've
17 gotten no documents from Mr. Harte's client other than 111
18 pages that we got that, essentially, were documents that
19 were at one time sealed that have now been unsealed pursuant
20 to a Motion that we filed.

21 So their reason for not giving us documents is that we
22 didn't give them search terms. Well, we did give them
23 search terms. And one part of my search terms that I gave
24 them was we can't tell you what witnesses to search for
25 because we don't know who all your client communicated with

1 about these matters. And we learned in there a moment ago
2 that our view of the case, which we believe falls within 26
3 that we're entitled to discover anything that's reasonably
4 related to -- likely to lead to something discoverable
5 entitles us to find out the communications.

6 An example of that would be a guy named Brian Cavanaugh
7 who came up in the deposition of Katherine Thomas on January
8 the 6th of this year, that he contacted her out of the blue.
9 When she went to SLED, she gave them a screen shot of the
10 phone call that he made to her and then there was a flurry
11 of text messages between the two of them. His name appears
12 in documents that we've since obtained by way of subpoena
13 that could have been given to us by Mr. Harte.

14 So Mr. Wlodarczyk made an appearance today for
15 Katherine Thomas because Judge Keesley had given her until
16 June the 6th to get new counsel. He advised us in the
17 discussion that he doesn't have any search terms to add to
18 whatever they're going to do for their electronic discovery.

19 So item number one is, we believe 30 days is an
20 abundance of time to do whatever this electronic discovery
21 that they claim they're going to do is. So we would ask the
22 Court to order that they have 30 days to produce documents
23 pursuant to this electronic search that we've been trying to
24 resolve. We've given them our search terms, which are you
25 know the witnesses, you need to search their e-mails. So

1 that is going to be done. That would be item number one and
2 I think we have an agreement on it.

3 Secondly, in the meeting, Ms. Moose indicated that she
4 has documents in her possession that she could produce now,
5 but she's not produced them thus far because in the letter,
6 I said I wanted everything at one time. Well, I hope I have
7 since clarified that, that I would be delighted to receive
8 things if it's three pages or two pages at a time. We just
9 want to get responsive documents from the Defendant.

10 An example would be Mr. Cavanaugh, the mysterious guy
11 who contacts Katherine Thomas when she goes to SLED --

12 THE COURT: Mr. Few, let's --

13 MR. FEW: Yes, Your Honor.

14 THE COURT: Let's don't keep doing the argument part.

15 MR. FEW: I understand. I understand.

16 So we pressed them in there about what are the
17 documents that you have that you could produce now, which,
18 by the way, that's standard interrogatory, I think, number
19 four under Rule 33(b) that says identify the documents that
20 are responsive. So we were told that they were e-mails and
21 then when we pressed again, we were told that they're not
22 e-mails that they're texts.

23 So we would request that everything that they have
24 gathered already be produced within ten days. Being mindful
25 of the fact, Your Honor, that we served the discovery with

1 the Complaint on April 30th of --

2 THE COURT: I'd appreciate if you don't -- I'm going to
3 make a decision about that. Let's just stay with what it is
4 they said they're going to produce, okay?

5 MR. FEW: Well, Your Honor --

6 THE COURT: Why don't we do this, why don't you tell me
7 what you -- I understand there may be some issues here,
8 there may be some confidentiality issues, there may be a lot
9 of things. That's what we have privileged logs for. Then
10 the Court becomes involved and I can do that. This isn't my
11 first rodeo with this kind of stuff.

12 MS. MOOSE: Yes, sir, Your Honor, I completely
13 understand. What happened was we supplemented our discovery
14 --

15 THE COURT: I just want you to produce -- whatever you
16 have, produce. Anything --

17 MS. MOOSE: Your Honor --

18 THE COURT: -- that you object to, say I object for
19 these reasons.

20 MS. MOOSE: Your Honor, I have hired -- we have hired a
21 third party vendor to search. And I found out this morning
22 that Ms. Thomas's counsel has no changes to the search
23 terms. I called the third vendor while we were on break.
24 He said he doesn't know how long it's going to take him to
25 do the searches without having the search terms because

1 there's all these different devices.

2 THE COURT: You know --

3 MS. MOOSE: So I don't know that I can have it in 30
4 days.

5 THE COURT: -- the search terms are very simple. If
6 you have -- and let me just say this: This comes from
7 something I did and Chief Justice Pleicones did when he was
8 a circuit court judge, I think, in Rock Hill and it's led me
9 to start doing some things as well. They said we don't have
10 anything or we've given you everything we have and they
11 found some things. Well, the penalties were six figures,
12 and that got everybody's attention.

13 I had, not a major case as that, but I had one in
14 Hampton years ago and Johnny Parker's firm handled it and
15 they asked for certain things. And the lawyer -- a local
16 lawyer representing the company said we don't have anything.
17 I said, okay, I said, Mr. Parker, they don't have anything.
18 So submitted a memo and further Motion, said here's what I
19 have from what they produced identical materials in another
20 suit that I had. That led me to say ummm. So the local
21 lawyer said well, that's what counsel in Chicago said. I
22 said, well, that's fine. Next time, I want counsel from
23 Chicago to be present in every single motion we have and I
24 want that counsel to put it on the record.

25 And what I've started doing is this: I don't care who

1 you have, I want you all to produce -- this isn't -- we're
2 all lawyers. You know what's relevant and what's not. And
3 if you have an objection to it, whether it's relevant or not
4 has got nothing to do with discovery. So I want you to
5 produce it. And I want an Affidavit by whoever's doing this
6 and that's it.

7 And then if you find something, Mr. Few, through other
8 means, now we're getting into a situation where we can start
9 putting sanctions on things. But I'm not going to sanction
10 anybody right now. This is obviously a dispute, we're got
11 lawyers and we'll see where we go. But --

12 MS. MOOSE: Your Honor --

13 THE COURT: -- we've got to get to first base first.

14 MS. MOOSE: -- that's the whole reason we have a third
15 party vendor.

16 THE COURT: Well, first of all, you knew you were going
17 to have to do it, why didn't you hire it a long time ago?

18 MS. MOOSE: We did, Your Honor, but they opposed -- Ms.
19 Thomas's lawyers had a conflict and had to get out and we
20 had to have that heard. Then we had a period of time where
21 she had to get counsel.

22 THE COURT: Well, I'll you what, you're going to get
23 busy. 30 days to produce it.

24 MS. MOOSE: Your Honor, I don't know if my third party
25 vendor can get it done.

1 THE COURT: Tell your third party vendor you better
2 hire some people, you've got 30 days.

3 MS. MOORE: Okay, Your Honor. Thank you.

4 MS. BARBIER: Your Honor, just briefly, I just want to
5 make sure we are clear on a couple of fundamental issues in
6 this case, especially with respect to the discovery that
7 they are going to produce. First of all, Your Honor, we
8 have interviewed witnesses who say there are other --

9 THE COURT: I appreciate all that. That's going to be
10 great when you get something that they produce and they say
11 this is it and you can say, well, wait a minute. That's
12 precisely what I'm talking about. I'm not going to deal in
13 abstracts.

14 MS. BARBIER: Okay, I understand that. But --

15 THE COURT: Well, if you understand that, then you're
16 getting the cart before the horse.

17 MS. BARBIER: Ms. Moose said this morning that they
18 believed this was only about one videotape and that's not
19 correct.

20 THE COURT: Well, y'all have told them that.

21 MS. BARBIER: I just wanted to put that on the record,
22 Your Honor.

23 THE COURT: Well, you can put it on the record. You've
24 made a Motion. As I said, it's very simple, if you find
25 something -- after they've given you an Affidavit that says

1 this is it and you find something out, then we're talking
2 about some serious sanctions. And I don't think the lawyers
3 want to be going to the office of disciplinary counsel nor
4 do I think the companies want to be penalized. But the
5 bottom line is, that's what's going to happen, folks, so
6 let's quit playing the games, let's do something.

7 Yes, sir?

8 MR. WLODARCZYK: May it please, Your Honor. Damon
9 Wlodarczyk, the prior law firm was relieved and I was hired
10 on Wednesday. I just represent Katherine Thomas in this
11 action. I don't know anything about what's been changed. I
12 don't have any depositions or anything.

13 THE COURT: Well, you know what, that's what -- I used
14 to -- when I first started, we actually went to lawyers'
15 offices and sat down and talked to people face-to-face.
16 Then we got real sophisticated and we started using
17 conference calls. Then we get really sophisticated with
18 e-mails and we end up texting. Y'all need to talk to each
19 other. That's simple how to do that. I mean, it's not
20 rocket science, folks.

21 MR. WLODARCZYK: No, I understand, Judge. I was just
22 asking for some time to actually get the file and speak to
23 them.

24 THE COURT: I would suggest that you speak to counsel.
25 You got him here right now. You speak to him and find out

1 what you need, but I'm giving you 30 days. Then if you need
2 to extend it, you can make a Motion to extend it, but it's
3 30 days. I want the order prepared, produce within 30 days.

4 MR. FEW: Your Honor, we also had a separate discussion
5 with Airbnb, but we also want them to identify -- for
6 example, Airbnb has not identified any witnesses on their
7 behalf.

8 THE COURT: They may or may not have any, I don't know.

9 MR. DUFFY: Your Honor, I can't agree to produce
10 witnesses who may or may not exist.

11 THE COURT: Well, I understand that, but you -- this
12 lawsuit was filed when?

13 MR. FEW: April 28th, 2021.

14 THE COURT: So you haven't bothered to find out whether
15 you've got witnesses or not in this lawsuit?

16 MR. DUFFY: We looked through --

17 THE COURT: You've got 30 days to give them witnesses
18 and if you don't, then we'll talk about whether they can
19 testify or not.

20 MR. FEW: One other thing we asked them for, Your
21 Honor, is we have a specific request for production for the
22 application that would have been provided by Katherine
23 Thomas to become an Airbnb host. The distinction that they
24 made back there was it's not so much an application, you
25 just sign up. Well, we want to know what data she was

1 required to provide. We can't ascertain that from what
2 they've produced.

3 THE COURT: Well, let me ask you a question, who's the
4 person that she talked to to book the house, book the place?

5 MR. WLODARCZYK: Ms. Foster did not actually book --

6 THE COURT: Whoever booked --

7 MR. WLODARCZYK: It's Airbnb, so it's an online
8 platform and she signed up and booked it on her own
9 volition.

10 THE COURT: So there was no person involved?

11 MR. WLODARCZYK: There would be no person -- no --

12 THE COURT: Then you need to respond and say there's no
13 person that she ever talked to.

14 MR. WLODARCZYK: Sure.

15 THE COURT: And if you find somebody, then we've got a
16 problem. So that's the response to that. I mean, come on,
17 folks, that's just common sense. You don't say well, we
18 don't know who we're looking for. That one you knew, there
19 was no person.

20 MR. WLODARCZYK: Yes, Your Honor.

21 THE COURT: Okay. That sounds like to me that's a
22 response.

23 MR. FEW: Thank you, Your Honor.

24 THE COURT: Thank you all.

25 MS. MOOSE: Thank you, Your Honor.

1 MS. BARBIER: Judge, would you like us to submit a
2 proposed order?

3 THE COURT: Yes, if you will, please, and if you'll
4 e-file it, please.

5 MS. BARBIER: Thank you, sir.

6 THE COURT: Thank you very much.

7 MS. MOOSE: Judge, can we have an opportunity to
8 comment?

9 THE COURT: I would suggest y'all share it when it's
10 filed and then we'll deal with that, okay? I'm going to
11 assume that y'all did that. Thank you.

12 What about the Rule to Show Cause? I dealt with that
13 subpoena. I think it's probably subsumed by all of this
14 other stuff.

15 MR. FEW: My preference on the record would be just to
16 continue it. Mr. Mostellar didn't appear. I've been in
17 some communication with him --

18 THE COURT: Well, we'll continue that.

19 MR. FEW: I guess if we could submit an order that just
20 ask them to give us a records custodian Affidavit, that
21 would --

22 THE COURT: Again, folks, y'all know what you've got to
23 do. Come on, man.

24 Who's the Rule to Show Cause against, an individual?

25 MR. FEW: It's the attorney for Katherine Thomas in the

1 dog lawsuit that was sealed from 2019. We subpoenaed him
2 because we couldn't get documents from the parties.

3 THE COURT: Okay.

4 MR. FEW: But if it's okay with the Court, I would just
5 give them 30 days to get us a records custodian Affidavit.
6 We'll put that in the order and I'll run that by Mr.
7 Mostellar.

8 THE COURT: All right.

9 MR. FEW: Thank you, Your Honor.

10 THE COURT: Thank you very much.
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CERTIFICATE OF REPORTER

STATE OF SOUTH CAROLINA)

COUNTY OF AIKEN)

I, PENNY M. JOHNSON, do hereby certify that the foregoing transcript is a true and correct record of the recorded proceedings; that said proceedings were transcribed to the best of my ability from the audio recording and supporting information; and that I am neither counsel for, related to, nor employed by any of the parties to this case, and I have no interest, financial or otherwise, in its outcome.

June 4, 2022

Penny M. Johnson
Penny M. Johnson
Court Reporter III

STATE OF SOUTH CAROLINA

COUNTY OF AIKEN

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

JULIANNE FOSTER,

Plaintiff,

v.

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

Defendants.

**SUPPLEMENTAL DECLARATION
OF RYAN P. DUFFY IN SUPPORT
OF DEFENDANT AIRBNB, INC.'S
MEMORANDUM OF LAW IN
SUPPORT OF ITS MOTION FOR A
PROTECTIVE ORDER**

DECLARATION OF RYAN P. DUFFY

I, Ryan P. Duffy, hereby declare and state as follows:

1. I am a member of the State Bar of South Carolina and am admitted to practice before the Courts of this State. I am an attorney in the law firm of Butler Weihmuller Katz Craig LLP, attorneys for Defendant Airbnb, Inc. in this litigation. I make this declaration in support of Airbnb's Motion for a Protective Order. I have personal knowledge of the matters stated herein and, if called upon, I could and would testify to the truth thereof.

2. Plaintiff served on Airbnb her initial document requests and interrogatories along with her complaint.

3. After the Court denied Airbnb's motion to dismiss, Airbnb supplemented its responses on March 16, 2022 and agreed to produce relevant, responsive documents it located after a reasonable search, including (among other things) (i) correspondence with the parties to the litigation; (ii) background checks on Riviere and Thomas; (iii) relevant photographs in its possession; and (iv) contracts with Defendants.

4. Airbnb completed its production on April 8, 2022.
5. A true and correct copy of Plaintiff's June 7, 2022 letter enclosing her Amended Second Set of Requests for Production to Defendant Airbnb, Inc. – No.'s 16-444 [*sic*] is attached hereto as **Exhibit 5**.

DATED this 24th day of June, 2022.

BUTLER WEIHMULLER KATZ CRAIG LLP

By /s/ Ryan P. Duffy

L. Andrew Watson

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June 7, 2022

Via Email:

Andy Watson, Esq.
Butler Weihmuller Katz Craig LLP
11605 N. Community House Drive, Ste.150
Charlotte, NC 28277
awatson@butler.legal

RE: Julianne Foster vs. Rhett Riviere, Katherine A. Thomas, Chase Enterprises, LLC
of South Carolina, and Airbnb, Inc.
Case No.: 2021-CP-02-00889
Our File No.: 00305-001

Mr. Watson,

Enclosed and served upon you are Plaintiff's Amended Requests for Production 16-44 to Airbnb, Inc. and certificate of service for same.

With warm regards, I remain

Sincerely Yours,



Wesley D. Few

WDF/cgy

Enclosures

CC: All Counsel of Record (*Via email only*)
Ryan L. Beasley, Esq. (*Via email only*)
Deborah B. Barbier, Esq. (*Via email only*)
Client (*Via email only*)



STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF AIKEN	)	2 ND JUDICIAL CIRCUIT
Julianne Foster,	)	
	)	CASE NO. 2021-CP-02-00889
Plaintiff,	)	
	)	PLAINTIFF'S AMENDED SECOND
vs.	)	SET OF REQUESTS FOR
	)	PRODUCTION TO DEFENDANT
Rhett Riviere, Katherine A. Thomas, Chase	)	AIRBNB, INC. – NO.'S 16-444
Enterprises, LLC of South Carolina, And	)	
Airbnb, Inc.,	)	
	)	
Defendants.	)	
	)	

TO: L. ANDREW WATSON, ESQUIRE, COUNSEL TO DEFENDANT AIRBNB, INC.

Pursuant to Rules 34 of the South Carolina Rules of Civil Procedure, Plaintiff Julianne Foster (“Plaintiff”) hereby requests that Defendant Airbnb, Inc. (“AIRBNB”) answer the following Requests for Production, in writing and under oath, within thirty (30) days from the date of the service hereof.

TABLE OF DEFINITIONS / ABBREVIATIONS

This section defines various words and phrases in this Notice. This information is provided to clarify the means of terms in this Notice to assist AIRBNB in understanding the objectives of Plaintiff’s discovery efforts, and to help locate and furnish the information and materials.

1. “AIRBNB” or “**Defendant**,” - Refers to AIRBNB, Inc., its subsidiaries, divisions, or any other entity (by whatever name and/or denomination), which is/was an owner, a predecessor or successor in interest, including any entity which may have merged or consolidated with AIRBNB’s designee may also be asked questions potentially known by another party, other contracting entities, or their agents or employees. By acceptance of this Notice, and production of a responsive witness thereto. AIRBNB acknowledges it will produce someone knowledgeable

about such matters. To the extent any other party, agent, or employee of AIRBNB can provide answers or responses unknown to AIRBNB's designated representative, be prepared to explain why that is the case.

2. The phrase "**writing and recording**" shall be defined under South Carolina Rules of Evidence Rule 1001(1), which specifically includes all electronic communications and electronically recorded information such as word processing files, e-mails, and computer / network backup media.

3. The term "**photograph**" shall be defined under South Carolina Rules of Evidence Rule 1001(2).

4. Where originals and/or non-identical copies are not available, "**writing and recording**" also means identical copies of original writing or recording and copies of non-identical copies.

5. "**Information**" - This term should include reference to both facts and applicable principles. This word should not be construed to be limited to any method of acquisition or compilation and should, therefore, be construed to include oral information and documents or other tangible objects.

REQUESTS FOR PRODUCTION

16. All documents reflecting the organizational, leadership and management structure of AIRBNB during the time period of January 1, 2019 through the present.

17. All non-privileged information of AIRBNB regarding the factual allegations in the case of *Foster v. Riviere, et al* – 2021-CP-02-00889.

18. All agreements and/or contracts between Rhett Riviere, Chase Enterprises, LLC of South Carolina, and/or Katherine Thomas with AIRBNB.

19. All records, reports, documents, correspondence, handwritten notes or otherwise, materials of any kind that concern, reference or relate to any of the following: Rhett

Riviere, Chase Enterprises, LLC of South Carolina, Katherine Thomas and/or Julianne Foster.

20. All documents which describe the process by which AIRBNB's online booking program notifies potential hosts of policies and procedures related to background checks.
21. All documents which describe the process by which AIRBNB checks public state and county criminal records, as well as state and national sex offender registries.
22. All documents which describe the process by which AIRBNB processes findings from public state and county criminal records, as well as state and national sex offender registries.
23. All documents which describe AIRBNB's policies related to rejecting a host from utilizing AIRBNB's online booking program or guest(s) reservation(s) canceling due to background check findings.
24. All documents which describe any agreement AIRBNB has related to filters for background checks with approved providers (i.e. canvassing public records whereby an arrest took place in addition to any convictions that followed).
25. All documents which describe AIRBNB's policies to execute removals of AIRBNB hosts; reinstatement after removal; criteria for host eligibility; and appeals of hosts after removal.
26. All documents that describe to audiences to whom AirCover protection is offered, including the circumstances under which hosts can opt out of AirCover protection.
27. All documents related to AIRBNB's governance of their privacy policies as they relate to disclosed or concealed monitoring devices in AIRBNB properties including data supporting removal, reinstatement, and appeals of hosts who violate the policy.
28. All documents related to AIRBNB and its hosts' compliance with state statutes concerning real estate property management licensure to hosts and potential hosts.

29. All communications between “Michele” and Defendant Katherine Thomas via AIRBNB’s online booking program since April 12, 2019.
30. All Protocols, manuals, memoranda, or other written standards of care or instructions that reference or concern the safety of guests while staying in an AIRBNB property during the time period of December 1, 2013 through the present.
31. All Protocols, manuals, memoranda, or other written standards of care or instructions that reference or concern the vetting of hosts by AIRBNB during the time period of December 1, 2013 through the present.
32. All Protocols, manuals, memoranda, or other written standards of care or instructions that reference or concern the inspection of host properties by AIRBNB during the time period of December 1, 2013 through the present.
33. All Protocols, manuals, memoranda, or other written standards of care or instructions that reference or concern the use of video cameras by AIRBNB hosts during the time period of December 1, 2013 through the present.
34. All reports and/or complaints made to AIRBNB of guests being secretly videotaped while staying in an AIRBNB during the time period of December 1, 2013 through the present.
35. All lawsuits filed against AIRBNB related to guests being secretly videotaped during the time period of December 1, 2013 through the present.
36. All settlements entered into by AIRBNB related to guests being secretly videotaped during the time period of December 1, 2013 through the present.
37. All information related to the employee training program for all employees of AIRBNB, Inc. that have responsibilities related to guest safety during the time period of December 1, 2013 through the present.
38. The internal reports and/or external reports and/or audits during the last ten years of AIRBNB that relate to guest safety during the time period of December 1, 2013 through

the present.

39. All documents which describe the process by which AIRBNB determines whether an AIRBNB host is the lawful owner and/or occupier of an AIRBNB property.
40. All audited financial statements reflecting the assets and liabilities of AIRBNB during the time period of 2013 through 2022.
41. All communications between AIRBNB and the company / entity known as TROOLY related to Katherine Thomas, for example, as same is identified in AIRBNB's production at pages: AIRBNB-000099, 000100, 000106, 000109 to 000111, 000113, 000114, and 000117 to 000122.
42. All communications between AIRBNB and the company / entity known as TROOLY related to Rhett Riviere, for example, as same is identified in AIRBNB's production at pages: AIRBNB-000099, 000100, 000106, 000109 to 000111, 000113, 000114, and 000117 to 000122.
43. All communications between AIRBNB and the company / entity known as TROOLY related to Chase Enterprises, LLC of South Carolina, for example, as same is identified in AIRBNB's production at pages: AIRBNB-000099, 000100, 000106, 000109 to 000111, 000113, 000114, and 000117 to 000122.
44. All agreements between AIRBNB and the company / entity known as TROOLY identified and described above that were in effect at any time since January 1, 2016.

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June 7, 2022
Greenville, South Carolina

STATE OF SOUTH CAROLINA

COUNTY OF AIKEN

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

JULIANNE FOSTER,

Plaintiff,

v.

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

Defendants.

**DEFENDANT AIRBNB, INC.'S
MEMORANDUM OF LAW IN
SUPPORT OF ITS MOTION FOR A
PROTECTIVE ORDER**

INTRODUCTION

The documents Airbnb has produced in this case make clear that the crux of Plaintiff's allegations—that Airbnb failed to conduct background checks on Defendants Rhett Riviere and Katherine Thomas—is false. Specifically, Plaintiff alleges that Airbnb's failure to conduct a background check allowed Riviere to secretly videorecord Plaintiff when she stayed at Thomas' property. But Airbnb in fact conducted several background checks of both Riviere and Thomas before Plaintiff's reservation, none of which revealed any red flags. Airbnb did not know about Riviere's unlawful recording, and it had no reason to know.

Unchastened by having falsely accused Airbnb of wrongdoing in a public pleading, Plaintiff has doubled down, now insisting that Airbnb must have acted improperly with respect to some other policy, procedure, or practice. This too is specious. In a blatantly improper use of a Rule 30(b)(6) entity deposition, Plaintiff demands that Airbnb produce a corporate designee on July 12 to recite all of the information—over the past decade and across the globe—Airbnb has concerning 24 broad topics (the "Topics") ranging from host "vetting," and background checks, to employee trainings, to "real estate property management statute licensure," and Airbnb's

relationship with all hosts and all host properties. Yet Plaintiff's broad and over reaching discovery requests have no regard for the relevance of the Topics to the events of May 17–18, 2019 in Aiken, South Carolina—when Plaintiff alleges that Defendant Rhett Riviere secretly recorded her while staying at a property her friend rented using Airbnb's platform.

The South Carolina Rules of Civil Procedure do not permit Plaintiff to burden Airbnb with an overbroad Rule 30(b)(6) deposition in this way. Because she did not bother to request the documents and policies she thought were relevant before crafting the deposition notice, Plaintiff was unable to describe the topics on which she seeks testimony with “reasonable particularity,” as required by Rule 30(b)(6). Each of Plaintiff's Topics is overbroad and imposes undue burden and expense upon Airbnb. Many Topics are insufficiently defined or otherwise vague (Topics 2, 5–9, 11, 12, 14, 15, 21, 22), or else are transparently irrelevant (Topics 1, 10, 11, 13, 21). *See* SCRCP 26(a), (c). Still others threaten to invade privilege (e.g., Topics 4, 23) or require disclosing third-party communications in violation of the federal Stored Communications Act (Topic 13). And Plaintiff has once again refused to meet and confer to address Airbnb's concerns, despite having been admonished by the Court for failing to do so at the May 31, 2022 hearing. Hearing Tr. at 8:17–9:6 (warning Plaintiff's counsel not to “push [the] envelope” by attempting to offer argument before conferring with Defense counsel). Furthermore, Plaintiff unilaterally scheduled the 30(b)(6) deposition for July 12, 2022, in person, in Aiken, South Carolina.

Plaintiff, like everyone else, must comply with the South Carolina Rules of Civil Procedure. The Court should grant Airbnb's motion and issue a protective order blocking the noticed deposition in its entirety.

FACTUAL BACKGROUND

Airbnb provides an online platform that connects third parties who wish to offer accommodations (“Hosts”) with third-party travelers seeking to book accommodations (“Guests”).

Compl. ¶¶16, 20. Plaintiff alleges that Airbnb's negligence—including its failure to conduct background checks—allowed Defendant Rhett Riviere to use undisclosed cameras to surreptitiously record her at a property the night of May 17–18, 2019, that her friend rented from Defendant Katherine Thomas using Airbnb's website. (Compl. ¶¶ 27, 30, 79.)

On April 8, after the Court denied Airbnb's motion to dismiss, Airbnb completed its production of documents including (among other things) (i) correspondence with the parties to the litigation; (ii) background checks on Riviere and Thomas; (iii) relevant photographs in its possession; and (iv) contracts with Defendants. (Duffy Supp. Dec. ¶ 3.) The background checks that Airbnb produced showed that Airbnb conducted numerous background checks on Riviere and Thomas, all of which came back clean.

On March 20, 2022, Plaintiff sent to Airbnb a draft deposition notice under Rule 30(b)(6), asking Airbnb to prepare a witness to testify about publicly available lawsuits and nearly a decade's worth of policies and other documents and employee lists unrelated to Plaintiff's lawsuit. (Watson Dec., Ex. 1 (March 20 Letter).). Plaintiff had not previously requested documents concerning the Topics, meaning that her proposal would require Airbnb's witnesses to memorize and recite details from documents she never requested. Airbnb responded on April 13 with a detailed letter objecting to each of Plaintiff's proposed topics. Airbnb offered to make a corporate witness available on a more targeted set of topics and to meet and confer regarding the rest. (Ex. 2 (Response) at 3.)

Plaintiff all but ignored Airbnb's correspondence. On May 26, 2022, she served a largely similar 30(b)(6) deposition notice, summoning one or more Airbnb witnesses to her counsel's office in South Carolina to testify on 24 overbroad Topics. (Ex. 3 (Dep notice).) Several weeks later, Plaintiff served Airbnb with document requests, most of which are substantively identical to

the Topics. (There are a few additional requests not covered in the 30(b)(6) notice.) (Duffy Supp. Dec., Ex. 5.)

Plaintiff never took Airbnb up on its offer to meet and confer over Airbnb’s objections and never asked Airbnb—a California-based company—when or where it could reasonably make witnesses available. This is not the first time Plaintiff has wasted this Court’s time on a discovery dispute that could have been narrowed or avoided entirely by meeting and conferring, in violation of this State’s rules. *See* SCRCP 11(a) (requiring counsel to “attempt[] in good faith to resolve the matter contained in the motion” before filing). This Court ordered Plaintiff to meet and confer with Airbnb on the spot after she failed to do so before a May 31, 2022 hearing on her motion to compel additional productions. (Ex. 4 (Hearing Tr.) at 8:17–9:9.) Defense counsel even sought to meet and confer about the deposition notice after the May 31 hearing, but Plaintiff refused.

ARGUMENT

Under Rule 30(b)(6), “the “initial burden . . . fall[s] on the [p]laintiff[] . . . to “describe[] with reasonable particularity the matters on which examination is requested.” *Tuition Payer 100 v. Bishop of Charleston*, 2021 WL 3611936, at *2 (D.S.C. Aug. 11, 2021); ¹ *accord* SCRCP 30(b)(6). In addition, “Rule 30(b)(6) is not designed to be a memory contest.” *Atanassova v. Gen. Motors LLC*, 2021 WL 1946520, at *3 (D.S.C. Mar. 12, 2021). Rule 26(a) prohibits discovery requests that are “unreasonably burdensome or expensive taking into account the needs of the case” or seek information “obtainable from some other source that is more convenient, less burdensome, or less expensive.” *Accord* SCRCP 26(c). And Rule 26(b)(1) limits discovery to that “relevant to the subject matter involved.”

¹ The language of SCRCP 30(b)(6) largely tracks Federal Rule of Civil Procedure 30(b)(6). In the absence of relevant state court case law analyzing the rule, South Carolina courts look to federal case law for guidance. *See Laffitte v. Bridgestone Corp.*, 381 S.C. 460, 474 n.10 (2009) (“The language of [South Carolina] Rule 26(c) mirrors that of federal Rule 26(c). Because there is [very little] South Carolina precedent construing this rule, federal interpretation of Rule 26(c) is persuasive authority.”).

As explained below, all of the Topics are overbroad, vague, and written so as to make the preparation of a corporate representative virtually impossible. Further, many of the Topics are irrelevant to the underlying claims and defenses of this case, and others seek privileged information. The Court should issue a protective order preventing Plaintiff from proceeding with a deposition that violates South Carolina's Rules of Civil Procedure.

A. All of the Topics Are Overbroad and Unduly Burdensome

Each of the Topics falls well short of Rule 30(b)(6)'s requirement that topics be described with "reasonable particularity" and Rule 26(a) and (c)'s requirements that they not be overbroad, unduly burdensome by reason of expense, or more easily sought from another source. *See Palmer v. Standard Fire Ins. Co.*, No. 3:14-CV-4713-TLW, 2016 WL 7839135, at *2–3 (D.S.C. Apr. 12, 2016) (granting motion for protective order against overbroad deposition topics); *Loboa v. Women's Health All., P.A.*, No. 5:18-CV-00329-FL, 2020 WL 889739, at *1 (E.D.N.C. Feb. 24, 2020) ("To meet Rule 30's reasonable particularity requirement ... the [noticed] topics may not be overbroad or lack limitations on time or geographic scope"). Plaintiff's requests, which require Airbnb to prepare witnesses to recite "[a]ll" information about a broad variety of topics and documents, cover information without any possible relevance and would impose unjustifiable burden and expense on Airbnb.

To begin, Plaintiff seeks information about "[a]ll facts and information" or "[a]ll Protocols, manuals, memoranda, or written standard" concerning aspects Airbnb's relationship with its millions of hosts: Airbnb's vetting of them and any associated property inspections, including the names of all Airbnb employees responsible for such vetting (Topics 15, 16, 22); the background checks Airbnb conducts on them (Topics 5–9); their "real estate property management statute licensure" (Topic 12); and even the insurance policies Airbnb makes available to them (Topic 10).

These topics are all overbroad because they call for testimony that goes well beyond Plaintiff's claim that Airbnb's vetting process should have notified Airbnb that Thomas and Riviere would videorecord Plaintiff years after Thomas signed up as a host. For example, Plaintiff seeks information about *every way* Airbnb vets hosts or conducts background checks on them, but many of those processes—which include policies to minimize the likelihood of fake listings—have nothing to do with the facts here. And how Airbnb may “notify potential hosts” about Airbnb's background check policies or how it reinstates hosts or allows hosts to appeal suspension decisions are irrelevant given there are no allegations that Airbnb reinstated Thomas after suspending her. (Topics 5, 9.) Similarly, Plaintiff's complaint is completely silent about “the audience” for Airbnb's host insurance program or when hosts can “opt out” of that program, so those programs have no relevance whatsoever. (Topic 10)

These Topics about Airbnb's relationship with hosts are overbroad for a second reason; as written, they seek information concerning Airbnb's relationship with *all* hosts and *all* host properties, though Plaintiff has sued over one host and one property. The names of Airbnb employees responsible for “vetting” hosts who are totally unrelated to the host in this lawsuit—or “memoranda” or “instructions” referencing that vetting—have no possible relationship to Plaintiff's claims. (Topics 15, 22.) The same goes for “memoranda” or “instructions” related to inspections of unrelated listings (Topic 16), or any information at all concerning background checks of unrelated hosts (Topics 5–9). By seeking information about all hosts, properties, and policies, Plaintiff drafted topics that are overbroad and over burdensome and do not satisfy her obligation to “describe[]” the topics “with reasonable particularity.” *See* SCRCP 26(a), (c), 30(b)(6).

Plaintiff also seeks testimony about every aspect of Airbnb’s privacy or safety policies, including the names of every single employee “responsible” for them and any “internal/external audit” (Topics 11, 14, 17, 21, 23). Again, Plaintiff does not bother to identify the particular Airbnb privacy or safety policies she alleges are relevant to her claims, much less the relevant portions of those policies about which a witness should be prepared to answer questions. Not every Airbnb policy about “privacy” or “safety” relates to video recordings, the issue in this case. Airbnb’s provision of smoke and carbon monoxide detectors to hosts—for example—undoubtedly promotes guest safety, but is completely irrelevant here. And Plaintiff’s requests for names of employees across the globe who are responsible for irrelevant policies are fatally overbroad. *See* SCRCP 26(a), (c), 30(b)(6); *Duenes v. Tidewater Boats, LLC*, No. CV 3:20-972-MGL-SVH, 2021 WL 1947291, at *7 (D.S.C. May 14, 2021) (holding discovery request overbroad when Plaintiff sought “‘any’ and ‘all’ documents and information” without limitation); *Zahariev v. Hartford Life & Accident Ins. Co.*, No. 9:20-CV-1072-RMG-MHC, 2020 WL 12783951, at *6 (D.S.C. Aug. 11, 2020) (holding discovery requests for “all” documents, invoices, and agreements overly broad); *Young v. United Parcel Serv. of Am., Inc.*, No. CIVA DKC-08-2586, 2010 WL 1346423, at *10 (D. Md. Mar. 30, 2010) (limiting 30(b)(6) deposition topics to policies covering where claims arose).

Several other requests (2–4, 13) ask Airbnb to prepare a witness to testify about “materials of any kind” concerning any party to the case, apparently including reciting from memory details of “[a]ll contracts” or “[a]ll communications” Airbnb has related to any of the parties to the case. But not every scrap of paper Airbnb has related to one of the parties necessarily pertains to Plaintiff’s allegations, and it is not reasonable to ask Airbnb to prepare a witness to testify about all such materials. Airbnb may communicate with its hosts about any number of things—from

payment processes to technical difficulties—that have nothing to do with the allegations of secret videorecording at issue in this case. Plaintiff does not even try to distinguish between materials that may be reasonably related to her allegations about secret recordings and other irrelevant communications. *See* SCRCP 26(a), (c), 30(b)(6); *Sandlapper Sec., LLC v. Green & Co., CPAs*, No. 6:18-CV-1280-TMC, 2018 WL 7318243, at *2 (D.S.C. Oct. 12, 2018) (quashing “production of ‘any and all documents related to [the plaintiff],’” for being “overly broad and request documents that appear to be irrelevant to any party’s claim or defense”). She should identify with particularity the portions of communications that she believes are relevant and about which she would like testimony so that Airbnb can reasonably prepare a witness to testify.

Still other requests ask Airbnb to prepare a witness to testify about Airbnb’s leadership structure and total assets. (Topics 1, 24.) But these Topics are only tangentially related to Plaintiff’s claims—and at least some of that information is publicly available, as Airbnb is a public company. And the Topics related to “reports or complaints” or “lawsuits” about secret videotapes, regardless of the circumstances (Topics 18–20) are likewise overbroad. Whether Airbnb has received complaints about video cameras at *other* properties has no bearing on whether Airbnb acted negligently with respect to video cameras at Thomas’ property. And these requests inappropriately seek highly sensitive personally identifying information about third parties in violation of their privacy rights. *See, e.g., Henderson v. Cleveland*, No. CV 4:20-2726-SAL-TER, 2022 WL 2106560, at *4 (D.S.C. June 9, 2022) (finding request for “any and all grievance, complaints, or other documents” about inmate mistreatment by defendant overbroad).

The Topics are also temporally overbroad. Though this case concerns a single night in May 2019, most of the Topics apparently seek information from the entire time period that Airbnb has existed, since its founding in 2008 until the present. And the few Topics that are narrowed by

time seek policies and information from January 1, 2013 through the present. (Topics 1, 14–20, 22, 23.) But Airbnb’s conduct over more than a decade—or even six years before the events at hand—has no relevance to Plaintiff’s claims. Nor does Airbnb’s post-incident conduct. *See, e.g., Henderson*, 2022 WL 2106560, at *3 (denying motion to compel request that was “vague, burdensome, and overbroad” because it “contain[ed] no date restriction”); *United States ex rel. Adams v. Remain at Home Senior Care, LLC*, 2021 WL 3285300, at *6 (D.S.C. Aug. 2, 2021) (limiting discovery requests to relevant time periods after finding “the undefined temporal and subject-matter scope of many of these requests [to be] overbroad”); *Wellin v. Wellin*, 2015 WL 5785709, at *13 (D.S.C. July 31, 2015), *report and recommendation adopted as modified*, 2015 WL 5781383 (D.S.C. Sept. 30, 2015) (finding interrogatory to be “clearly overbroad on its face” because “there is no temporal limitation to the requested information”); *Loboa v. Women’s Health All., P.A.*, No. 5:18-CV-00329-FL, 2020 WL 889739, at *1 (E.D.N.C. Feb. 24, 2020) (“To meet Rule 30’s reasonable particularity requirement ... the [noticed] topics may not . . . lack limitations on time”).

The Topics are also geographically overbroad. The only request that contains *any* geographic limitation (Request 12) seeks testimony about Airbnb’s compliance with real estate licensure statutes in *all 50 states*. The remaining requests have *no* limitation for geographic scope, despite Airbnb’s global operations. The only Airbnb policies or practices relevant here are those operative in Aiken, South Carolina—not those governing the thousands of cities worldwide where hosts list properties. Plaintiff’s failure to provide any geographic limitation makes her Topics fatally overbroad. *See, e.g., Hospira, Inc. v. Alpha & Omega Transp. Servs., Inc.*, No. 1:06CV74, 2007 WL 57771, at *4 (W.D.N.C. Jan. 5, 2007) (finding that discovery requests seeking records without geographic limitation “would be unduly burdensome and overly broad” where the alleged

damage occurred in Chicago); *Loboa v. Women's Health All., P.A.*, 2020 WL 889739, at *1 (“To meet Rule 30’s reasonable particularity requirement ... the [noticed] topics may not ... lack limitations on ... geographic scope”).

Plaintiff’s problems stem in part from having gotten the discovery process backwards. Rather than seeking the documents and then negotiating with Airbnb about a reasonable 30(b)(6) notice, she immediately demanded that a deponent testify about the contents of documents she never requested. Preparing a witness for such a quiz is virtually impossible. Furthermore, Plaintiff’s approach meant that she could not use produced documents to narrow the information required of Airbnb’s deponent(s) and craft her topics with “reasonable particularity” as required under Rule 30(b)(6).

B. Topics 2, 5–9, 11, 12, 14, 15, 21, and 22 Are Fatally Vague and Ambiguous

Several Topics fail for the additional reason that they are vague and ambiguous. Without this Court’s intervention, Airbnb would need to prepare its witnesses to testify without understanding the Topics noticed—one of the harms Rule 30(b)(6)’s “reasonable particularity” requirement is intended to avoid. *See* SCRCF 30(b)(6); *see also* *Mills v. Gen. Motors, LLC*, 2017 WL 4279651, at *3 (D.S.C. Sept. 26, 2017) (denying motion to compel response to “impossibly vague” discovery response).

Plaintiff defines no term throughout her entire deposition notice. Airbnb does not know what Plaintiff means to encompass in her reference to “the factual allegations in the case of *Foster v. Riviere*” in Topic 2, or which specific state real estate licensing statutes she means to inquire about in Topic 12. Similarly, Plaintiff’s references to “safety of guests” or “responsibilities related to guest safety” in Topics 14 and 21 and “vetting” in Topics 15 and 22 could be interpreted to cover any number of things, from identity theft to loose floorboards. Nor does Airbnb understand

Plaintiff's use of the term "Airbnb property" in Topic 14, because Airbnb does not own, control, or manage the properties hosts list via its online platform.

Airbnb also cannot make sense of the following phrases:

- "opinion[s]" related to background checks (Topics 5, 9);
- "databases of public state and county criminal records" (Topics 6);
- "guest(s) reservation(s) canceling due to background check findings" (Topics 7);
- Airbnb's supposed "filter[ing] for background checks" (Topics 8);
- "governance of [Airbnb's] privacy policies," (Topics 11).

Vague, ambiguous, and undefined terms leave Airbnb with the impossible task of guessing the topics about which Plaintiff seeks testimony, wasting everyone's time and effort and setting up further disputes. Airbnb should not have to prepare a witness to respond to vague requests, particularly when Plaintiff has refused to meet and confer to clarify.

C. Topics 1, 10, 11, 13, and 21 Seek Irrelevant Information

Several Topics impermissibly seek testimony that has nothing to do with the facts, claims, or defenses in this case. Information sought in discovery "must be specifically relevant to the issues involved in the litigation, not merely relevant to the subject matter of the litigation." *Hollman v. Woolfson*, 384 S.C. 571, 579, 683 S.E.2d 495, 499 (2009); *see also* SCRCP 26(b)(1); 26(c) (authorizing protective order to prevent harassment).

Some Topics simply have nothing to do with the case on their face. For example, Airbnb's organizational, leadership, or management structure (Topic 1) or its host insurance policies (Topic 10) do not remotely concern Plaintiff's claims about unauthorized video cameras in Aiken, South Carolina. Nor are there allegations that an employee made Plaintiff unsafe, so testimony on "the employee training program for all employees of Airbnb, Inc. that have responsibilities related to

guest safety” is irrelevant. (Topic 21.) Similarly, Plaintiff has not alleged (nor is there any evidence) that Thomas or Riviere was reinstated after appealing a prior violation of a privacy policy, so procedures relating to that process have nothing to do with this case (Topic 11).

Because these and other requests are not relevant to Plaintiff’s claims, a protective order should be granted. *See Ex parte Smith*, 407 S.C. 422, 423, 756 S.E.2d 386 (2014) (granting protective order pursuant to Rule 26(c) where information sought in deposition notices “may not be related to the issue before this Court”); *Hollman v. Woolfson*, 384 S.C. 571, 580, 683 S.E.2d 495, 500 (2009) (granting protective order where evidence sought “is not necessary for respondents to establish th[e] cause of action”).

D. Topic 13 Seeks Information Protected by the Stored Communications Act

Topic 13 (“All communications between ‘Michele’ and Defendant Katherine Thomas via AIRBNB’s online booking program...”) impermissibly seeks information protected by the Stored Communications Act (“SCA”). The SCA prohibits entities that provide electronic communication services to the public from “divulg[ing] to any person or entity the contents of a communication while in electronic storage by that service.” 18 U.S.C. § 2702(a)(1); *see also, e.g., Crispin v. Christian Audigier, Inc.*, 717 F. Supp. 2d 965, 991 (C.D. Cal. 2010) (quashing pursuant to the SCA a subpoena seeking messages that were “inherently private such that stored messages are not readily accessible to the general public”); *Katz v. Liberty Power Corp., LLC*, 2019 WL 957129, at *3 (D. Mass. Feb. 27, 2019) (similar). The SCA therefore prohibits Airbnb’s corporate representative from testifying about private messages exchanged between Michele and Thomas. Plaintiff can seek this information from Michele or Thomas instead.

E. Several Topics May Implicate Privileged Information

In addition, several Topics may implicate information protected by the attorney-client

privilege. *See, e.g.*, Topic 4 (“all . . . documents . . . concern[ing] . . . Rhett Riviere” and other individuals involved in this lawsuit); Topic 23 (“external reports . . . that relate to guest safety”). Airbnb’s corporate representative will not testify to privileged information. *See* SCRCP 26(b)(1) (“Parties may obtain discovery regarding any [relevant] matter [that is] *not privileged*” (emphasis added)).

F. An In-Person Deposition in South Carolina Imposes Undue Burden and Expense on Airbnb

Plaintiff’s insistence that the deposition take place in person in Aiken, SC on July 12, 2022 is an independent reason to grant Airbnb a protective order because it would impose an undue burden and expense on Airbnb. To start, Plaintiff set the date unilaterally and then categorically refused to change it when asked. The Court should not countenance such disregard for basic professional courtesy, and there is no reason the parties cannot meet-and-confer to find a mutually agreeable date.

In addition, Plaintiff noticed the deposition to take place in South Carolina, but Airbnb maintains no offices there. “The fact that the [events] at issue took place in [South] Carolina . . . is not sufficient to overcome the initial presumption that a party should depose a defendant in the district where he or she resides.” *Carolina First Bank v. Stambaugh*, No. 1:10CV174, 2011 WL 13356709, at *1–2 (W.D.N.C. Mar. 24, 2011) (granting motion for protective order against requiring Defendants, Florida residents, from being deposed in North Carolina where “Defendants contend that they will suffer undue burden and expense if required to travel to North Carolina for the depositions.”).

Finally, Plaintiff served her request for documents well after proposing these 30(b)(6) topics, Airbnb will not have completed its document production by then—especially if the parties end up needing to negotiate over the proper scope of that production. It would be far more efficient

to schedule the deposition to occur a reasonable time *after* the document production, which will make the deposition more efficient and allow Plaintiff to narrow her questioning based on the documents.

For these reasons, even if the Court is not inclined to Airbnb's request to quash the deposition notice in its entirety, it should at least postpone the deposition to a mutually agreeable date after Airbnb has completed its document production and the parties have resolved any alleged deficiencies in that production. And the Court should require Plaintiff to hold the deposition via Zoom or where the witness resides. *See id.* at *2 (directing "parties to confer in an attempt to accommodate both parties by allowing counsel for Plaintiff to depose Defendants remotely by video"); *Buie v. Charter Commc'ns*, No. 617CV03007DCCJDA, 2018 WL 11357534, at *2 (D.S.C. Nov. 9, 2018) (granting protective order and ordering that witness' "deposition should occur in St. Louis, Missouri, where she resides and works, or by telephone or video").

CONCLUSION

Airbnb is willing to produce a witness to testify on a reasonable number of topics that actually pertain to the incident over which Plaintiff has sued. Because Plaintiff seeks discovery into topics that have no bearing, and for the reasons stated above, Airbnb's motion for a protective order should be granted. To the extent the Court denies this motion in any part, Airbnb will need time to prepare one or more witnesses to give corporate deposition testimony based on the Court's potential ruling, and so Airbnb requests that the deposition date of July 12, 2022 be postponed to a mutually agreeable date chosen between the parties and that the deposition proceed via Zoom or in the geography where the witness resides.

DATED this 24th day of June, 2022.

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