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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

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

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

v.

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

FINAL REPLY BRIEF OF APPELLANT

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ARGUMENT

The trial court erred by denying Appellant Starbucks, Inc.'s ("Starbucks") Motion to Compel Arbitration. The Arbitration Agreement between Starbucks and Respondents, which Respondents do not dispute is valid or that they are bound by, expressly delegated all gateway issues concerning arbitrability, which would include Respondents' waiver and outrageous torts exception arguments, ***solely*** to the arbitrator. Therefore, for this reason alone, the trial court should have compelled the dispute to arbitration. However, even if the parties had not delegated all gateway issues, the trial court also erred because Respondents' claims fall within the Arbitration Agreement's broad scope. Finally, contrary to Respondents' contention, Starbucks did not waive its right to compel arbitration.

This Court, through its *de novo* review, should reverse the trial court and compel the dispute to arbitration.

I. Respondents entered into a valid Arbitration Agreement with Starbucks.

Respondents do not dispute in their brief that a valid Arbitration Agreement exists between Starbucks and Respondents or that the Federal Arbitration Act ("FAA") applies. Therefore, the Court's analysis turns on whether this valid Arbitration Agreement supports compelling Respondents' claims to arbitration.

II. The dispute should be compelled to arbitration because the Arbitration Agreement delegated gateway issues concerning arbitrability, including waiver and the applicability of the outrageous torts exception, to the arbitrator.

A. The Arbitration Agreement properly delegated gateway issues.

"A delegation clause gives an arbitrator authority to decide even the initial question whether the parties' dispute is subject to arbitration." *New Prime Inc. v. Oliveira*, 139 S. Ct. 532, 538 (2019). Where a delegation occurs, the court retains "the right and duty to determine whether

the delegation is valid and enforceable ***as long as the party resisting arbitration has made a direct and discrete challenge to the validity and enforceability of the delegation clause specifically***." *Doe v. TCSC, LLC,* 430 S.C. 602, 608, 846 S.E.2d 874, 877 (Ct. App. 2020) (emphasis added).

The Arbitration Agreement at issue in this case contains a delegation clause providing that the arbitrator, not a court or agency, possesses the "***exclusive authority***" to resolve any disputes concerning "the formation, interpretation, applicability, enforceability, or implementation of this Agreement, including any claim that all or part of this Agreement is void or voidable." (Starbucks' Mem. in Supp. of Mot. to Compel, Ex. C – Executed Arbitration Agreements; R. 350-72 (emphasis added).) Respondents do not dispute the existence of the delegation clause. Rather, they contend that it does not apply because: (1) Starbucks did not timely raise this argument, (2) their claims do not fall within the Agreement's scope, and (3) the Agreement does not delegate the issues of waiver or the outrageous torts exception. These arguments are all without merit.

B. Respondents Failed to Challenge the Delegation Clause

Contrary to Respondents' contention in their brief, they did ***not*** mount a specific challenge to the delegation clause itself. This is fatal to their position that the trial court properly found that it could resolve gateway issues here. *See Doe*, 430 S.C. at 608, 846 S.E.2d at 877 (noting that a "party resisting arbitration" must make "a direct and discrete challenge to the validity and enforceability of the delegation clause ***specifically***") (citing *Rent-A-Ctr., W., Inc.*, 561 U.S. at 68 (2010)). No such challenge occurred here, which precludes Respondents' from challenging the relevant delegation clause now and further precludes them from contesting that the parties delegated all gateway issues, including that of waiver and the scope of the relevant Agreement, to the arbitrator.

Notably, the portions of the hearing transcript that Respondents' cite in their brief, (Hearing Tr. pp. 23-24, 28; R. 95-96, 100), merely contended that the delegation clause does not apply because Starbucks waived the right to compel arbitration and Respondents' claims do not fall within the scope of the Agreement. However, Respondents ***never*** raised any challenge to the delegation clause at the trial court level. Respondents neither raised this issue in the briefs to the trial court nor did they raise it at oral argument, and they further failed to raise it when Starbucks clearly presented the issue to the trial court. Therefore, Respondents did not make a specific challenge to the enforceability of the delegation clause, as they were obligated to do, and thus this Court must enforce the delegation clause as written. In so doing, this dispute and any challenges to the Arbitration Agreement may only be addressed by the arbitrator.

C. Starbucks timely raised the applicability of the delegation clause.

Starbucks moved to compel Respondents' claims to arbitration pursuant to the Arbitration Agreement that undisputedly contained the delegation clause. In response to the motion, Respondents raised waiver and other exceptions to arbitration. Starbucks then specifically noted and pointed to the delegation clause for such positions ahead of the hearing on its motion to compel arbitration and made the same arguments – specifically presenting the delegation clause – to the trial court at the hearing regarding the Starbucks' motion seeking to compel this dispute to arbitration. Importantly, this was all that was required to present and preserve the argument for appeal since it was both raised to and ruled upon by the trial court. *See Sloan v. S.C. Dep't of Rev.*, 409 S.C. 551, 555 n.4, 762 S.E.2d 687, 689 n.4 (2014). Parties frequently submit supporting memoranda on the eve of a hearing with new or additional arguments or counterarguments, or

raise them at the hearing.[1] Respondents acknowledge they had the opportunity to address the delegation clause argument at the hearing. (Resp. Br. p. 28.) However, Respondents never challenged that clause at that hearing or even remotely addressed the fact that they never directly challenged the delegation clause as they were required to do. Respondents could have also requested leave to submit additional briefing after the hearing if they believed it was necessary, but they did not do so. Respondents also never objected to Starbucks' argument of the delegation clause argument by Starbucks either prior to, or at, the hearing on the motion to compel arbitration.

Respondents also assert that Starbucks failed to preserve this argument because it took inconsistent positions, asserting that the delegation clause applied but also that Respondents' claims do not fall within the scope of the Agreement. Starbucks' positions, however, were not "inconsistent" – they were alternative grounds. Starbucks' initial position was that all gateway issues should be delegated to the arbitrator. (*See* Hearing Tr. pp. 5-7, 19; *see also* Starbucks' Reply in Support of Mot. to Compel pp. 3-5; R. 77-79, 91, 192-94.) However, while maintaining that the court should not reach these issues, Starbucks also addressed Respondents' arguments regarding the scope of the Agreement and the applicability of waiver and the outrageous torts exception in the event the Court determined that it should reach those issues. (*See* Hearing Tr. pp. 8-19; *see also* Starbucks' Reply in Support of Mot. to Compel p. 5-15; R. 80-91, 194-204.)

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[1] The federal district court cases cited by Respondents stating that an issue may not be raised for the first time in a reply brief are not applicable. Unlike the applicable state court rules where there is no set briefing schedule or deadlines unless otherwise directed by the court, the District of South Carolina Local Rules set forth a briefing schedule for all motions filed before that court. *See* D.S.C. Local Rule 7.06 (providing for 14 days for response briefs) & D.S.C. Local Rule 7.07 (providing for 7 days for reply briefs). Moreover, unlike state court, the Local Rules permit the District Court to rule on motions without a hearing, *see* D.S.C. Local Rule 7.08, which happens frequently in that court.

Therefore, these arguments were not conflicting or inconsistent. Moreover, presenting alternative arguments is not improper, and Respondents themselves have even done so in this action.

Starbucks properly raised and did not waive the delegation clause argument, and it is preserved for this Court's *de novo* consideration on appeal.

D. Waiver and the applicability of the outrageous torts exception are gateway issues delegated to the arbitrator.

Contracting parties may agree to have an arbitrator decide not only the merits but also questions of enforcement of the arbitration agreement. *Palmetto Wildlife Extractors, LLC v. Ludy*, 435 S.C. 690, 699-700, 869 S.E.2d 859, 864 (Ct. App. 2022) (discussing *Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S. 63, 68–69 (2010)).[2] Although Respondents cite to a number of cases from ***other jurisdictions***, Respondents ***do not*** cite to any binding ***South Carolina*** precedent supporting that waiver must be determined by the Court.[3] Importantly, the Supreme Court of the United States has held that "the arbitrator should decide 'allegation[s] of waiver, delay, or a like defense to

[2] Although the underlying merits of the waiver and scope issues may require some factual analysis, those questions may only be answered by the trial court if no delegation occurred. Thus, the Court should apply its standard *de novo* review to this delegation question before reviewing any types of factual issues related to the merits. *See Sanders v. Savannah Highway Auto. Co.*, 440 S.C. 377, 382, 892 S.E.2d 112, 114 (2023); *Gissel v. Hart*, 382 S.C. 235, 240, 676 S.E.2d 320, 323 (2009).

[3] Respondents' brief cites to *Sanders v. Savannah Highway Auto. Co.*, (Resp. Br. p. 33) to support their statement that absent specific reference to waiver through litigation, even the most broadly worded delegation clause does not provide "clear and unmistakable evidence" that the parties agreed to delegate waiver to the arbitrator. *Sanders*, however, ***did not address waiver through litigation or the circumstances in which waiver can be delegated***. *See* 440 S.C. 377, 384, 892 S.E.2d 112, 115 (2023), *reh'g denied* (Sept. 27, 2023) (noting that the court would not reach the delegation clause issue presented).

The only other South Carolina case cited by Respondents was *Samuel v. Schumacher Homes of S.C.*, No. 2019-001972, 2022 WL 854380 (S.C. Ct. App. Mar. 23, 2022), which the trial court also cited in its Order. As Starbucks' detailed in its opening brief, the trial court and Respondents' reliance on this unpublished case was in direct violation of Rule 268, SCACR (noting that memorandum opinions "have no precedential value ***and should not be cited*** except in proceedings in which they are directly involved"). Thus, the *Samuel* order should ***not*** be relied upon here or by the trial court.

arbitrability.'" *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84 (2002) (quoting *Moses H. Cone Mem'l Hospital v. Mercury Constr. Corp.*, 460 U.S. 1, 24–25 (1983)).[4] This is in part because these types of "questions do not present any legal challenge to the arbitrator's underlying power[.]" *Del Webb Communities, Inc. v. Carlson*, 817 F.3d 867, 874 (4th Cir. 2016) (citations omitted). Moreover, the Supreme Court's recent directive that courts must return to the standard "intentional relinquishment" test for waiver suggests that there should be no distinction between contractual waiver and litigation-conduct waiver, as the distinction would place arbitration agreements on unequal footing in the waiver context. *Morgan v. Sundance, Inc.*, 142 S. Ct. 1708, 1714 (2022).

Here, the question of waiver must be decided by the arbitrator because Respondents' waiver argument relates to the enforcement of the Arbitration Agreement, an issue delegated solely to the arbitrator. *See Coulter v. Experian Info. Sols., Inc.*, No. 20-cv-01814, 2021 WL 735726, at *4–5 (E.D. Pa. Feb. 25, 2021) ("This provision constitutes a 'clear and unmistakable' delegation clause under *Henry Schein* and delegates the exclusive authority to resolve 'all issues' to the arbitrator, including . . . whether Defendant waived its right to arbitrate."); *Chatman v. Jimmy Gray Chevrolet, Inc.*, 2016 WL 4975044, at *6 (N.D. Miss. 2016) ("Given that the waiver issue goes to the scope of arbitration, which in this case must be decided by the arbitrator given the existence of the delegation clause, unquestionably, the issue must be decided by the arbitrator and not this Court."). The trial court erred in holding that it could reach this gateway issue.

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[4] Two circuits have split on whether *Howsam* applies to litigation conduct waiver or is solely limited to contractual waiver. *Compare JPD, Inc. v. Chronimed Holdings, Inc.*, 539 F.3d 388, 394 (6th Cir. 2008) (contractual waiver only) *with Nat'l Am. Ins. Co. v. Transamerica Occidental Life Ins. Co.*, 328 F.3d 462, 466 (8th Cir. 2003) (contractual and litigation conduct waiver).

Regarding the outrageous torts exception, this Court has expressly held that its applicability to an action is an issue of arbitrability to be decided by an arbitrator. *Palmetto Wildlife Extractors, LLC v. Ludy*, 435 S.C. 690, 702–03, 869 S.E.2d 859, 866 (Ct. App. 2022), *reh'g denied* (Feb. 25, 2022) (finding that the trial court erred by failing to send claims that the plaintiff contended fell within the exception and arose out of context that was unforeseeable, including a defamation claim, "to the arbitration proceeding to determine if the Agreement requires they be arbitrated" in light of the delegation clause); *see also Doe v. TCSC, LLC,* 430 S.C. 602, 615–16, 846 S.E.2d 874, 881 (Ct. App. 2020) ("We express no opinion on whether the 2011 arbitration contract covers Doe's claims, or, if so, whether the claims are still subject to arbitration due to the 'outrageous and unforeseen torts' exception. The dissent argues this exception does apply, but whether the exception applies is a question the parties delegated to the arbitrator, not the court.")). The trial court's application of the outrageous torts exception to this action when there exists a valid delegation clause, which Respondents never challenged at the trial court level, was reversible error in light of this precedent.

For all these reasons, the trial court erred in failing to compel the action to arbitration and reserving for the arbitrator the issues of waiver and the applicability of the outrageous torts exception.

III. Respondents' claims fall within the scope of the Arbitration Agreement.

Even assuming *arguendo* that there was no delegation clause, this matter should still be compelled to arbitration because Respondents' claims fall within the scope of the claims covered by the Arbitration Agreement. Hence, the trial court should be reversed.

The Agreement here is broad and applies to any claims "related to" Respondents' employment. (Mem. in Supp. of Mot. to Compel, Ex. C – Executed Arbitration Agreements; R.

350-72.)[5] Respondents' claims arise out of (and are thus related to) an incident directly related to their employment and thus fall squarely within the scope. The genesis of this dispute was Respondents' confrontation of their manager in the Starbucks store about what they believed to be unfair terms of their employment. Respondents demanded changes to the terms and conditions of their employment with Starbucks, including, among others, wage increases. (Compl. ¶¶ 18, 49-57; R. 65, 69-70.) Therefore, the dispute arose at Respondents' place of employment and directly involved the terms of Respondents' employment. Moreover, their defamation and abuse of process claims are directly premised on Defendants' alleged response to this workplace incident. The Arbitration Agreement's scope is more than sufficient to cover these claims regardless of whether Respondents also asserted traditional employment causes of action. *See Landers v. F.D.I.C.*, 402 S.C. 100, 111, 739 S.E. 2d 209, 214 (2013) ("[U]nder the expansive reach of the FAA a tort claim need not raise an issue that requires reference to or the construction of some portion of the contract in order to be encompassed by a broadly-worded arbitration clause"). The Court cannot say with "positive assurance" that Respondents' claims are not covered by the Agreement, *Carolina Care Plan, Inc.*, 361 S.C. at 550, 606 S.E.2d at 755 (2004), and the language of the Agreement is broad.

Respondents contend that *Davis v. ISCO Industries, Inc.*, 434 S.C. 488, 492, 498–99, 864 S.E.2d 391, 393, 396-97 (Ct. App. 2021) weighs against Starbucks' position. However, in *Davis*, the relationship between the claims and the plaintiff's employment was much more tenuous than in this case. The arbitration provision in *Davis* similarly provided that the parties agreed to arbitrate all claims "arising out of or relating to" the plaintiff's employment. The genesis of the

[5] The Agreement provided a ***nonexclusive*** list of categories which were included in this definition, explaining that "those concerning any element of compensation, harassment, discrimination, retaliation, recovery of bonus or relocation benefits, leaves of absence, accommodations, or termination of employment." (*Id.*) Thus, contrary to Respondents' assertion, "covered claims" were not limited to solely to these categories.

Davis dispute, however, was a data breach that led to hackers obtaining plaintiff's confidential information one year after the plaintiff had left the company. As the Court explained in *Davis*, while it was true that the employer only had the data because of his prior employment, the "grounds for his negligence claim—the human resources employee disclosing his information to hackers—[did] not truly relate to his employment." *Davis*, 434 S.C. at 498–99, 864 S.E. 2d at 396–97.

Here, on the other hand, the purported defamatory statement(s) giving rise to Respondents' defamation claims related entirely to Respondents' employment with Starbucks, the incident that occurred on Starbucks' property, and Starbucks' response to issues which arose with its employees, who, in Respondents' own words, were engaging in activity focused on altering the terms and conditions of the employment. The same is essentially true for Respondents' abuse of process claim. In fact, the allegations in Respondents' Complaint makes clear that ***Respondents*** themselves believed that the facts which purportedly support their claims in this action are ***inextricably tied*** to their employment with Starbucks.

Moreover, Respondents' defamation and abuse of process claims will necessarily require presentation of evidence and testimony about the confrontation since the alleged false statements were about those very events. Their Complaint acknowledges that Respondents approached their manager, Morris, at the store and presented her "with a letter in which they ***asked for a wage increase, among other requests relating to their terms and conditions of employment***." (Compl. ¶¶ 29, 36 (emphasis added); R. 66-67.) They contend that Morris then falsely alleged to other Starbucks personnel, and later the police, that Respondents "would not let her leave until they got a raise" and "one employee also assaulted her." (*Id.*) Respondents contend that Starbucks then repeated these false statements in a media release and characterized the employees as having threatened Morris and engaged in criminal conduct. (*See id.* at ¶¶ 36-37; R. 67-68.) Respondents

then assert that these false statements were not made for a proper purpose but "instead for the illegitimate collateral purpose of ***preventing Plaintiffs from publicly protesting Starbucks***" (*i.e.*, publicly protesting their employer). (Compl. ¶ 62 (emphasis added); R. 70.) Therefore, Respondents contention that "nothing about the fact that they were employees relates to their claims" is without merit and contradicted by their own Complaint.[6]

For all these reasons, the record is more than sufficient to establish that Respondents' claims "related to" their employment and were covered by the Arbitration Agreement. Therefore, the Court should reverse the trial court and compel the matter to arbitration.

IV. Starbucks did not waive its right to compel arbitration.

As detailed above, the issue of waiver is a gateway issue that should be reserved for determination ***only*** by the arbitrator, and the trial court erred in finding otherwise. However, to the extent the Court disagrees and reaches the issue of waiver in its *de novo* review (which, again, it should not), Starbucks did not waive its rights.

As an initial matter, Respondents' contention that Starbucks failed to argue that it should prevail under ordinary waiver principles is without merit. The entire Section III of Starbucks' opening brief addressed the waiver issue and explained how its actions did not constitute a voluntary relinquishment of a known right.

Respondents devote a significant portion of their waiver argument to examining the Supreme Court of the United States' decision in *Morgan v. Sundance, Inc.* As *Morgan* recognized, courts may not create "custom-made rules, to tilt the playing field in favor of (***or against***) arbitration." 142 S. Ct. at 1712. It emphasized the general waiver rule of "voluntary

[6] If Plaintiffs' allegations in the Complaint are untrue, then their Complaint violates Rule 11 of the South Carolina Rules of Civil Procedure. *See* Rule 11, SCRCP.

relinquishment of a known right," and noted that the analysis should focus on the actions of the party who held the right. *Id.* South Carolina case law supports that in assessing waiver in the arbitration context, courts should consider: (1) whether a ***substantial length*** of time passed between the commencement of the underlying action and the filing of the motion to compel arbitration, (2) whether the party seeking to compel arbitration engaged in ***extensive*** discovery before moving to compel arbitration, and (3) whether the non-moving party was prejudiced by the delay in seeking to compel arbitration. *Rhodes v. Benson Chrysler-Plymouth, Inc.*, 374 S.C. 122, 126, 647 S.E.2d 249, 251 (Ct. App. 2007). These first two elements are consistent with the question of whether the moving party acted in a manner consistent with voluntarily relinquishing its right to compel arbitration and is not inconsistent with *Morgan*.[7] Indeed, the first two elements articulated in *Rhodes* cannot reasonably be construed as favoring (or disfavoring) arbitration, the underlying practice prohibited by the Court in *Morgan*. Therefore, the case law cited by Starbucks remains instructive because it examines the impact of things like delay in moving to assert the arbitration provision or invocation of certain mechanisms of the judicial process.

Respondents nevertheless assert that *Morgan* supports their position that Starbucks waived its right to compel arbitration, and they criticize Starbucks for looking to the above case law. Again, however, the first two prongs of the waiver test are consistent with South Carolina's general waiver law because these factors help courts evaluate whether the moving party voluntarily relinquished a known right. Moreover, while Respondents criticize Starbucks' reliance on these cases, they offer no alternatives that the Court should look to in assessing waiver. Further

[7] Respondents acknowledge that South Carolina case law examining these first two elements have required the nonmoving party had to show that the party seeking to compel arbitration waited a significant period of time, "often years," and had engaged in "extensive discovery." (Resp. Br. p 8.)

demonstrating the inherent inconsistency with their argument, Respondents later argued that Starbucks' delay and motions practice (the very two factors that they claim are no longer relevant following *Morgan*) were grounds for finding waiver here. (*See* Resp. Br. pp. 13-14.)

Furthermore, although Respondents attempt to paint the *Morgan* holding as a negative for Starbucks, *Morgan* actually benefits Starbucks. Under *Morgan,* the focus is ***solely*** on the actions of party seeking to compel arbitration rather than what prejudice the nonmoving party may or may not have suffered. As outlined above, the first two factors articulated in *Rhodes* ***do not consider*** the prejudice to the nonmoving party, and, as is consistent with *Morgan*, solely focus on Starbucks' conduct. Thus, even if Respondents established that they were prejudiced by Starbucks' actions, that fact would no longer matter under *Morgan* assuming *arguendo* that its holding would apply to eliminate that element under South Carolina law.

As for the specifics of Starbucks' actions, Respondents gloss over critical details about the narrow nature of Starbucks' invocation of the judicial process. As Starbucks detailed in its opening brief, the actions it took at the very outset of the case were solely limited to raising the issue of whether Respondents' claims had to be exclusively litigated before the National Labor Relations Board ("NLRB"). The gravamen of Respondents' Complaint involves allegations that Respondents were attempting to alter the terms and conditions of their employment – *i.e.*, activity which is protected pursuant to the National Labor Relations Act undertaken as part of their employment with Starbucks. Such claims are under the exclusive competence of the NLRB pursuant to *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 245 (1959). (Starbucks Mot. to Dismiss; R. 417-19.) Starbucks certainly should not be deemed to have waived its arbitration rights and be deemed to have knowingly agreed to proceed in the trial court here when it moved to dismiss the trial court proceedings entirely in the first place by arguing ***no court proceedings***

could occur. Indeed, the concept of moving to dismiss Respondents' Complaint for lack of subject matter jurisdiction under *Garmon* preemption is entirely consistent with the purpose of Starbucks' motion seeking to dismiss or compel this dispute to arbitration – that the Court of Common Pleas for Anderson County was not the proper forum for this dispute. Further, to hold that challenging subject matter jurisdiction prior to moving to enforce an arbitration agreement constitutes waiver – precisely the argument that Respondents offer here – is entirely inconsistent with the concept of subject matter jurisdiction, which is a necessary prerequisite that must be established before a court could pass judgment on a motion related to an arbitration agreement.

Notably, Starbucks also promptly raised the applicability of the Arbitration Agreement in its initial Answer, which was filed simultaneously with the motion raising *Garmon* preemption. By maintaining this right in its pleading and providing Plaintiff notice, Starbucks made it clear that it was maintaining this right and was not voluntarily relinquishing it. Expressly asserting arbitration as an affirmative defense is the exact opposite of knowingly relinquishing the right to compel it.

Starbucks' motion to assign the matter to business court also exclusively focused on the narrow, discrete issue of *Garmon* preemption. The business court motion, which Starbucks filed only one day prior to its motion to dismiss and Answer, explained how NLRB preemption was a complex legal doctrine of federal labor law. (*See* Starbucks' Mot. for Assignment to Business Court; R. 419-24.) Since our circuit courts are not accustomed to hearing this issue, Starbucks contended it was appropriate to assign a dedicated business court judge – one familiar with complex civil litigation – to make this initial determination.[8] Such a motion does not amount to a

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[8] Contrary to Respondents' contention, (*see* Resp. Br. p. 14), the Business Court is not a different "forum." Rather, it is a mechanism to assign jurisdiction over a case to a single judge. The program provides greater flexibility and promotes efficiency because the case receives a dedicated

knowing relinquishment of arbitration rights and is simply an administrative request, not a substantive step in litigation.

Respondents cite to cases from other jurisdictions expressing skepticism with regards to attempts to compel arbitration after motions practice that ***could have resolved the case***. (*See* Resp. Br. pp. 14-16.) But that is not what happened here. Rather, Starbucks' actions were limited to raising the very narrow issue of whether the NLRB was the only proper forum for disposition of the Respondents' claims given that Respondents presented the same facts and claims in their unfair labor charges filed with the NLRB that they included in their Complaint in this action. Starbucks' *Garmon* motion and its arbitration motion ***both*** sought to have Respondents' claims heard in a forum other than the circuit court, and neither motion sought merits disposition of Respondents' claims. Indeed, ***both*** of those motions have the same premise: that litigating Respondents' claims before the South Carolina Court of Common Pleas was not proper. Thus, Starbucks' actions here are decidedly different than those in the authorities which Respondents cite to in their brief.

The Fourth Circuit's decision in *Am. Heart Disease Prevention Found., Inc. v. Hughey*, 106 F.3d 389, 1997 WL 42714 (4th Cir. 1997) (unpublished table decision) is, while not precedent, an example of persuasive reasoning. As the *Hughey* court explained, the existence of a binding arbitration agreement is an affirmative defense properly pleaded in the answer. Thus, "[f]ailure to raise the issue of arbitration before the answer is filed ***will rarely, if ever, amount to waiver*** of arbitration." *Id.* at *3 (emphasis added). Where the party's litigation activities are solely related to challenging venue, such is "not inconsistent with a desire to arbitrate." *Id.* As the court reasoned, "a party is not required to litigate any issue—including arbitrability—in an improper or

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judge who is familiar with the parties and issues, and the business court judge is given the authority to schedule hearings regardless of whether there is a term of court on the calendar. *See* Order, https://www.sccourts.org/courtOrders/displayOrder.cfm?orderNo=2023-07-14-01.

inconvenient forum." *Id.* Therefore, because the defendant had the right to seek a transfer of venue before raising the arbitration defense, "doing so was not inconsistent with a desire to arbitrate." *Id.*; *see also In re Mercury Const. Corp.*, 656 F.2d 933, 939-40 (4th Cir. 1981), *aff'd sub nom. Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1 (1983) ("[T]he earliest point at which such preclusion (i. e., waiver as used in this sense) may be found (in an arbitration case) is when the other party files an answer on the merits." (quoting *Chatham Shipping Co. v. Fertex Steamship Corp.*, 352 F.2d 291, 293 (2d Cir. 1965))).

Respondents' final argument criticizes the length of time that transpired between when Starbucks filed its motion to dismiss based on preemption and when it moved to compel arbitration. However, much of the "delay" (which was less than four months) was entirely outside of Starbucks' control. Starbucks, of course, had no power over how much time would transpire between the filing of its *Garmon* motion and the scheduling of the hearing or between the hearing and the Court's ruling on the *Garmon* motion.[9]

Importantly, the concept that Respondents argue should apply here would materially alter the litigation landscape in South Carolina with respect to arbitration terms and the concept of waiver. No other South Carolina court has found that a four-month delay in seeking to enforce an arbitration agreement, while awaiting a ruling on a motion pertaining to subject matter jurisdiction, is sufficient to constitute waiver. That is precisely the conclusion which Respondents ask this Court to reach here. If Respondents' arguments here are accepted and applied, the practical effect is that a party can be deemed to have waived a defense or claim without knowingly doing so simply by waiting for a court to rule upon an issue which is required for that party to proceed in the same

[9] For example, the final order denying Starbucks' *Garmon* motion was not issued until April 27, 2023, more than two months after the hearing on that motion and more than four months after the original motion was filed.

court. In other words, waiver can be found simply from a delay ***outside*** of a party's control and without an affirmative step to waive a claim or defense. This is simply impractical and entirely prejudicial to parties to litigation.

Setting aside the Olympic leap that Respondents ask this Court to make, Starbucks' conduct here is not sufficient to demonstrate waiver. Starbucks first asserted its right to arbitration this dispute in its initial Answer filed simultaneously with the preemption motion, meaning Starbucks indicated its desire to retain and exercise its right to arbitration of this dispute in its ***initial*** responsive pleadings filed in December 2022. More importantly, Respondents were placed on notice of Starbucks' intent to exercise that right from the outset of its appearance in this action. Further, Starbucks promptly filed a motion to compel arbitration, and did so even ***before*** the trial court issued it final order denying Starbucks' *Garmon* motion.

The party asserting waiver has the burden of proof. *Provident Life & Accident Ins. Co. v. Driver,* 317 S.C. 471, 478, 451 S.E.2d 924, 929 (Ct. App. 1994). Further, "for a party to waive a right, the party must have known of the right and known that the right was being abandoned." *King v. James,* 388 S.C. 16, 30, 694 S.E.2d 35, 42-43 (Ct. App. 2010). Respondents did not prove that Starbucks knowingly abandoned its rights to arbitration. Quite the contrary, each of Starbucks' actions leading up to filing its motion related to arbitration were entirely consistent with retaining and asserting its arbitration rights and were entirely inconsistent with relinquishing those rights. Thus, Respondents – as the parties with the burden of proof – failed to demonstrate that Starbucks knowingly and voluntarily abandoned its right to compel this dispute to arbitration.

V. The outrageous torts exception is no longer consistent with binding Supreme Court precedent and, regardless, does not apply here.

Respondents contend that Starbucks waived any right to make an argument about the trial court's error in applying the so-called outrageous torts exception. This is incorrect. First, the trial

court did not make a separate ruling about this issue. The court's statement about the nature of Respondents' claims was within the paragraph detailing its ruling about whether the claims related to Respondents' employment and thus fell within the scope of the Arbitration Agreement. Starbucks appealed that ruling and addressed it in its opening brief. Further, this Court's review is *de novo*, meaning it may decide a question of law such as the applicability of the outrageous torts exception with "no particular deference to the trial court." *See Flexon v. PHC-Jasper, Inc.*, 413 S.C. 561, 569–70, 776 S.E.2d 397, 402 (Ct. App. 2015) (quoting *Proctor v. Steedley*, 398 S.C. 561, 573, 730 S.E.2d 357, 363 (Ct. App. 2012)). As Starbucks detailed in its opening brief, the Court should not even reach gateway issues and, even if it does, Respondents' claims do fall within the scope of the Agreement. However, if the Court disagrees and reaches the question of the scope of the Arbitration Agreement in its *de novo* review, it should recognize that this exception is ***no longer viable*** under applicable U.S. Supreme Court precedent.

In South Carolina, the outrageous torts exception permitted "parties whose claims arose out of an opponent's 'outrageous' tortious conduct to avoid arbitration." *Parsons v. John Wieland Homes & Neighborhoods of the Carolinas, Inc.*, 418 S.C. 1, 9, 791 S.E.2d 128, 132 (2016). South Carolina created this exception to arbitration in 2007. *Id.* (citing *Aiken v. World Fin. Corp. of South Carolina*, 373 S.C. 144, 151–52, 644 S.E.2d 705, 709 (2007)). In *Aiken*, the Court "pronounce[d] a more definitive rule" that the State's courts "will refuse to interpret any arbitration agreement as applying to outrageous torts that are unforeseeable to a reasonable consumer in the context of normal business dealings." *Aiken*, 373 S.C. at 151, 644 S.E.2d at 709.[10]

[10] *Aiken* involved intentional tort claims brought by a borrower against a consumer finance company based on the finance company's employees misuse of the borrower's personal financial information. *Id.* at 373 S.C. at 146, 644 S.E.2d at 706. Finding the criminal theft of Aiken's personal information to be outrageous conduct that could not have been foreseen when he agreed

This exception is no longer viable. Although the FAA allows courts to invalidate arbitration agreements based upon generally applicable contract defenses, 9 U.S.C. § 2, they cannot apply arbitration-specific defenses. *See Morgan* 142 S. Ct. at 1712; *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996). And even when analyzing defenses of general applicability, courts cannot employ those defenses in a manner which would subject arbitration agreements to special scrutiny. *See, e.g.*, *Perry v. Thomas*, 482 U.S. 483, 492 n.9 (1987) ("A court may not, then, in assessing the rights of litigants to enforce an arbitration agreement, construe that agreement in a manner different from that in which it otherwise construes nonarbitration agreements . . . ."). That is, arbitration agreements must be placed on the same footing as any other contract. *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 593, 553 S.E.2d 110, 116 (2001) (citing *Doctor's Assocs.*, 517 U.S. at 687).

All cases that have applied the outrageous torts exception since *Aiken* have focused explicitly on arbitration.[11] In fact, the one opinion that tried to apply the exception outside of the

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to do business with World Finance, the Court found Aiken's tort claims were not subject to arbitration. *Id.*

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

arbitration context was reversed by our Supreme Court. *Wachovia Bank, Nat. Ass'n v. Blackburn*, 407 S.C. 321, 333–34, 755 S.E.2d 437, 444 (2014) ("[H]owever, we reverse the portion [of the Court of Appeals opinion] finding that the outrageous and unforeseeable torts exception to arbitration applies in the jury trial waiver context, and find instead that Respondents waived their right to a jury trial on all of their counterclaims.").

The outrageous torts exception offends these basic principles under the FAA. South Carolina's outrageous torts exception is "unique" and "restricted" to the field of arbitration. *Parsons*, 418 S.C. at 11, 791 S.E.2d at 133 (Pleicones, J.) (plurality opinion). No South Carolina precedent has definitively addressed whether the doctrine remains viable, although two justices in *Parsons* would have held that the "exception cannot survive." *Id.* at 13, 791 S.E.2d at 134.[12] South Carolina's unique application of the exception solely to arbitration agreements requires the exception to yield to the Federal Arbitration Act's "national policy favoring arbitration and places arbitration agreements on equal footing with all other contracts." *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006) (citing 9 U.S.C. § 2). Therefore, the trial court erred by applying to this exception and this Court should reverse.

Moreover, even if the exception was still viable, the facts of this case do not align with the exception as contemplated by *Aiken*. Respondents' Complaint inextricably bound their claims to their employment by claiming Defendants' actions arose from a confrontation at their workplace where they were protesting the terms and conditions of their employment. South Carolina courts have consistently held that such tort claims, including defamation, fall within the scope of a broad arbitration clause between employer and employee. *See Landers*, 402 S.C. at 109, 739 S.E.2d at

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[12] Three justices in *Parsons*, in statements spread across multiple, non-plurality opinions, expressed their view that U.S. Supreme Court precedent had not eliminated the exception under South Carolina law.

213 (finding Landers' defamation claim arbitrable because the alleged defamatory statements "directly related to Landers' ability to perform his duties with Bank"); *Pearson v. Hilton Head Hosp.*, 400 S.C. 281, 297, 733 S.E.2d 597, 605 (Ct. App. 2012) (finding Pearson's tort claims, including defamation, arbitrable because the arbitration clause was broad and Pearson's tort claims resulted from his employment); *Towles v. United HealthCare Corp.*, 338 S.C. 29, 42, 524 S.E.2d 839, 846 (Ct. App. 1999) (finding Towles' defamation claim arbitrable because the agreement's plain language covered all tort and contract theories).

Additionally, the cases applying the exception require more than the commission of a tort for the exception to apply. They require an intentional act, *Parsons v. John Wieland Homes & Neighborhoods of the Carolinas, Inc.*, 418 S.C. 1, 9, 791 S.E.2d 128, 132 (2016) (seller intentionally failing to disclose toxic sludge to homebuyer), or blatantly fraudulent conduct, *Partain v. Upstate Auto. Grp.*, 386 S.C. 488, 494, 689 S.E.2d 602, 605 (2010). The facts here are more akin to the bank's inaction while funds were being withdrawn from the plaintiff's account as in *Timmons v. Starkey*, 380 S.C. 590, 598, 671 S.E.2d 101, 106 (Ct. App. 2008), *aff'd*, 389 S.C. 375, 698 S.E.2d 809 (2010), or the negligent failure to identify mold spores in rental units that sparked the plaintiffs' claims in *Osborne v. Marina Inn at Grande Dunes, LLC*, No. CIV.A. 4:08-CV-0490, 2009 WL 3152044, at *2 (D.S.C. Sept. 23, 2009). In both cases, the courts concluded that the actions by the parties seeking to compel arbitration were insufficient to apply the exception.

Therefore, the trial court erred by relying on the outrageous torts exception because it is no longer a viable doctrine and, even if it was, it does not place Respondents' claims beyond the reach of the Arbitration Agreement.

CONCLUSION

For the reasons stated in Starbucks' opening brief and herein, this court should reverse the judgment of the trial court and compel the matter to arbitration.

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April 19, 2024

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

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

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

v.

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

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Reply Brief of Appellant complies with Rule 211(b), SCACR.

Signature on Following Page

Respectfully submitted,

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